

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(1) SALE OF GOODS AND SUPPLY OF SERVICES/1. Meaning of 'sale'.

SALE OF GOODS AND SUPPLY OF SERVICES (

1. INTRODUCTION

(1) SALE OF GOODS AND SUPPLY OF SERVICES

1. Meaning of 'sale'.

Sale¹ is the transfer by mutual assent² of the ownership³ of a thing from one person to another for a money price. Where the consideration for the transfer consists of other goods or some other valuable consideration (not being money), the transaction is called exchange or barter⁴, although in certain circumstances it may be treated as one of sale⁵.

It is clear that statutes relating to the sale of goods do not, as such, apply to transactions by way of barter, where the consideration for the thing does not consist in money, or by way of hire, where ownership in the thing is not transferred⁶. The terms implied in contracts for the sale of goods by the Sale of Goods Act 1979⁷ are, however, similarly implied in contracts for the supply of goods by the Supply of Goods and Services Act 1982⁸, which applies to contracts for the transfer of goods⁹, other than (inter alia) contracts for the sale of goods¹⁰, and to contracts for the hire of goods¹¹, other than a hire-purchase agreement¹². Contracts of exchange or barter and contracts for the hire of goods would consequently be covered by the terms implied by the Supply of Goods and Services Act 1982 and this would be the case whether or not either type of contract also provides for the carrying out of a service¹³ and, in either type of contract, whatever the nature of the consideration¹⁴.

1 As to contracts within the Sale of Goods Act 1979 see PARA 27 et seq post. As to the alienation of personal property see PERSONAL PROPERTY vol 35 (Reissue) PARA 1249 et seq. As to bailment see BAILMENT vol 3(1) (2005 Reissue) PARA 1 et seq. As to hire-purchase agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 23 et seq. As to pawns see CONSUMER CREDIT vol 9(1) (Reissue) PARA 208 et seq; PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 1 et seq.

2 *Kirkness (Inspector of Taxes) v John Hudson & Co Ltd* [1955] AC 696, [1955] 2 All ER 345, HL (compulsory acquisition by statute not a sale); and see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 501. The supply of drugs to a patient in accordance with a statutory duty is not a sale of goods: *Pfizer Corp v Ministry of Health* [1965] AC 512, [1965] 1 All ER 450, HL; *Appleby v Sleep* [1968] 2 All ER 265, [1968] 1 WLR 948, DC.

3 Cf *Beecham Foods Ltd v North Supplies (Edmonton) Ltd* [1959] 2 All ER 336, [1959] 1 WLR 643 (where it was held that on the sale of a soft drink, with a sum of money refundable on the bottle, there was no intention to transfer ownership of the bottle).

4 *Read v Hutchinson* (1813) 3 Camp 352; *Harrison v Luke* (1845) 14 M & W 139. Cf *Davies v Customs and Excise Comrs* [1975] 1 All ER 309, [1975] 1 WLR 204, DC (where a supply of goods in exchange for vouchers redeemable by a third person was held to be a contract of sale). For the purposes of the Stamp Act 1891, transfers executed abroad of shares in exchange for money's worth have been held to be 'conveyances on sale' (*IRC v Maple & Co (Paris) Ltd* [1908] AC 22, HL), although 'sale' connotes a sale at common law with a buyer, a seller, something sold and a price in money (*Littlewoods Mail Order Stores Ltd v IRC* [1961] Ch 597, [1961] 3 All ER 258, CA (affd sub nom *IRC v Littlewoods Mail Order Stores Ltd* [1963] AC 135, [1962] 2 All ER 279, HL)). See STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1031. Stamp duty is now chargeable under the Finance Act 1999 s 112(3), Sch 13 (as amended) only on instruments relating to stock or marketable securities; and the Finance Act 1895 s 12 does not apply to property other than stock or marketable securities: Finance Act

2003 s 125 (amended by the Stamp Duty and Stamp Duty Land Tax (Variation of the Finance Act 2003) (No 2) Regulations 2003, SI 2003/2816). Land transactions are instead subject to stamp duty land tax: see STAMP DUTIES AND STAMP DUTY RESERVE TAX.

5 If the goods are to be paid for by money and other goods on which a fixed value is put, the contract may be treated as one of sale for the aggregate sum as the price: *Hands v Burton* (1808) 9 East 349, followed in *Saxty v Wilkin* (1843) 11 M & W 622; *Aldridge v Johnson* (1857) 7 E & B 885; *GJ Dawson (Clapham) Ltd v Dutfield* [1936] 2 All ER 232. See also *Harman v Reeve* (1856) 18 CB 587; *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87, [1959] 2 All ER 701, HL. The contract may also be a contract of sale even where no fixed value is put on the goods delivered in part exchange: see *Buckley v Lever Bros Ltd* [1953] 4 DLR 16 (special offer of clothes-pegs for cash plus wrappers); *Routledge v McKay* [1954] 1 All ER 855, [1955] 1 WLR 615, CA; *Clarke v Reilly* (1962) 96 ILTR 96 (exchange of new car for old car plus cash). If the goods on either side are delivered, any money balance payable may be recovered as on a contract of sale: *Sheldon v Cox* (1824) 3 B & C 420; *Bull v Parker* (1842) 7 Jur 282. See also *Ingram v Shirley* (1816) 1 Stark 185 (balance struck payable in money) (as explained in *Harrison v Luke* (1845) 14 M & W 139); *Garey v Pyke* (1839) 10 Ad & El 512 (no balance struck). If the party liable to deliver goods in exchange refuses to do so, or disables himself from doing so, the other party may recover on a quantum valebat (ie as much as they were worth) the value of the goods given in exchange: *Forsyth v Jervis* (1816) 1 Stark 437; *Keys v Harwood* (1846) 2 CB 905. See further RESTITUTION vol 40(1) (2007 Reissue) PARAS 7, 113 et seq.

6 Thus, the Sale of Goods Act 1979 s 14 (as amended) (implied terms about quality or fitness: see PARA 77 et seq post) and s 15 (as amended) (sale by sample: see PARAS 93-94 post) would, as such, be inapplicable. The view has, however, been expressed that the legal effect of contracts of sale and of barter is the same: see Blackburn's Contract of Sale (1st Edn) 3.

7 Ie by the Sale of Goods Act 1979 s 12 (as amended) (implied terms about title etc: see PARA 69 post), s 13 (as amended) (sale by description: see PARAS 72-101 post), s 14 (as amended) (implied terms about quality or fitness: see PARAS 77-82 post), s 15 (as amended) (sale by sample: see PARAS 93-94 post) and s 55 (as amended) (exclusion of implied terms: see PARA 100 post).

8 Ie by the Supply of Goods and Services Act 1982 s 2 (implied terms about title etc: see PARA 70 post), s 3 (transfer by description: see PARA 75 post), s 4 (as amended) (implied terms about quality or fitness: see PARAS 83-87 post), s 5 (as amended) (transfer by sample: see PARA 95 post), s 7 (right to transfer possession etc: see PARA 71 post), s 8 (hire by description: see PARA 76 post), s 9 (as amended) (implied terms about quality or fitness: see PARAS 88-92 post), s 10 (as amended) (hire by sample: see PARA 96 post) and s 11 (exclusion of implied terms etc: see PARA 102 post). Before the Supply of Goods and Services Act 1982 the courts in any event seemed inclined to deal with such contracts as analogous to contracts of sale: see *Power v Wells* (1778) 2 Cowp 818; *Emanuel v Dane* (1812) 3 Camp 299; *La Neuville v Nourse* (1813) 3 Camp 351; *Fairmaner v Budd* (1831) 7 Bing 574.

9 For the meaning of 'contract for the transfer of goods' see PARA 32 post.

10 As to the contracts which do not constitute contracts for the transfer of goods see PARA 32 heads (1)-(4) post.

11 For the meaning of 'contract for the hire of goods' see PARA 33 post.

12 See PARA 33 post.

13 For the meaning of 'contract for the supply of a service' see PARA 35 post.

14 See the Supply of Goods and Services Act 1982 s 1(3) (as amended) (see PARA 32 post) and s 6(3) (as amended) (see PARA 33 post).

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(1) SALE OF GOODS AND SUPPLY OF SERVICES/2. Sale distinguished from mortgage.

2. Sale distinguished from mortgage.

A mortgage is sometimes called a conditional sale, but a sale subject to a condition for resale to the original seller is distinguishable from a mortgage¹. The essence of a mortgage of goods is the transfer of the general property in the goods from mortgagor to mortgagee in order to secure a debt². It is a question of substance and not of form whether a given transaction is really a mortgage or a sale³.

1 See the distinction stated by Cave J in *Beckett v Tower Assets Co Ltd* [1891] 1 QB 1 at 25. For examples of conditional sales see *Williams v Burgess* (1839) 10 Ad & El 499; *Shaw v Jeffery* (1860) 13 Moo PCC 432; *Gavin's Trustee v Fraser* (1920) 57 SLR 595, Ct of Sess (where the sale of a cartage contractor's plant to a timber merchant with an agreement for repurchase at the same price with interest was held to be a genuine sale). As to sale generally see PARA 1 ante.

2 *Keith v Burrows* (1876) 1 CPD 722 at 731; *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690 at 698, CA; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 at 232, CA. See further FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1620 et seq.

3 As to the substance of a transaction see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1641. Cf MORTGAGE vol 32 (2005 Reissue) PARA 309. See also PARA 8 post.

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1-26 Introduction

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(1) SALE OF GOODS AND SUPPLY OF SERVICES/3. Contracts for the supply of services.

3. Contracts for the supply of services.

A contract for the supply of a service is one under which a person ('the supplier') agrees to carry out a service¹. Such contracts may involve the transfer of goods and, whether or not they do so, they are governed by the Supply of Goods and Services Act 1982², which implies in such contracts terms³ analogous to those implied in contracts for the sale of goods by the Sale of Goods Act 1979⁴. Consequently, so far as concerns most disputes relating to the performance of the supplier's duties under a contract for the supply of a service, it is not now necessary to distinguish between contracts for the sale of goods and contracts for work and labour.

Such distinctions may, however, still be necessary in the case of statutes whose application to a particular contract depends on whether that contract is one for the sale of goods. Thus, the Law Reform (Frustrated Contracts) Act 1943 does not apply to any contract for the sale of specific goods which perish before the risk has passed to the buyer⁵ or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished⁶. Further, the Unfair Contracts Terms Act 1977

applies to miscellaneous contracts under which goods pass in pursuance of a contract not governed by the law of sale of goods⁷. Where, for such purposes, it remains necessary to distinguish between a contract for the sale of goods and a contract for the supply of a service, the distinction drawn between contracts for the sale of goods and contracts for work and labour⁸ before the Supply of Goods and Services Act 1982 may still be of assistance. The distinction so drawn is, however, often a fine one. A contract of sale is a contract the main object of which is the transfer of the property in, and the delivery of the possession of, a chattel as such to the buyer⁹. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel as such, the contract is one for work and labour¹⁰. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale¹¹. Neither the ownership of the materials¹² nor the value of the skill and labour as compared with the value of the materials is conclusive, although such matters may be taken into consideration in determining in the circumstances of a particular case whether the contract is in substance one for work and labour or one for the sale of a chattel¹³.

1 See the Supply of Goods and Services Act 1982 s 12(1); and PARA 35 post. A contract of service or apprenticeship is not a contract for the supply of a service: see s 12(2); and PARA 35 post. Nor is a tenancy a contract for the supply of a service: see *Dunn v Bradford Metropolitan District Council* [2002] EWCA Civ 1137, [2003] HLR 154; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 1356.

2 See the Supply of Goods and Services Act 1982 s 12(3)(a); and PARA 35 post.

3 See *ibid* s 13 (care and skill: see PARA 97 post), s 14 (time for performance: see PARA 98 post), s 15 (consideration: see PARA 99 post) and s 16 (exclusion of implied terms: see PARA 102 post). Before the Supply of Goods and Services Act 1982 terms implied by the Sale of Goods Act 1979 (see note 4 *infra*) were applied by analogy to contracts of work and materials: see eg *GH Myers & Co v Brent Cross Service Co* [1934] 1 KB 46 at 55; *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL; *Rotherham Metropolitan Borough Council v Frank Haslam Milan & Co Ltd and MJ Gleeson (Northern) Ltd* (1996) 78 BLR 1, CA.

4 See the Sale of Goods Act 1979 s 12 (as amended) (implied terms about title etc: see PARA 69 post), s 13 (as amended) (sale by description: see PARAS 72-74, 101 post), s 14 (as amended) (implied terms about quality or fitness: see PARAS 77-82 post), s 15 (as amended) (sale by sample: see PARAS 93-94 post) and s 55 (as amended) (exclusion of implied terms: see PARA 100 post).

5 See a contract to which *ibid* s 7 applies: see PARA 55 post.

6 See the Law Reform (Frustrated Contracts) Act 1943 s 2(5)(c) (as amended); para 55 text and notes 10-13 post; and CONTRACT vol 9(1) (Reissue) PARA 919.

7 See the Unfair Contract Terms Act 1977 s 7 (as amended); para 450 post; and CONTRACT vol 9(1) (Reissue) PARA 827.

8 The Sale of Goods Act 1979 does not apply to contracts for work and labour but only to contracts of sale of goods: see s 1(1); and eg *Robinson v Graves* [1935] 1 KB 579, CA. As to sale generally see PARA 1 ante; and as to contracts within the Sale of Goods Act 1979 see PARA 27 et seq post.

9 See *Lee v Griffin* (1861) 1 B & S 272, applied in *J Marcel (Furriers) Ltd v Tapper* [1953] 1 All ER 15, [1953] 1 WLR 49. See also *Smith v Surman* (1829) 9 B & C 561; *Dixon v London Small Arms Co* (1876) 1 App Cas 632, HL; *Samuels v Davis* [1943] KB 526, [1943] 2 All ER 3, CA; *Love v Norman Wright (Builders) Ltd* [1944] KB 484, [1944] 1 All ER 618, CA.

10 See *Clay v Yates* (1856) 1 H & N 73. See also *Grafton v Armitage* (1845) 2 CB 336; *Robinson v Graves* [1935] 1 KB 579, CA (where a commission to paint a portrait was held on the facts to be a contract for work and labour). Cf *Isaacs v Hardy* (1884) Cab & El 287 (where a contract to paint a picture was held to be a contract of sale); *Philip Head & Sons Ltd v Showfronts Ltd* [1970] 1 Lloyd's Rep 140 (where a contract to supply and lay a carpet was held to be a contract of sale); *Lyle v Ajax Distributing Agency Pty Ltd* (1975) 11 SASR 9 (S Aust) (where a contract to take photographs was held to be a contract for work and labour). Where there is a contract to affix a chattel to land or to another chattel before the property passes, there is no contract of sale either of the chattel or of the separate materials: *Cotterell v Apsey* (1815) 6 Taunt 322; *Tripp v Armitage* (1839) 4 M & W 687; *Chanter v Dickinson* (1843) 5 Man & G 253; *Clark v Bulmer* (1843) 11 M & W 243; *Anglo-Egyptian Navigation Co v Rennie* (1875) LR 10 CP 271 (on appeal LR 10 CP 571, Ex Ch); *Reid v Macbeth and Gray* [1904] AC 223, HL; *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431, [1958] 1 WLR 1126. See further BAILMENT vol 3(1) (2005 Reissue) PARA 63 et seq. A fortiori, where a contract for work and labour is not concerned

with a chattel at all, the fact that it involves the transfer of the property in the materials, which are merely accessory to the work, does not constitute a contract of sale of the materials: see *Clark v Mumford* (1811) 3 Camp 37; *Grafton v Armitage* (1845) 2 CB 336. See also BAILMENT vol 3(1) (2005 Reissue) PARAS 1, 63 et seq; CONTRACT vol 9(1) (Reissue) PARA 619.

11 *Lee v Griffin* (1861) 1 B & S 272 at 277 per Blackburn J; *Robinson v Graves* [1935] 1 KB 579 at 592-593, CA, per Roche LJ.

12 *Robinson v Graves* [1935] 1 KB 579, CA. See also *Grafton v Armitage* (1845) 2 CB 336. In both cases the proposition of Bayley J in *Atkinson v Bell* (1828) 8 B & C 277 at 283-284, that, where a person has bestowed work and labour on his own materials, he cannot maintain an action for work and labour, was repudiated as a general principle. A claim for work and labour only does not cover materials, which should be specifically claimed: *Heath v Freeland* (1836) 1 M & W 543, Ex Ch. See also *Cotterell v Apsey* (1815) 6 Taunt 322.

13 See *Newman v Lipman* [1951] 1 KB 333, [1950] 2 All ER 832, DC (activities of street photographer not street trading); and the cases cited in notes 9-10 supra.

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1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(1) SALE OF GOODS AND SUPPLY OF SERVICES/4. Contracts for the sale and supply of goods and services distinguished from contract of hire purchase.

4. Contracts for the sale and supply of goods and services distinguished from contract of hire purchase.

A contract of hire purchase is, properly speaking¹, a contract of hire by which the hirer is granted an option to buy but is not (as is a buyer in a contract of sale) under a legal obligation to do so². A contract of hire purchase is neither a contract for the transfer of goods³ nor a contract for the hire of goods⁴ within the provisions of the Supply of Goods and Services Act 1982.

1 The term 'hire purchase' is also loosely used to describe transactions of credit sale, where payment is to be made by instalments, but such transactions constitute no more than a particular kind of contract of sale: see eg *Lee v Butler* [1893] 2 QB 318, CA. See also PARA 763 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 23 et seq.

2 See *Helby v Matthews* [1895] AC 471, HL. As to hire-purchase agreements generally see CONSUMER CREDIT vol 9(1) (Reissue) PARA 23 et seq; as to contracts of sale or return, where the 'buyer' is similarly really a bailee see PARA 120 post; as to sale generally see PARA 1 ante; and as to contracts within the Sale of Goods Act 1979 see PARA 27 et seq post.

3 See the Supply of Goods and Services Act 1982 s 1(2)(b); and PARA 32 head (2) post.

4 See *ibid* s 6(1); and PARA 33 post.

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY OF SERVICES/5. In general.

(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY OF SERVICES

5. In general.

Before the Sale of Goods Act 1893 the English law relating to the sale of goods was governed almost entirely by the common law, including, for this purpose, the law merchant¹. There were, however, a few limited enactments affecting the subject and restricting the freedom of contract². The Sale of Goods Act 1893 codified part of the existing law relating to the sale of goods. It applied to the whole of the United Kingdom, uniform rules being laid down for England and Northern Ireland, but certain special rules of Scottish law being either saved or re-enacted as applicable to Scotland³. Broadly speaking, the English law of sale has developed on lines of its own, while Scottish law has been founded on, and has closely adhered to, the rules of the civil law.

The Sale of Goods Act 1893 was amended several times between 1954 and 1977⁴. These amendments were consolidated in the Sale of Goods Act 1979, which, with certain exceptions and savings, repealed and replaced the Sale of Goods Act 1893⁵ and has itself been amended by the Insolvency Act 1985⁶, the Sale of Goods (Amendment) Act 1994⁷, the Sale and Supply of Goods Act 1994⁸, the Sale of Goods (Amendment) Act 1995⁹ and the Sale and Supply of Goods to Consumers Regulations 2002¹⁰.

The Sale of Goods Act 1979 came into force on 1 January 1980¹¹ and applies to all contracts of sale of goods made on or after 1 January 1894¹². In relation to contracts made before certain dates when the Sale of Goods Act 1893 was amended, the Sale of Goods Act 1979 applies, subject to the modification of certain of its provisions¹³, so as to preserve the law which applied when those contracts were made.

The provisions of the Supply of Goods and Services Act 1982 relating to the supply of goods¹⁴ came into force on 4 January 1983¹⁵; and the provisions of that Act relating to the supply of services¹⁶ came into force on 4 July 1983¹⁷.

1 As to the law merchant see CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 662-664.

2 See eg 1 Jac 1 c 21 (Act against Brokers) (1603); the Statute of Frauds (1677) ss 15, 16; the Statute of Frauds Amendment Act 1828 s 7; and the Mercantile Law Amendment Act 1856 ss 1, 2. All these enactments were repealed by the Sale of Goods Act 1893 s 60, Schedule (repealed).

3 See eg *ibid* ss 11(2), 22(3), 24(3), 26(3), 40, 49(3), 52, 53(5), 59, 61(5), and the Scottish definitions in s 62 (all repealed).

4 See the Law Reform (Enforcement of Contracts) Act 1954 s 2 (repealed); the Misrepresentation Act 1967 s 4 (repealed); the Criminal Law Act 1967 s 10(2), Sch 3 Pt III; the Theft Act 1968 s 33(3), Sch 3 Pt III; the Supply of Goods (Implied Terms) Act 1973 ss 1-7 (repealed); the Consumer Credit Act 1974 s 192(3)(a), Sch 4 paras 3, 4; and the Unfair Contract Terms Act 1977 s 31(3), (4), Sch 3 (repealed in part), Sch 4.

- 5 See the Sale of Goods Act 1979 s 63(2), Sch 3. The Sale of Goods Act 1893 s 26 (effect of writs of execution), which was excepted from the general repeal, was subsequently repealed by the Supreme Court Act 1981 s 152(4), Sch 7. As to the savings see the Sale of Goods Act 1979 s 63(3), Sch 4.
- 6 See the Insolvency Act 1985 s 253(3), Sch 10 Pt III.
- 7 See the Sale of Goods (Amendment) Act 1994 s 1.
- 8 See the Sale and Supply of Goods Act 1994 ss 1-4, 7(1), (2), Sch 2 (as amended), Sch 3.
- 9 See the Sale of Goods (Amendment) Act 1995 ss 1, 2.
- 10 See the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, which implement EC Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees (OJ L171, 7.7.99, p 12).
- 11 Sale of Goods Act 1979 s 64(2).
- 12 Ibid s 1(1). 1 January 1894 is the date on which the Sale of Goods Act 1893 (repealed) came into force: see s 63 (repealed). As to contracts within the Sale of Goods Act 1979 see PARA 27 et seq post.
- 13 Ibid s 1(2). Any such modification is indicated in the provision concerned by a reference to Sch 1 (s 1(3)); and, where any provision does not contain such a reference, the Sale of Goods Act 1979 applies in relation to the contract concerned without such modification of the provision (s 1(4)). As to such modifications see s 1(2), (3), Sch 1 para 2 (see PARA 66 note 10 post), Sch 1 para 3 (see PARA 69 notes 10, 13, 15, 19 post), Sch 1 para 4 (see PARA 72 note 8 post), Sch 1 para 5 (see PARAS 77 note 4, 78 notes 8, 21 post), Sch 1 para 6 (see PARAS 77-80 post), Sch 1 para 7 (see PARA 94 note 3 post), Sch 1 para 8 (see PARA 23 note 5 post), Sch 1 para 9 (see PARA 158 note 19 post), Sch 1 para 10 (see PARA 199 note 8 post), Sch 1 para 11 (see PARA 450 note 7 post), Sch 1 para 12 (see PARA 100 note 9 post), Sch 1 para 13 (see PARA 24 note 3 post), Sch 1 para 14 (see PARA 78 note 3 post), Sch 1 para 15 (see PARA 78 note 3 post). Nothing in Sch 1 affects a contract made before 1 January 1894: Sch 1 para 1(1), (3). For these purposes, references to contracts are to contracts of sale of goods: Sch 1 para 1(1), (2).
- 14 Ie the Supply of Goods and Services Act 1982 Pt I (ss 1-11) (as amended) (see PARAS 32-33, 70 et seq post), together with so much of s 18 (as amended) (general interpretation) and s 19 (interpretation of references to Acts) as relates to Pt I (as amended).
- 15 Ibid s 20(3). Transitional provisions were made in s 20(2), Schedule but these are now spent.
- 16 Ie ibid Pt II (ss 12-16) (see PARAS 35, 97-99, 102 post), together with so much of s 18 (general interpretation) and s 19 (interpretation of references to Acts) as relates the Pt II (as amended).
- 17 Ibid s 20(3); Supply of Goods and Services Act 1982 (Commencement) Order 1982, SI 1982/1770, art 2.

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5 In general

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY OF SERVICES/6. Extent of codification and relation to general law.

6. Extent of codification and relation to general law.

The Sale of Goods Act 1979 deals only with those rules of law which are peculiar to the law of sale, and, if the whole law of contract were codified, it would form merely a chapter in that code. The same may be said of contracts within the Supply of Goods and Services Act 1982¹. The Sale of Goods Act 1979, therefore, does not deal with questions common to the whole law of contract². If then, for example, any question arises on a contract of sale as to what constitutes a valid offer or acceptance of the offer³, or whether there has been a sufficient consensus ad idem as to the subject matter or the identity of the parties⁴, or whether the contract has been validly rescinded or performed by a substituted mode⁵, reference must be made to the general law of contract. Apart from its specific rules of interpretation⁶, the Sale of Goods Act 1979 does not touch the ordinary law relating to the interpretation of contracts in writing or the ascertainment of terms of oral contracts or the law of evidence⁷. Quite apart from contract, the seller of goods may be liable in tort if he sells goods in a condition likely to cause danger without fair warning to the buyer⁸, or commits any act infringing the buyer's right of property in the goods, as by converting them⁹.

The Sale of Goods Act 1979 relates only to goods as there defined¹⁰; and the sale or transfer of other personal chattels is left to be regulated by the general law¹¹.

1 As to the contracts within the Supply of Goods and Services Act 1982 see PARAS 1, 3 ante, 32-35 post.

2 See the Sale of Goods Act 1979 s 62(2) (see PARA 9 post), which expressly saves the common law rules. The rules in bankruptcy (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 1 et seq), the enactments relating to bills of sale (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1630 et seq) and the enactments relating to the sale of goods which are not expressly repealed are also saved: see s 62(1), (3); and PARA 10 post. As to contracts within the Sale of Goods Act 1979 see PARA 27 et seq post.

3 As to offer and acceptance see CONTRACT vol 9(1) (Reissue) PARA 631 et seq. As to contracts for sale at auction see PARA 745 et seq post; and AUCTION vol 2(3) (Reissue) PARA 205 et seq.

4 As to consent generally see CONTRACT vol 9(1) (Reissue) PARA 701 et seq.

5 As to the exact performance of the contract and rescission for breach of contract see CONTRACT vol 9(1) (Reissue) PARAS 921, 989 et seq.

6 See the Sale of Goods Act 1979 s 10 (stipulations about time: see PARA 68 post), s 12 (as amended) (implied terms about title etc: see PARA 69 post), s 15(2) (as amended) (sale by sample: see PARA 94 post), s 18 rr 1-5 (as amended) (rules for ascertaining intention: see PARAS 113 et seq, 136 post) and s 61 (as amended) (general interpretation provisions).

7 As to the formalities of a contract see PARA 38 et seq post.

8 As to the sale of dangerous goods see PARA 20 post; and as to the duty of care in relation to goods supplied see NEGLIGENCE vol 78 (2010) PARA 47 et seq. A seller may also incur criminal liability: see eg HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 533 (supply and fabrication of machinery). As to prohibited sales generally see PARAS 49-53 post.

9 *Martindale v Smith* (1841) 1 QB 389.

10 For the meaning of 'goods' in the Sale of Goods Act 1979 see PARA 30 post; cf the meaning of 'goods' in the Supply of Goods and Services Act 1982 (see PARA 34 post).

11 See eg the common law warranty of title when a negotiable instrument payable to bearer is sold, ie transferred for value by mere delivery: *Westropp v Solomon* (1849) 8 CB 345 at 373; *Raphael & Sons v Burt & Co* (1884) Cab & El 325; *Meyer v Richards* 163 US 385 at 405 (1895). As to alienation of personal property generally see PERSONAL PROPERTY vol 35 (Reissue) PARA 1249 et seq.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY OF SERVICES/7. Construction of legislation.

7. Construction of legislation.

The intention of the Sale of Goods Act 1893 was not to change but merely to codify the existing law relating to the sale of goods. Consequently, the appropriate canons of construction applied to it were those applicable to a codifying statute, which require the language of the statute to be first examined for its natural meaning and only permit inquiry into the previous state of the law for the purpose of construing doubtful or technical provisions¹.

Similar canons of construction apply to a consolidating statute such as the Sale of Goods Act 1979. If reasonably possible, such a statute should be interpreted without regard to its antecedents. Recourse should only be had to the earlier legislation, and to the rule that, in so far as a consolidating statute merely re-enacts, it does not change the law, where there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve².

¹ *Bank of England v Vagliano Bros* [1891] AC 107 at 144-145, HL, per Lord Herschell. See STATUTES vol 44(1) (Reissue) PARA 1418.

² *Farrell v Alexander* [1977] AC 59, [1976] 2 All ER 721, HL. See STATUTES vol 44(1) (Reissue) PARAS 1372, 1415 et seq.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY OF SERVICES/8. Exclusion of mortgages and other securities.

8. Exclusion of mortgages and other securities.

The provisions of the Sale of Goods Act 1979 relating to contracts of sale¹ do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security². Certain other provisions are, however, applicable to pledges or other dispositions³.

1 For the meaning of 'contract of sale' see PARA 29 post.

2 Sale of Goods Act 1979 s 62(4). The governing word is 'intended'. If the intention is to create a mortgage, the form is immaterial, and conversely in the case of a sale: see generally *Cushing v Dupuy* (1880) 5 App Cas 409, PC (pledge under guise of sale); *Re Watson, ex p Official Receiver in Bankruptcy* (1890) 25 QBD 27, CA (bill of sale); *Madell v Thomas & Co* [1891] 1 QB 230, CA (bill of sale); *Lawrence v Lawrence's Trustee, Lawrence v Sievright and Miller* (1899) 6 SLT 356; *Maas v Pepper* [1905] AC 102, HL (bill of sale); *Gavin's Trustee v Fraser* 1920 SC 674, Ct of Sess; *G and C Finance Corp Ltd v Brown* 1961 SLT 408, Ct of Sess (refinancing arrangements; security not a sale). The intention must, however, be that of both parties or the documents will prevail: *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537, [1965] 1 All ER 513, CA; *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 QB 747, [1966] 2 All ER 414, CA; *Bennett v Griffin Finance* [1967] 2 QB 46, [1967] 1 All ER 515, CA; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, [1967] 1 All ER 518, CA. See also *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339, [1990] 3 All ER 481, HL; and PARA 29 post. In view of the explicit provisions of the Sale of Goods Act 1893 s 61(4) (repealed and now re-enacted in the Sale of Goods Act 1979 s 62(4)), cases decided before its commencement (see PARA 5 ante) which held that a particular transaction was a sale and not a mortgage must be looked at critically: see eg *M'Bain v Wallace & Co* (1881) 6 App Cas 588, HL (where it was held that, where there is an absolute contract of sale, the existence of an ulterior object that the transaction should operate so as to give security for a loan is immaterial). In *Jones & Co's Trustee v Allan* (1901) 4 F 374 and *Rennett v Mathieson* (1903) 40 SLR 421, the view prevailed that *M'Bain v Wallace & Co* supra had been overridden by the Sale of Goods Act 1893 (repealed). As to contracts within the Sale of Goods Act 1979 see PARA 27 et seq post. See also PARA 2 ante. See generally FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1620 et seq; MORTGAGE vol 32 (2005 Reissue) PARAS 309, 312.

3 See eg the Sale of Goods Act 1979 ss 24, 25, 47 (which relate to dispositions by sellers and buyers of goods after sale, and extend to pledges and other dispositions); and PARAS 157-159, 251-284 post.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY OF SERVICES/9. Saving for common law rules.

9. Saving for common law rules.

The rules of the common law, including the law merchant¹, save in so far as they are inconsistent with the express provisions of the Sale of Goods Act 1979, and, in particular, the rules relating to the law of principal and agent² and the effect of fraud, misrepresentation³, duress⁴, mistake⁵ or other invalidating cause⁶, continue to apply to contracts for the sale of goods⁷.

1 As to the law merchant see CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 662-664.

2 See AGENCY vol 1 (2008) PARA 1 et seq.

3 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 701 et seq.

4 See CONTRACT vol 9(1) (Reissue) PARAS 710-711.

5 See CONTRACT vol 9(1) (Reissue) PARAS 703-708; MISTAKE vol 32 (2005 Reissue) PARA 1 et seq.

6 Eg undue influence, illegality or contemporaneous impossibility of performance: see CONTRACT vol 9(1) (Reissue) PARAS 712-716, 836 et seq; EQUITY vol 16(2) (Reissue) PARA 416 et seq.

7 Sale of Goods Act 1979 s 62(2). As to contracts within the Sale of Goods Act 1979 see PARA 27 et seq post.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY OF SERVICES/10. Savings in the Sale of Goods Act 1979 as to bankruptcy rules, bills of sale and unrepealed enactments.

10. Savings in the Sale of Goods Act 1979 as to bankruptcy rules, bills of sale and unrepealed enactments.

The rules in bankruptcy¹ relating to contracts of sale continue to apply notwithstanding anything in the Sale of Goods Act 1979².

Nothing in the Sale of Goods Act 1979 or the Sale of Goods Act 1893 affects the enactments relating to bills of sale³ or any enactment relating to the sale of goods which is not expressly repealed or amended by either Act⁴.

1 See, in particular, the Insolvency Act 1986 s 284 (restrictions on dispositions of property: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 217), s 314(1)(b), Sch 5 Pt II (trustee's general power of sale: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 458), s 315 (as amended) (general power of disclaimer of onerous property: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472 et seq), ss 339-342 (as amended) (transactions at an undervalue and preferences: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq), s 345(1)-(3) (discharge by the court of contracts to which bankrupt is a party: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 677) and s 345(4) (non-joinder of bankrupt in action on joint contract: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 677). See also CHOSSES IN ACTION vol 13 (2009) PARA 87.

2 Sale of Goods Act 1979 s 62(1). As to contracts within the Sale of Goods Act 1979 see PARA 27 et seq post.

3 As to such enactments see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1630 et seq. As to the effect of a bill of sale in transferring property see PARA 38 post.

4 Sale of Goods Act 1979 s 62(3). As to such repeals and amendments generally see PARA 5 ante. For other enactments relating to the sale of goods see PARA 17 et seq post.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY

OF SERVICES/11. Savings in the Supply of Goods and Services Act 1982 as to other enactments or rules of law.

11. Savings in the Supply of Goods and Services Act 1982 as to other enactments or rules of law.

Nothing in the provisions of the Supply of Goods and Services Act 1982 relating to contracts for the transfer of property in goods or contracts for the hire of goods¹ prejudices the operation of any other enactment or any rule of law whereby any condition or warranty, other than one relating to quality or fitness, is to be implied in a contract for the transfer of goods or a contract for the hire of goods².

Nor does anything in the provisions of the Supply of Goods and Services Act 1982 relating to the supply of a service³ prejudice any rule of law which imposes on the supplier a duty stricter than that imposed by the Supply of Goods and Services Act 1982 in respect of care and skill⁴ or the time for performance⁵ or, subject thereto, any rule of law whereby any term not inconsistent with those provisions⁶ is to be implied in a contract for the supply of a service⁷. The provisions of the Supply of Goods and Services Act 1982 relating to the supply of a service⁸ have effect subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description⁹.

1 Ie nothing in the Supply of Goods and Services Act 1982 ss 1-10A (as amended): see PARAS 32-33, 70 et seq post.

2 Ibid s 11(3).

3 Ie ibid Pt II (ss 12-16): see PARAS 35, 97-99 post.

4 Ie the duty imposed by ibid s 13: see PARA 98 post.

5 Ie the duty imposed by ibid s 14: see PARA 99 post.

6 See note 3 supra.

7 Supply of Goods and Services Act 1982 s 16(3).

8 See note 3 supra.

9 Supply of Goods and Services Act 1982 s 16(4).

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY OF SERVICES/12. Freedom of contract.

12. Freedom of contract.

Subject to certain minor statutory limitations¹, there was, before the Sale of Goods Act 1893, no rule of law to prevent persons from making any bargain they pleased²; and this freedom of contract was preserved by the 1893 Act. Thus, it was expressly provided that, where any right, duty or liability arose under a contract of sale by implication of law³, it could be negated or varied by express agreement or by the course of dealing between the parties, or by usage if the usage was such as to bind⁴ both parties to the contract⁵.

This provision is retained in the Sale of Goods Act 1979⁶, but it is there expressed to be subject to the Unfair Contract Terms Act 1977, which limits the extent to which parties to a contract may negative or vary rights, duties or liabilities⁷. Similar provisions are contained in the Supply of Goods and Services Act 1982⁸. In so far as the Unfair Terms in Consumer Contracts Regulations 1999⁹ apply to contracts regulated by the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, it is to be assumed that the parties' freedom of contract so preserved is equally subject to the provisions of the 1999 Regulations¹⁰.

1 As to these statutory limitations see PARA 5 note 2 ante.

2 *Calcutta and Burmah Steam Navigation Co Ltd v De Mattos* (1863) 32 LJQB 322 at 328 per Lord Blackburn.

3 I.e. under a contract of sale simpliciter, apart from express agreement or other stipulation.

4 See *Landauer & Co v Craven and Speeding Bros* [1912] 2 KB 94. As to the characteristics of usage see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 656 et seq.

5 Sale of Goods Act 1893 s 55 (repealed). This provision had to be read subject to the ordinary rules governing the admissibility of oral evidence in relation to written contracts: *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152 (usage). See generally CONTRACT vol 9(1) (Reissue) PARAS 667-675, 778-781, 1019-1024; CUSTOM AND USAGE vol 12(1) (Reissue) PARA 653; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 185 et seq. To exclude a term implied by law, the express agreement must be inconsistent with it, eg an express warranty of quality could be consistent with a condition implied by the Sale of Goods Act 1893 s 14 (repealed). Cf *Bigge v Parkinson* (1862) 7 H & N 955, Ex Ch. For illustrations of this provision see *Re Walkers, Winser and Hamm and Shaw, Son & Co* supra. See also PARA 72 et seq post.

6 See the Sale of Goods Act 1979 s 55(1), (2) (as amended); and PARA 100 post.

7 See PARAS 103 et seq, 450 et seq post.

8 See the Supply of Goods and Services Act 1982 ss 11(1), (2), 16(1), (2); and PARA 102 post.

9 I.e. the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARA 452 et seq post.

10 As to the terms to which the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended), apply see PARA 452 post; and as to the application of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended), to consumer arbitration agreements see the Arbitration Act 1996 ss 89-91 (as amended); and PARA 897 post.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY OF SERVICES/13. International sale contracts.

13. International sale contracts.

The statutory provision that usage may negative or vary rights, duties and liabilities arising under a contract of sale of goods by implication of law¹ has the effect of rendering many of the provisions of the Sale of Goods Act 1979 inapplicable to some common forms of international sale contracts. Of these the most important are:

- 1 (1) cif (cost, insurance, freight) contracts², where the goods are sold at a price which includes their cost, freight to destination and the premium on a policy of insurance covering the transit; the buyer's duty is to pay the price not on the arrival of the goods at their destination but on the tender of documents covering those goods, which documents typically include a bill of lading, policy of insurance and invoice;
- 2 (2) fob (free on board) contracts³, where the seller's duty is to deliver the goods on board ship at his own expense, on which prima facie the property and the risk pass to the buyer, who is liable for subsequent charges, and payment for the goods becomes due; but commonly the fob contract contains special terms as to payment, as, for example, by providing for 'cash against documents' in a similar manner to the cif contract.

Other common commercial contracts include fas (free alongside) and for (free on rail)⁴, which are contracts under which delivery is to be made alongside the ship or on rail respectively, the seller undertaking so to deliver at his own expense, and ex-ship contracts⁵, where the seller undertakes to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery, and has reached a place there which is usual for delivery of goods of the kind in question.

Special features of these commercial contracts are discussed later in this title⁶.

1 See the Sale of Goods Act 1979 s 55(1); para 12 ante; and PARA 100 post.

2 See PARA 324 et seq post.

3 See PARA 351 et seq post.

4 See PARA 361 post.

5 See PARA 362 post.

6 As to international sale contracts generally see PARA 322 et seq post.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

14. Statutory rights enforceable by action.

Where a right, duty or liability is declared by the Sale of Goods Act 1979, it may, unless otherwise¹ provided by that Act, be enforced by action². For these purposes, 'action' includes counterclaim and set-off³; and 'claimant'⁴ includes a defendant counterclaiming⁵.

1 These words appear to refer to the unpaid seller's rights of lien, stoppage in transit and resale (see PARA 236 et seq post), which are enforceable without action.

2 Sale of Goods Act 1979 s 60. See note 4 infra. This statutory provision was first enacted (probably) to negative the common law rule that, where a statute provided no specific penalty, disobedience to its provisions was indictable as a misdemeanour: see *R v Harris* (1791) 4 Term Rep 202; *R v Buchanan* (1846) 8 QB 883 at 887; and STATUTES vol 44(1) (Reissue) PARAS 1354, 1510. The particular rights provided by the Sale of Goods Act 1979 are in addition to the general rights and duties of the parties.

3 Ibid s 61(1). As to counterclaim and set-off generally see CIVIL PROCEDURE vol 11 (2009) PARA 634 et seq; and as to breach of contract of sale see PARA 285 et seq post.

4 Ibid s 61(1) refers to 'plaintiff'; but on and after 26 April 1999 all proceedings, whether in a county court or the High Court, are now started when the court issues a claim form at the request of the claimant: see CPR 7.2(1); and CIVIL PROCEDURE vol 11 (2009) PARAS 18, 118.

5 Sale of Goods Act 1979 s 61(1).

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(2) LEGISLATION RELATING TO THE SALE OF GOODS AND SUPPLY OF SERVICES/15. The Secretary of State.

15. The Secretary of State.

The general oversight of the legislation relating to consumer affairs is the responsibility of the Secretary of State. 'Secretary of State' is a general term comprising all the Secretaries of State, each of whom may perform the duties of all or any of them, except where a statute specifically allocates a function to a particular Secretary of State¹. The functions of the Secretary of State relating to consumer affairs are performed by the Secretary of State for Trade and Industry².

1 See the Interpretation Act 1978 ss 5, 22(1), Sch 1, Sch 2 para 4(1)(b); and STATUTES vol 44(1) (Reissue) PARA 1382 note 4. As to the office of Secretary of State see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 335.

2 See the Transfer of Functions (Trade and Industry) Order 1983, SI 1983/1127. As to the Secretary of State for Trade and Industry see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 506; and as to the functions and organisation of the Department of Trade and Industry see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 507-508. As to the power of the Secretary of State to fund activities that benefit consumers see the Enterprise Act 2002 s 274; and COMPETITION vol 18 (2009) PARA 171. As to the designation of Ministers

who may exercise the power to make regulations conferred by the European Communities Act 1972 s 2(2) see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 359.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(i) Law relating to Particular Sales/16. Common law powers of sale in particular cases.

(3) COGNATE LAW

(i) Law relating to Particular Sales

16. Common law powers of sale in particular cases.

The following persons have power at common law to sell the goods of others:

- 3 (1) pawnees, who may sell the goods pledged on the pawner's default¹;
- 4 (2) executors or administrators selling as such²; and
- 5 (3) masters of ships, who may sell the ship or cargo in cases of absolute necessity³.

A person, whether a master of a ship or not, may be an agent of necessity to sell goods wherever the sale was in the circumstances the only reasonable business course to take, but the doctrine of agent of necessity is sparingly applied in English law⁴.

1 *Pothonier and Hodgson v Dawson* (1816) Holt NP 383; *Pigot v Cubley* (1864) 15 CBNS 701; *Donald v Suckling* (1866) LR 1 QB 585 per curiam; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 at 223, CA; *The Ningchow* [1916] P 221. See PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 27.

2 *Solomon v Attenborough* [1912] 1 Ch 451, CA; affd sub nom *George Attenborough & Son v Solomon* [1913] AC 76, HL. See also *Nugent v Gifford* (1738) 1 Atk 463; *Whale v Booth* (1784) 4 Term Rep 625n; *Doe d Woodhead v Fallows* (1832) 2 Cr & J 481 per curiam (administrator). The sale must be in good faith on the part of the buyer: *Doe d Woodhead v Fallows* supra. See generally EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 438 et seq.

3 *The Gratitude* (1801) 3 Ch Rob 240 at 259; *Hunter v Prinsep* (1808) 10 East 378 (wrongful sale a conversion); *Vlierboom v Chapman* (1844) 13 M & W 230 (perishable goods); *Australasian Steam Navigation Co v Morse* (1872) LR 4 PC 222; *Acatos v Burns* (1878) 3 Ex D 282, CA (communication with owner); *Atlantic Mutual Insurance Co Ltd v Huth* (1880) 16 ChD 474, CA. See generally SHIPPING AND MARITIME LAW vol 93 (2008) PARA 440 et seq.

4 *Springer v Great Western Rly Co* [1921] 1 KB 257, CA (sale unnecessary; no property passed); *Tetley & Co v British Trade Corp* (1922) unreported, but cited in 10 Ll L Rep at 678 (doctrine applied in Russia); *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566 (sale unnecessary). See also CARRIAGE AND CARRIERS vol 7 (2008) PARA 15. As to agency of necessity generally see AGENCY vol 1 (2008) PARA 24.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(i) Law relating to Particular Sales/17. Statutory powers of sale in particular cases.

17. Statutory powers of sale in particular cases.

The following persons have, subject to the legislation conferring the powers, statutory powers of sale:

- 6 (1) district judges with regard to goods seized in execution¹;
- 7 (2) enforcement officers, who may, after seizure, sell the goods of the judgment debtor pursuant to a writ of execution²; and
- 8 (3) distrainers for rent³, council tax⁴, non-domestic rates⁵, taxes⁶, customs or excise duty⁷ or sums due by order of a magistrates' court⁸;
- 9 (4) innkeepers for the board and lodging of their guests⁹;
- 10 (5) pawnees¹⁰;
- 11 (6) the police with regard to stray dogs¹¹ or with regard to property which has come into their possession in connection with a criminal charge or under certain statutory provisions where the owner cannot be ascertained¹²;
- 12 (7) trustees in bankruptcy¹³;
- 13 (8) administrators¹⁴, administrative receivers¹⁵ and liquidators of companies being wound up by the court¹⁶;
- 14 (9) mortgagees¹⁷;
- 15 (10) harbour masters with regard to goods left on quays when removal expenses remain unpaid¹⁸;
- 16 (11) bailees with regard to goods accepted for repair or other treatment and which remain uncollected and unpaid for¹⁹;
- 17 (12) tenants for life of settled land with regard to chattels settled to devolve with the land²⁰;
- 18 (13) unpaid sellers of perishable goods or of any goods where notice of intention to resell has been disregarded by the buyer²¹; and
- 19 (14) certain recipients of unsolicited goods²².

1 See COURTS vol 10 (Reissue) PARA 731.

2 See generally CIVIL PROCEDURE vol 12 (2009) PARAS 1315, 1336 et seq. Under the Courts Act 2003 s 99(1), Sch 7 para 4, enforcement officers have the traditional powers of a sheriff. As to sale by enforcement officers see Sch 7 para 10. For the previous common law position see *Manning's Case* (1609) 8 Co Rep 94b at 96b (sale good although judgment set aside); *Doe v Thorn* (1813) 1 M & S 425; *Doe v Donston* (1818) 1 B & Ald 230; *Farrant v Thompson* (1822) 5 B & Ald 826; *Manders v Williams* (1849) 4 Exch 339 (wrongful sale passes no property); *Ward v Dalton* (1849) 7 CB 643 (unascertained goods); *Re Townsend, ex p Hall* (1880) 14 ChD 132, CA (seizure necessary).

3 See DISTRESS vol 13 (2007 Reissue) PARAS 904, 1044 et seq.

4 See RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 335.

5 See RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 195.

- 6 See DISTRESS vol 13 (2007 Reissue) PARA 1131.
- 7 See CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1144.
- 8 See DISTRESS vol 13 (2007 Reissue) PARA 1134 et seq.
- 9 See LICENSING AND GAMBLING vol 67 (2008) PARA 214.
- 10 See CONSUMER CREDIT vol 9(1) (Reissue) PARA 216; PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 41.
- 11 See ANIMALS vol 2 (2008) PARA 926.
- 12 See POLICE vol 36(1) (2007 Reissue) PARAS 520-522.
- 13 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 458, 461.
- 14 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 158.
- 15 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 395 et seq.
- 16 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARAS 577-578.
- 17 See MORTGAGE vol 32 (2005 Reissue) PARA 644 et seq.
- 18 See the Harbours, Docks, and Piers Clauses Act 1847 s 68; and PORTS AND HARBOURS vol 36(1) (2007 Reissue) PARA 695.
- 19 See the Torts (Interference with Goods) Act 1977 ss 12, 13; BAILMENT vol 3(1) (2005 Reissue) PARA 80; and TORT vol 45(2) (Reissue) PARA 647.
- 20 See the Settled Land Act 1925 s 67(1); and SETTLEMENTS vol 42 (Reissue) PARA 941. Save in a very limited class of cases, no settlement created on or after 1 January 1997 is a settlement for the purposes of the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and SETTLEMENTS vol 42 (Reissue) PARA 675 et seq.
- 21 See the Sale of Goods Act 1979 s 48(3); and PARA 282 post.
- 22 See the Unsolicited Goods and Services Acts 1971 and 1975; and PARA 657 et seq post.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

17 Statutory powers of sale in particular cases

NOTE 2--2003 Act s 99(1), Sch 7 amended: Tribunals, Courts and Enforcement Act 2007 s 140.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(i) Law relating to Particular Sales/18. Sales by court order.

18. Sales by court order.

A court may:

- 20 (1) by way of an interim remedy, grant an order for the sale of relevant property¹ which is of a perishable nature or which for any other good reason it is desired to sell quickly²;
- 21 (2) order the sale of the property involved in an Admiralty action in rem³, of goods seized in execution and claimed by a third person under a bill of sale or otherwise⁴, and of mortgaged property on the application of the mortgagee or in a foreclosure action⁵.

1 For these purposes, 'relevant property' means property, including land, which is the subject of a claim or as to which any question may arise on a claim: CPR 25(2).

2 See CPR 25(1)(c)(iv); and CIVIL PROCEDURE. As to the sale of perishable and deteriorating property see also SHIPPING AND MARITIME LAW.

3 See CPR 61.10; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 178.

4 As to the power to order a sale under these circumstances see CPR 50(4), Sch 2 CCR Ord 26; CIVIL PROCEDURE vol 12 (2009) PARAS 1336 et seq, 1628.

5 As to such sale see MORTGAGE vol 32 (2005 Reissue) PARAS 771 et seq, 872.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(i) Law relating to Particular Sales/19. Common law or statutory conditions and warranties.

19. Common law or statutory conditions and warranties.

Apart from the conditions and warranties¹ specifically annexed to sales by the Sale of Goods Act 1979², an implied term about quality or fitness for a particular purpose may be annexed to a contract of sale³ by usage⁴.

In addition, statutory warranties are annexed to the sale of certain articles; for example, on the sale of fertilisers and cattle and poultry food there are implied warranties as to composition, fitness and similar matters which cannot be excluded by express contract⁵.

1 As to conditions and warranties see PARA 62 et seq post.

2 As to such specific conditions and warranties under the Sale of Goods Act 1979 see ss 10-15 (as amended); and PARA 68 et seq post.

3 For the meaning of 'contract of sale' see PARA 29 post.

4 See the Sale of Goods Act 1979 s 14(4) (amended by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 5(1), (5)); *Jones v Bowden* (1813) 4 Taunt 847; *Weall v King* (1810) 12 East 452, cited by Heath J in *Jones v Bowden* supra (sale of sheep as 'stock'); and PARA 77 post. Cf *Syers v Jonas* (1848) 2 Exch 111 (sale by sample

implied). Conversely, an implied condition or warranty may be negated by the usage of a particular trade: see PARA 12 ante. As to trade usage generally see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 650 et seq. Before the Sale of Goods Act 1893 (repealed) it had been held (*Johnson v Raylton Dixon & Co* (1881) 7 QBD 438, CA, Bramwell LJ dissenting) that, where there was a contract of sale by a manufacturer as such, there was an implied condition that the goods were of the seller's own manufacture (contra in Scotland: see *West Stockton Iron Co Ltd v Neilson and Maxwell* (1880) 7 R 1055, Ct of Sess; *Johnson and Reay v Nicoll & Son* (1881) 8 R 437, Ct of Sess). Such an implied condition is, however, probably negated by the exclusive terms of the Sale of Goods Act 1979 s 14 (as amended), unless, on the true construction of the contract, it forms part of the description of the goods. Cf *Wren v Holt* [1903] 1 KB 610, CA.

5 See the Agriculture Act 1970 ss 68-72 (as amended); para 743 post; and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 944 et seq. There are similar warranties in respect of seeds: see the Plant Varieties and Seeds Act 1964 s 17; para 744 post; and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 908. As to the marking of food for sale see PARA 682 et seq post and FOOD vol 18(2) (Reissue) PARA 371 et seq; and as to the sale of poisons see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 290 et seq.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

19 Common law or statutory conditions and warranties

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(i) Law relating to Particular Sales/20. Sale of dangerous goods.

20. Sale of dangerous goods.

Apart from any condition or warranty, the seller of dangerous goods which he knows or ought to know are dangerous¹ is liable in damages if he sells them without fair warning² and injury results to the buyer³. This liability is in tort and thus independent of the contractual relationship between the parties. Normally, the goods, whether or not the seller knew or ought to have known that they were dangerous, would not comply with the implied terms about quality or fitness⁴, and there would be a contractual liability as well as one founded on tort⁵.

Where there is a contractual relationship, and the dangerous goods cause loss to the other party to the contract other than death or personal injury, a person's business liability may be excluded by such express terms as satisfy the requirement of reasonableness⁶. Where, however, there is a contractual relationship and the dangerous goods cause the death of or personal injury to the other party to the contract through negligence⁷, a person's business liability for such negligence cannot be excluded or restricted by reference to any contractual term⁸.

The same is true of goods supplied under a contract for the transfer⁹ or hire¹⁰ of goods or a contract for the supply of a service¹¹.

If a person supplies any consumer goods which fail to comply with the general safety requirement, offers or agrees to supply any such goods or exposes or possesses any such goods for supply, he is guilty of a criminal offence¹².

1 See *Gordon v M'Hardy* (1903) 6 F 210 (injury from tinned salmon; grocer held not liable), referred to with approval in *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 at 604, 622, HL.

2 See *Hurley v Dyke* [1979] RTR 265, HL (where a dangerous car was sold at an auction 'as seen with all its faults and without warranty'; the seller knew the car might be dangerous, but it was held that fair warning had been given).

3 *M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL. See NEGLIGENCE vol 78 (2010) PARA 45 et seq; cf BAILMENT vol 3(1) (2005 Reissue) PARAS 32, 55.

4 There may be cases in which the goods, although dangerous, would comply with such conditions, eg on a sale of goods known both to the seller and the buyer to be of a dangerous nature and bought and sold as such.

5 As to the duty of care in relation to goods supplied see NEGLIGENCE vol 78 (2010) PARA 47 et seq. The principle is not confined to sellers. It applies equally to anyone who consigns dangerous goods to another without warning: see CARRIAGE AND CARRIERS vol 7 (2008) PARA 105. Cf the cases cited in note 1 supra. The principle has been extended to manufacturers of goods intended to reach the ultimate consumer in the form in which they left the manufacturer, and has been applied in a number of cases where goods have been so manufactured and sold: see NEGLIGENCE vol 78 (2010) PARA 47 et seq.

6 See the Unfair Contract Terms Act 1977 s 2(2); and CONTRACT vol 9(1) (Reissue) PARA 822. As to the test of reasonableness see PARAS 104, 451 post. As to the position where the contractual party injured by the dangerous goods is a consumer see the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 5-8 (as amended); and PARAS 453-457 post.

7 For these purposes, 'negligence' means the breach: (1) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract; (2) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty); (3) of the common duty of care imposed by the Occupiers' Liability Act 1957: Unfair Contract Terms Act 1977 ss 1(1), 14.

8 See *ibid* s 2(1); para 450 post; and CONTRACT vol 9(1) (Reissue) PARA 822.

9 For the meaning of 'contract for the transfer of goods' see PARA 32 post.

10 For the meaning of 'contract for the hire of goods' see PARA 33 post.

11 For the meaning of 'contract for the supply of a service' see PARA 35 post.

12 See the Consumer Protection Act 1987 s 10 (as amended); and PARA 533 post.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(i) Law relating to Particular Sales/21. Restriction on sale of agricultural products.

21. Restriction on sale of agricultural products.

Sales of agricultural products which are the subject of marketing schemes approved¹ by the Secretary of State are liable to severe restrictions. For example, a scheme may require registered producers to sell the regulated product only to, or through the agency of, the appropriate marketing board², and may regulate the manner in which the regulated product must be graded, marked, packed, stored, adapted for sale, insured, advertised or transported³. The restrictions vary with the different products regulated by marketing schemes⁴.

In addition, a number of miscellaneous statutory provisions affect the sales of various agricultural products⁵.

1 le approved under the Agricultural Marketing Act 1958 s 2 (as amended): see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1087. As to agricultural marketing schemes generally see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1082 et seq.

2 See *ibid* s 6(2)(a); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1084. Every scheme must prohibit sales of the regulated product by unregistered producers who are not exempt from registration: s 6(1). As to prohibited sales generally see PARAS 49-53 post.

3 See *ibid* s 7(1)(h); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1085.

4 At the date at which this volume states the law the only product which is the subject of such a scheme is British wool: see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARAS 1110-1111. Cereals are the subject of a separate scheme under the Cereals Marketing Act 1965: see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1122 et seq.

5 Eg horticultural produce, cereals, seeds, plant varieties, fertilisers and feeding stuffs: see PARA 52 post; and AGRICULTURAL LAND vol 1 (2008) PARA 357 et seq; AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARAS 906 et seq, 941 et seq, 1122 et seq.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

21 Restriction on sale of agricultural products

NOTE 4--Cereals Marketing Act 1965 repealed: SI 2008/576.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(i) Law relating to Particular Sales/22. Duty and tax.

22. Duty and tax.

Many contracts for the sale of goods involve, directly or incidentally, the payment of duty or tax¹. Goods themselves may be subject, broadly, to three classes of duty or tax, namely, customs duty², excise duty³ and VAT⁴. In order to secure payment, there are elaborate provisions regulating such matters as the import⁵ and export⁶ of goods and the position of persons dealing in goods subject to excise duty⁷ and VAT⁸.

Certain sales at artificial prices between associated persons or between associated undertakings made for the purpose of avoiding tax or increasing tax allowances may result in the parties concerned being treated for purposes of tax as if the price had been a normal one⁹.

Generally, no stamp duty is payable on contracts for the sale of goods¹⁰.

1 As to adjustments between buyer and seller under contracts affected by a change in duty or tax see PARA 59 post; and as to payment of import and export duties in international sale contracts see PARAS 345, 358 post.

2 As to customs duties see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 1 et seq.

3 As to excise duties see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 389 et seq.

4 As to value added tax see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 1 et seq.

5 See CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 962 et seq, 1092 et seq.

6 See CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 999 et seq.

7 See CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 622 et seq.

8 See VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 245 et seq.

9 As to transactions between associates at undervalue or overvalue see INCOME TAXATION vol 23(2) (Reissue) PARA 1624 et seq.

10 Ie because a contract for the sale of goods did not generally fall within any of the heads of charge in the Stamp Act 1891 s 1, Sch 1 (repealed); and now stamp duty is chargeable under the Finance Act 1999 s 112(3), Sch 13 (as amended) only on instruments relating to stock or marketable securities: see the Finance Act 2003 s 125(1); and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1027 et seq.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(i) Law relating to Particular Sales/23. Miscellaneous restrictions on conduct of sales.

23. Miscellaneous restrictions on conduct of sales.

Restrictions relating to the conduct of sales¹ include those relating to:

- 22 (1) sales of animals in pet shops²;
- 23 (2) sales by auctioneers³;
- 24 (3) sales of intoxicating liquor⁴;
- 25 (4) sales in statutory markets⁵;
- 26 (5) sales of goods advertised as made by, or sold for the benefit of, blind or otherwise disabled persons⁶;
- 27 (6) sales of pawned goods⁷;
- 28 (7) sales of poisons, medicines, therapeutic substances and radioactive substances⁸;

- 29 (8) sales of coal, sand and ballast⁹;
- 30 (9) sales of food by weight, measure or number¹⁰;
- 31 (10) sales of animal feeding stuffs¹¹;
- 32 (11) sales of gaming machines¹²;
- 33 (12) sales of television sets¹³;
- 34 (13) sales of distress¹⁴;
- 35 (14) sales under execution¹⁵; and
- 36 (15) sales of foreign currency¹⁶.

1 As to the law relating to particular sales generally see PARA 16 et seq ante; as to common law and statutory conditions and warranties see PARAS 19 ante, 69 et seq post; and as to prohibited sales generally see PARAS 49-53 post.

2 See ANIMALS vol 2 (2008) PARAS 936-937.

3 See PARA 745 post; and AUCTION vol 2(3) (Reissue) PARA 233 et seq.

4 See LICENSING AND GAMBLING vol 67 (2008) PARA 26 et seq. See also PARA 49 et seq post.

5 See MARKETS, FAIRS AND STREET TRADING vol 29(2) (Reissue) PARA 1068 et seq. As to sales by pedlars see MARKETS, FAIRS AND STREET TRADING vol 29(2) (Reissue) PARA 1117 et seq. Where goods were sold in market overt, according to the usage of the market, and the contract was made before 3 January 1995, the buyer acquired a good title to the goods, provided that he bought them in good faith and without notice of any defect or want of title on the part of the seller: Sale of Goods Act 1979 s 22(1) (repealed by the Sale of Goods (Amendment) Act 1994 ss 1, 3(2), (3)). As to the former law relating to sale in market overt see MARKETS, FAIRS AND STREET TRADING vol 29(2) (Reissue) PARA 1026; and as to the reasons for its abolition see 551 HL Official Report (5th series) cols 209-223. As to contracts under which goods were sold before 1 January 1968 see the Sale of Goods Act 1979 s 22(3), Sch 1 para 8.

6 See PARA 805 post.

7 See PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARAS 27-28; CONSUMER CREDIT vol 9(1) (Reissue) PARAS 216-217.

8 See MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 133 et seq, 290 et seq.

9 See WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 168 et seq.

10 See WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 126 et seq.

11 See AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 941 et seq.

12 See the Gaming Act 1968 ss 26-29 (as amended); and LICENSING AND GAMBLING.

13 See TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARAS 564-566.

14 See DISTRESS vol 13 (2007 Reissue) PARA 1044 et seq.

15 See CIVIL PROCEDURE vol 12 (2009) PARA 1336 et seq.

16 See PARA 756 et seq post.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(i) Law relating to Particular Sales/24. Conflict of laws.

24. Conflict of laws.

The transfer of the property in goods under sales made in foreign countries is generally regulated by the law of the place where the goods are situated at the time of the sale, the rule being that, if personal property is disposed of in a manner binding according to the *lex situs*, that is to say, the law of the country where it is at the time, that disposition is binding everywhere¹.

The identification of the law governing the construction of a contract of sale of goods or a contract for the supply of services, in so far as it creates mutual rights in personam, depends on whether the parties to the contract have chosen a particular system of law as the applicable law². Where the parties have chosen a particular system of law, either expressly or in a manner which can be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case, the contract will be governed by the chosen law³. Where the parties have not so chosen, the contract will be governed by the law of the country with which it is most closely connected⁴, with the exception of any severable part of the contract which has a closer connection with any other country⁵.

Where a contract has as its object the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract is for the provision of credit for that object, then, notwithstanding the general rules on the express choice of applicable law⁶, a choice of law made by the parties does not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- 37 (1) if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract;
- 38 (2) if the other party or his agent received the consumer's order in that country; or
- 39 (3) if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purposes of inducing the consumer to buy⁷.

In the absence of an express choice of applicable law⁸, a consumer contract will be governed⁹ by the law of the country in which the consumer has his habitual residence¹⁰. The rules relating to consumer contracts¹¹ do not, however, apply to a contract of carriage or a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence¹²; but they do apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation¹³.

The rules on the law applicable to contractual obligations in the case of conflict of laws¹⁴ do not apply to (inter alia) the following matters, even if they are contractual in nature:

- 40 (a) property rights¹⁵;
- 41 (b) questions involving the status or legal capacity of natural persons;
- 42 (c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

- 43 (d) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;
- 44 (e) arbitration agreements and agreements on the choice of court;
- 45 (f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party; and
- 46 (g) evidence and procedure¹⁶.

1 See *Cammell v Sewell* (1860) 5 H & N 728, Ex Ch; *Todd v Armour* (1882) 9 R 901; *Re Anziani, Herbert v Christopherson* [1930] 1 Ch 407; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248, [1951] 2 All ER 779; *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496, [1980] 1 All ER 1121. See also CONFLICT OF LAWS vol 8(3) (Reissue) PARA 405 et seq.

The Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980) ('the Rome Convention': see infra; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 349 et seq) applies only to contracts made on or after 1 April 1991: art 17; Contracts (Applicable Law) Act 1990 (Commencement No 1) Order 1991, SI 1991/707, art 2. The Rome Convention is set out in the Contracts (Applicable Law) Act 1990 s 2(4)(a), Sch 1 (as amended). Further supplementary Conventions have been made: (1) on the accession to the Rome Convention of Greece ('the Luxembourg Convention') signed by the United Kingdom on 10 April 1984 (see the Contracts (Applicable Law) Act 1990 s 1(b)); (2) on the accession to the Rome Convention of Spain and Portugal ('the Funchal Convention') signed by the United Kingdom on 18 May 1992 (see the Contracts (Applicable Law) Act 1990 s 1(d) (added by the Contracts (Applicable Law) Act 1990 (Amendment) Order 1994, SI 1994/1900, art 3)); and (3) on the accession of Austria, Finland and Sweden to the Rome Convention and the Brussels Protocol ('the 1996 Accession Convention') signed by the United Kingdom on 29 November 1996 (see the Contracts (Applicable Law) Act 1990 s 1(e) (added by the Contracts (Applicable Law) Act 1990 (Amendment) Order 2000, SI 2000/1825, art 3). The Luxembourg Convention is set out in the Contracts (Applicable Law) Act 1990 s 2(4)(b), Sch 2; the Funchal Convention is set out in s 2(4)(d), Sch 3A (added by the Contracts (Applicable Law) Act 1990 (Amendment) Order 1994, arts 6, 9, Schedule), and the 1996 Accession Convention is set out in the Contracts (Applicable Law) Act 1990 s 2(4)(e), Sch 3B (added by the Contracts (Applicable Law) Act 1990 (Amendment) Order 2000, SI 2000/1825, arts 4, 7, Schedule).

A Protocol ('the Brussels Protocol') on the interpretation of the Rome Convention by the European Court was signed by the United Kingdom in Brussels on 19 December 1988: see the Contracts (Applicable Law) Act 1990 s 1(c). The Brussels Protocol is set out in the Contracts (Applicable Law) Act 1990 s 2(4)(c), Sch 3. It entered into force in the United Kingdom on 1 January 2001: see the London Gazette, 24 November 2000.

2 See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 349 et seq.

3 See the Rome Convention art 3(1); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 351. As to contracts made on or after 18 May 1973 and before 1 February 1978 see the Sale of Goods Act 1979 s 56, Sch 1 para 13.

4 As to the country with which it is presumed that the contract is most closely connected see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 352.

5 See the Rome Convention art 4(1); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 352.

6 Ie notwithstanding *ibid* art 3: see *supra*.

7 See *ibid* art 5(1), (2); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 353.

8 Ie in accordance with *ibid* art 3.

9 Ie notwithstanding *ibid* art 4 (see *supra*) and provided that the contract is entered into in the circumstances described in art 5(2) (see *supra*).

10 *Ibid* art 5(3).

11 Ie *ibid* art 5: see *supra*.

12 See *ibid* art 5(4); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 353.

13 See *ibid* art 5(5); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 353.

14 Ie the rules set out in the Rome Convention.

15 See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 350.

16 See the Rome Convention art 1(2)(a), (c)-(f), (h); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 350.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(ii) Quasi-contracts of Sale/25. Effect of judgment.

(ii) Quasi-contracts of Sale

25. Effect of judgment.

In certain transactions, independently of the volition of the parties, the law annexes consequences similar to those which result from a contract of sale express or implied and its performance¹. Such transactions may be called quasi-contracts of sale.

Thus, where damages for wrongful interference with goods² are, or would fall to be, assessed on the footing that the claimant is being compensated for the whole of his interest in the goods or for the whole of that interest subject to a reduction for contributory negligence, then, subject to exceptions and qualifications³, payment of the assessed damages (under all heads), or, as the case may be, settlement of a claim⁴ for damages for the wrong (under all heads), extinguishes the claimant's title to that interest⁵. However, when the judgment against the tortfeasor is in substance for the price of the goods, the judgment transfers the property to the defendant without satisfaction⁶.

1 The Sale of Goods Act 1979 deals only with contracts of sale (see s 2(1); and PARAS 28-29 post), but under s 62(2) (see PARAS 6, 9 ante) the rules of the common law are expressly saved.

2 For these purposes, 'wrongful interference' or 'wrongful interference with goods' means conversion of goods (or trover), trespass to goods, negligence so far as it results in damage to goods or to an interest in goods and any other tort so far as it results in damage to goods or to an interest in goods: Torts (Interference with Goods) Act 1977 s 1(a)-(d). References in the Torts (Interference with Goods) Act 1977, however worded, to proceedings for wrongful interference or to a claim for wrongful interference include references to proceedings by virtue of the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended) (product liability: see PARA 518 et seq post) in respect of any damage to goods or to an interest in goods or, as the case may be, to a claim or right to claim by virtue of Pt I (as amended) in respect of any such damage: Torts (Interference with Goods) Act 1977 s 1 (amended by the Consumer Protection Act 1987 s 48(1), Sch 4 para 5).

3 The Torts (Interference with Goods) Act 1977 s 5 has effect subject to any agreement varying the respective rights of the parties to the agreement and, where the claim is made in court proceedings, has effect subject to any order of the court (s 5(5)); and s 5(1) does not apply where damages are assessed on the footing that the claimant is being compensated for the whole of his interest in the goods, but the damages paid are limited to some lesser amount by virtue of any enactment or rule of law (s 5(3)). See also TORT vol 45(2) (Reissue) PARAS 655, 684.

4 For these purposes, the reference to settlement of the claim includes: (1) where the claim is made in court proceedings, and the defendant has paid a sum into court to meet the whole claim, the taking of that sum by the claimant; and (2) where the claim is made in court proceedings, and the proceedings are settled or

compromised, the payment of what is due in accordance with the settlement or compromise; and (3) where the claim is made out of court and is settled or compromised, the payment of what is due in accordance with the settlement or compromise: *ibid* s 5(2)(a)-(c).

5 *Ibid* s 5(1). As to the forms of judgment where goods are detained see s 3; and TORT vol 45(2) (Reissue) PARA 653. As to the avoidance of unjust enrichment and double liability see ss 5(3), 6-8; and TORT vol 45(2) (Reissue) PARAS 624, 637, 644, 655, 684. As to the position before the Torts (Interference with Goods) Act 1977 see Jenk's Fourth Century, Case No 88 (trespass); *Cooper v Shepherd* (1846) 3 CB 266 (conversion); *Marston v Phillips* (1863) 9 LT 289 (conversion); *Brinsmead v Harrison* (1871) LR 6 CP 584 at 588 (conversion); *Re Scarth* (1874) 10 Ch App 234 (detinue); *Re Ware, ex p Drake* (1877) 5 ChD 866 at 871, CA (detinue); *Hiort v London and North Western Ry Co* (1879) 4 Ex D 188 at 199, CA (conversion); *Eberle's Hotels and Restaurant Co Ltd v E Jonas & Bros* (1887) 18 QBD 459 at 468, CA (detinue); *Ellis v John Stenning & Son* [1932] 2 Ch 81 (conversion). A recovery in trover of the difference between the value of the goods and the amount of a debt which the claimant owed to the defendant was treated as the equivalent to recovery of full value: *Chinery v Viall* (1860) 5 H & N 288. Expenses necessarily incurred in respect of the goods by the defendant could be deducted from the damages: *Peruvian Guano Co Ltd v Dreyfus Bros & Co* [1892] AC 166 at 174 et seq, HL. If a bailee of goods brings the action and recovers full damages, the rule stated in the text must also apply, for the defendant cannot be subjected to a second action at the suit of the owner: see *Turner v Hardcastle* (1862) 11 CBNS 683; *Swire v Leach* (1865) 18 CBNS 479; *The Winkfield* [1902] P 42, CA; *O'Sullivan v Williams* [1992] 3 All ER 385, CA. The rule is probably an illustration of the principle obtaining in cases of indemnity: see the Marine Insurance Act 1906 s 79; *Rankin v Potter* (1873) LR 6 HL 83 at 118 per Blackburn J; *Castellain v Preston* (1883) 11 QBD 380, CA; and INSURANCE vol 25 (2003 Reissue) PARA 190.

6 *Bradley & Cohn Ltd v Ramsay & Co* (1912) 106 LT 771, CA.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/1. INTRODUCTION/(3) COGNATE LAW/(ii) Quasi-contracts of Sale/26. Effect of waiver of tort; estoppel.

26. Effect of waiver of tort; estoppel.

When one person has wrongfully obtained possession of or dealt with the goods of another, the owner of the goods may waive the tort and recover the value of the goods¹ as on a sale by himself to that person²; and similarly a person who fraudulently induces another to sell goods to a third person whom he knows to be insolvent is liable on an implied contract to pay the price³.

A person may so conduct himself as to be precluded from denying that he intended to be either a buyer or a seller, although in fact he had no such intention⁴.

1 This is, however, not necessarily any price which may have been put on the goods: *Nicol v Hennessey* (1896) 44 WR 584.

2 *Hambly v Trott* (1776) 1 Cowp 371 at 376 (trees cut down), explained in *Foster v Stewart* (1814) 3 M & S 191; *Lee v Shore* (1822) 1 B & C 94 (wrongful appropriation by stranger); *Russell v Bell* (1842) 10 M & W 340 (sale by bankrupt after act of bankruptcy); *Birmingham and Staffordshire Gas Co v Ratcliff* (1871) LR 6 Exch 224 (fraudulent abstraction of gas); *Nicol v Hennessey* (1896) 44 WR 584 (wrongful sale by co-owner; rule stated); *Rice v Reed* [1900] 1 QB 54, CA (wrongful sale by employee). See RESTITUTION vol 40(1) (2007 Reissue) PARA 153. The owner must prove his title: *Lee v Shore* supra. Where the person having wrongful possession of the goods has bought them from the owner's mercantile agent, the owner's right to recover the price is expressly

reserved by the Factors Act 1889 s 12(3). As to waiver of a tort by suing for money had and received see RESTITUTION vol 40(1) (2007 Reissue) PARA 161.

3 See *Hill v Perrott* (1810) 3 Taunt 274; and RESTITUTION vol 40(1) (2007 Reissue) PARA 153. See also *Biddle and Loyd v Levy* (1815) 1 Stark 20 (sale to minor); *Wilson v Hart* (1817) 7 Taunt 295; *Abbotts v Barry* (1820) 2 Brod & Bing 369 (sale to insolvent); *Selway v Fogg* (1839) 5 M & W 83 at 84 per Parke B. Where the fraud consists in a representation as to the credit, ability etc of another, the representation must be in writing, but the requirement of writing does not extend to misrepresentations which are not fraudulent: see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 804.

4 This is simply an application of the general rule of estoppel in pais to cases of contract of sale: see *Cornish v Abington* (1859) 4 H & N 549 (buyer). However see also *Williamson v Barton* (1862) 7 H & N 899 (buyer at auction). See generally ESTOPPEL vol 16(2) (Reissue) PARA 1043 et seq. If a person sells goods to one person and the documents of title relating to those goods to another, he is liable to both: see *Coventry v Great Eastern Rly Co* (1883) 11 QBD 776, CA (two delivery orders for same goods); *Seton v Lafone* (1886) 18 QBD 139 (affd (1887) 19 QBD 68, CA) (warrant for goods, previously delivered to another, treated as good). Certain cases of sale by estoppel can be explained by the rule that a contract of sale may be implied from the conduct of the parties: see the Sale of Goods Act 1979 s 4 (where 'implied' really means 'inferred as a fact'). See also PARA 38 post; *Gillett v Hill* (1834) 2 Cr & M 530; *Henderson & Co v Williams* [1895] 1 QB 521, CA; *Farquharson Bros & Co v C King & Co* [1902] AC 325, HL.

UPDATE

1-26 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(1) CONTRACTS WITHIN THE SALE OF GOODS ACT 1979/27. Sale and agreement to sell.

2. THE CONTRACT

(1) CONTRACTS WITHIN THE

27. Sale and agreement to sell.

Unless the context or subject matter otherwise requires, the term 'contract of sale' in the Sale of Goods Act 1979 includes an agreement to sell as well as a sale¹; and 'seller' accordingly means a person who sells or agrees to sell goods².

Where under a contract of sale the property in the goods is transferred from the seller to the buyer³, the contract is called a 'sale'⁴; but, where the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled, the contract is called an 'agreement to sell'⁵. 'Sale' includes a bargain and sale as well as a sale and delivery⁶.

An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred⁷.

The term 'property' in the Sale of Goods Act 1979 means, unless the context or subject matter otherwise requires, the general property in goods and not merely a special property⁸.

1 See the Sale of Goods Act 1979 s 61(1); and PARA 29 post.

2 Ibid s 61(1). For the meaning of 'goods' see PARA 30 post. In other statutes the expression 'seller' must be construed, literally or not, according to the context and subject matter.

3 For the meaning of 'buyer' see PARA 29 post.

4 Sale of Goods Act 1979 s 2(4).

5 Ibid s 2(5). The definition in the text is applicable only where there is a contract of sale. Therefore, any transaction under which the property may pass, although there is originally no mutual agreement binding the parties to sell and buy, must be governed by some other provision or by the common law: see further the cases cited in note 7 infra.

6 Ibid s 61(1). For the meaning of 'delivery' see PARA 163 post.

Under the old common law system of pleading, the claim for goods bargained and sold and that for goods sold and delivered were regarded as distinct causes of action (*Forbes v Smith* (1863) 11 WR 574), but counts for goods bargained and sold and for goods sold and delivered, together with any other appropriate money counts, could be joined together as of right in the same claim. The count for goods sold and delivered was appropriate where the property had passed and the goods had been delivered to the buyer, the count for goods bargained and sold was applicable when the property in the goods had passed, the contract was otherwise complete except as to delivery, and delivery was not a condition precedent to payment of the purchase price: see Bullen and Leake's *Precedents of Pleading* (3rd Edn) 38-40. Modern practice in pleading preserves the distinction between the two forms, but the distinction is unnecessary and is not drawn by the Sale of Goods Act 1979: see s 49; and PARA 285 et seq post. Where delivery is part of the consideration for the price or a condition precedent to its payment, a seller who has not delivered could not under the old common law, and cannot now under the Sale of Goods Act 1979, recover the price from the buyer, although he may be entitled to damages for breach of contract: see PARA 287 et seq post.

Prima facie the delivery of the goods and the payment of the price are concurrent conditions (see s 28; and PARA 162 post); but there are many cases where the property has passed, and the price is payable, even though the goods have not been delivered, as where the price is payable irrespective of delivery (see s 49(2); and PARA 286 post), or delivery has been excused. In such cases the price could have been recovered on a count for goods bargained and sold: see eg *Hankey v Smith* (1796) Peake 42n (delivery refused by buyer); *Kymer v Suwercroft* (1807) 1 Camp 109 (payment to precede delivery); *Alexander v Gardner* (1835) 1 Bing NC 671 (loss of goods at buyer's risk); *Scott v England* (1844) 14 LJQB 43; *Forbes v Smith* (1863) 11 WR 574 (delivery no condition precedent to payment).

7 Sale of Goods Act 1979 s 2(6). As to completion of a sale in a shop see *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795 at 802, [1952] 2 All ER 456 at 458 per Lord Goddard CJ ('self-service' shop) (affd [1953] 1 QB 401, [1953] 1 All ER 482, CA); *Lacis v Cashmarts* [1969] 2 QB 400, DC. Cf *Wiles v Maddison* [1943] 1 All ER 315, DC; *Phillips v Dalziel* [1948] 2 All ER 810, DC (offer to sell). See also *Mischief v Springett* [1942] 2 KB 331, [1942] 2 All ER 349 (agreement to sell unascertained goods). The rules for determining when an agreement to sell becomes a sale transferring the property in the goods are contained in the Sale of Goods Act 1979 ss 16-19 (as amended): see PARA 109 et seq post. According to the civil law, which with some statutory modifications was followed in Scotland before the Sale of Goods Act 1893 (repealed) (cf *M'Bain v Wallace & Co* (1881) 6 App Cas 588 at 605, 608-609, HL), the property in goods sold did not pass to the buyer until delivery. English law has, however, rejected the test of delivery and has adopted the rule that the ownership of the goods may be transferred by the contract itself if the parties so intend. If the parties express their intention clearly, no difficulty arises; but in many cases the parties either form no intention as to the precise time when the property is to pass or fail to express it. To meet these cases the law has worked out a series of more or less artificial canons which are now embodied in the Sale of Goods Act 1979 s 18 (as amended): see PARA 112 et seq post. For the history of the English rule, which is as old as the Year Books see *Cochrane v Moore* (1890) 25 QBD 57, CA (comparing sale and gift).

8 Sale of Goods Act 1979 s 61(1). The general property may be in one person while a special property is in another, as in the case of a pledge: see eg *Sewell v Burdick* (1884) 10 App Cas 74, HL; and PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARAS 3, 13, 27. Further, the general property may be transferred to one person subject to a special property in another: *Dodsley v Varley* (1840) 12 Ad & El 632 (special property in seller); *Franklin v Neate* (1844) 13 M & W 481; *Jenkyns v Brown* (1849) 14 QB 496 (pledgee of bill of lading). The right of property in goods may be distinct from the right to their present possession, as in the case of a lien: see *Milgate v Keble* (1841) 3 Man & G 100; *Mulliner v Florence* (1878) 3 QBD 484, CA. See also LICENSING AND GAMBLING vol 67 (2008) PARA 213; LIEN vol 68 (2008) PARA 801 et seq. Property in goods may be divided between different owners, but the right to possession may be in one alone: *Nyberg v Handelaar* [1892] 2 QB 202, CA. As to sale from one part-owner to another see PARA 29 post.

UPDATE

27-31 Contracts Within the Sale of Goods Act 1979

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(1) CONTRACTS WITHIN THE SALE OF GOODS ACT 1979/28. Sale and agreement to sell distinguished.

28. Sale and agreement to sell distinguished.

An agreement to sell¹, or, as it is often called, an executory contract of sale, is a contract pure and simple, whereas a sale², or, as it is called for distinction, an executed contract of sale, is a contract plus a conveyance. Thus, by an agreement to sell, a mere right in personam is created, whereas, by a sale, a right in rem is transferred. Where goods³ have been sold and the buyer⁴ makes default in payment, the seller⁵ may sue for the contract price⁶; but, where an agreement to buy is broken, usually the seller's only remedy is an action⁷ for unliquidated damages⁸. Similarly, if an agreement to sell is broken by the seller, the buyer has only a personal remedy against the seller⁹. The goods are the property of the seller and he can dispose of them. They may be taken in execution for his debts¹⁰, and, if he becomes bankrupt, they pass to his trustee in bankruptcy¹¹.

If, however, there has been a sale and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller¹² but also the usual proprietary remedies in respect of the goods themselves, such as the action for wrongful interference with goods¹³. If there is an agreement for sale and the goods perish, the loss as a rule falls on the seller, while, if there has been a sale, the loss as a rule falls on the buyer¹⁴.

1 As to an agreement to sell under the Sale of Goods Act 1979 see PARA 27 ante.

2 For the meaning of 'sale', and as to sale generally, under the Sale of Goods Act 1979 see PARA 27 ante.

3 For the meaning of 'goods' see PARA 30 post.

4 For the meaning of 'buyer' see PARA 29 post.

5 For the meaning of 'seller' see PARA 27 ante.

6 See the Sale of Goods Act 1979 s 49; and PARAS 285-286 post.

7 For the meaning of 'action' see PARA 14 ante.

8 See the Sale of Goods Act 1979 s 50; and PARAS 287-288 post. Cf *Atkinson v Bell* (1828) 8 B & C 277; *Boswell v Kilborn* (1862) 15 Moo PCC 309. See also *Macklin v Newbury Sanitary Laundry* (1919) 63 Sol Jo 337, DC. For an exception see the Sale of Goods Act 1979 s 49(2); and PARA 286 post. For the meaning of 'unliquidated damages' see DAMAGES vol 12(1) (Reissue) PARA 808.

9 See *ibid* s 51; and PARAS 292-294 post. In the case of specific or ascertained goods, the buyer may sue for specific performance: see PARA 305 post. For the meaning of 'specific goods' see PARA 54 post. As to specific performance generally see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 801 et seq.

10 See PARA 150 post.

11 *Reid v Macbeth and Gray* [1904] AC 223, HL; *Hayman & Son v M'Lintock* 1907 SC 936. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 417.

12 See the Sale of Goods Act 1979 ss 51, 52; and PARAS 292-294, 305 post.

13 lie under the Torts (Interference with Goods) Act 1977: see TORT vol 45(2) (Reissue) PARA 542 et seq. The claim would formerly have been in detinue or conversion. As to detinue see *Langton v Higgins* (1859) 4 H & N 402; and as to conversion see *Chinery v Viall* (1860) 5 H & N 288. Cf *Hollins v Fowler* (1875) LR 7 HL 757.

14 See the Sale of Goods Act 1979 s 20(1); and PARA 142 post.

UPDATE

27-31 Contracts Within the Sale of Goods Act 1979

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(1) CONTRACTS WITHIN THE SALE OF GOODS ACT 1979/29. Meaning of 'contract of sale'.

29. Meaning of 'contract of sale'.

A contract of sale of goods¹ is a contract by which the seller² transfers or agrees³ to transfer the property⁴ in goods to the buyer for a money consideration, called the price⁵. Although a contract may be clothed with the form of a contract of sale, or may contain terms implying that it is a contract of sale, if, on its true construction, it appears to be some other kind of contract⁶, effect will be given to it as such, and the provisions of the Sale of Goods Act 1979 will not apply⁷. Unless the context or subject matter of the Sale of Goods Act 1979 otherwise requires⁸, 'buyer' means a person who buys or agrees to buy goods⁹. Accordingly, there must be a consent to buy as well as a consent to sell goods¹⁰, otherwise the agreement, unless void for want of consideration¹¹, is a mere option to buy, and the Sale of Goods Act 1979 is not applicable to it until the option to buy is exercised and the contract of sale thus created¹². There may be a contract of sale between one part-owner and another¹³ and the contract may be absolute or conditional¹⁴.

1 For the meaning of 'goods' see PARA 30 post.

2 For the meaning of 'seller' see PARA 27 ante.

3 Unless the context or subject matter otherwise requires, the term 'contract of sale' in the Sale of Goods Act 1979 includes an agreement to sell as well as a sale: Sale of Goods Act 1979 s 61(1).

4 For the meaning of 'property', in relation to goods see PARA 27 ante.

5 Sale of Goods Act 1979 s 2(1). See also PARAS 3, 27 ante. As to continuing offers see CONTRACT vol 9(1) (Reissue) PARA 643 et seq. The essence of sale is the transfer by mutual assent of ownership from one person to another for a price, ie in exchange for a price as a quid pro quo. It is not every payment of money on a transfer of property that constitutes a sale. Thus, the payment may be the motive of a gift by the person transferring the property: *Denn v Manifold v Diamond* (1825) 4 B & C 243; *Massy v Nanney* (1837) 3 Bing NC 478. A tender of money, even in pursuance of an award, will not transfer the property as on a sale, unless the owner of the property agrees to receive it as the price: *Hunter v Rice* (1812) 15 East 100. See also PARA 1 ante. A delivery of goods previously made for other reasons may, however, be subsequently treated as a sale: *Coles v Bulman* (1848) 6 CB 184. English law in general regards the substance and not the form of a transaction: *Re Watson, ex p Official Receiver in Bankruptcy* (1890) 25 QBD 27, CA. As to misleading price indications see PARA 702 et seq post.

6 As to mortgages see PARA 2 ante; and as to sale compared and contrasted with gifts see *Cochrane v Moore* (1890) 25 QBD 57, CA. Cf GIFTS vol 52 (2009) PARA 201. See also note 5 supra. For contrast with pledge see

Burdick v Sewell (1884) 13 QBD 159 at 175, CA; and PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 3. The distinction between a contract for the sale of goods and a del credere agency is also important: see *John Towle & Co v White* (1873) 29 LT 78, HL; *Michelin Tyre Co Ltd v Macfarlane (Glasgow) Ltd* (1916) 54 SLR 1. See generally AGENCY vol 1 (2008) PARAS 2, 13; and the cases cited in note 7 infra.

7 Thus, unless he is estopped, a seller may show that the sale was a pretended one and that no property was intended to pass but that a mere bailment was in fact intended (*Bowes v Foster* (1858) 2 H & N 779; approved in *Lee v Lancashire and Yorkshire Rly Co* (1871) 6 Ch App 527 at 535), or the alleged buyer may show that delivery was made to him only as an agent to sell (*Miller v Newman* (1842) 4 Man & G 646). See further *Weiner v Harris* [1910] 1 KB 285, CA (where goods were sent, nominally, on sale or return, but the contract on its true construction was held to be merely a contract of agency for sale). Cf *Gedding v Marsh* [1920] 1 KB 668, DC (where mineral waters were sold in bottles with a refund on the bottles returned and the bottles were held to be supplied under a contract of sale). See further *Cobbold v Caston* (1824) 1 Bing 399; *Grizewood v Blane* (1851) 11 CB 526 at 538 (wager under guise of sale); *Re Nevill, ex p White* (1871) 6 Ch App 397, CA. Cf *Re Smith, ex p Bright* (1879) 10 ChD 566, CA. See also PARA 8 note 2 ante; and AGENCY vol 1 (2008) PARAS 1, 141. As to the distinction between sale and bailment see *South Australian Insurance Co v Randell* (1869) LR 3 PC 101; and BAILMENT vol 3(1) (2005 Reissue) PARA 1. See also *Hutton v Lippert* (1883) 8 App Cas 309, PC. As to sale or agistment see ANIMALS vol 2 (2008) PARAS 721-723. See also *Senécal v Pauzé* (1889) 14 App Cas 637, PC; *Re Watson, ex p Official Receiver in Bankruptcy* (1890) 25 QBD 27, CA; *McEntire v Crossley Bros Ltd* [1895] AC 457, HL; *Re Gieve* [1899] 1 QB 794, CA; *Brooks v Beirnsstein* [1909] 1 KB 98, DC; *Re Lovegrove, ex p Lovegrove & Co (Sales) Ltd* [1935] Ch 464, CA; *Polsky v S and A Services* [1951] 1 All ER 185 (affd [1951] 1 All ER 1062n, CA). Cf *Pye v British Automobile Commercial Syndicate Ltd* [1906] 1 KB 425; *Lavalette v Riches & Co* (1907) 24 TLR 2 (on appeal (1908) 24 TLR 336, CA); *Morgan v Russell & Sons* [1909] 1 KB 357, DC; *Lancaster v JF Turner & Co Ltd* [1924] 2 KB 222, CA. As to licences to obtain mineral products from land see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 349 et seq.

8 Eg the context of the Sale of Goods Act 1979 s 18 r 4 shows that the buyer there mentioned is only a bailee with an option to purchase: see PARA 120 note 4 post.

9 Ibid s 61(1). Buyer and seller must be different persons, but in certain cases a person may buy his own goods when another person sells them: see note 13 infra.

10 In many agreements, of which hire-purchase agreements are among the commonest examples, the buyer may have only an option to buy: see *Helby v Matthews* [1895] AC 471, HL; *Grande Maison d'Automobiles Ltd v Beresford* (1909) 25 TLR 522, CA; *Belsize Motor Supply Co v Cox* [1914] 1 KB 244. Cf *Felston Tile Co Ltd v Winget Ltd* [1936] 3 All ER 473, CA (where, on the facts, a hire-purchase agreement was held to be within what is now the Sale of Goods Act 1979 s 2). See generally CONSUMER CREDIT vol 9(1) (Reissue) PARA 23 et seq. See also *Percival Ltd v LCC Asylums and Mental Deficiency Committee* (1918) 87 LJB 677 (no obligation to order goods under option to purchase); *JL Kier & Co Ltd v Whitehead Iron and Steel Co Ltd* [1938] 1 All ER 591; *Wm Cory & Son Ltd v IRC* [1965] AC 1088, [1965] 1 All ER 917, HL. Similarly, the seller may have only an option to sell: *Manders v Williams* (1849) 4 Exch 339. See also *Bianchi v Nash* (1836) 1 M & W 545. See further *Cantrell and Cochrane Ltd v Neeson* [1926] NI 107, NI CA; *William Leitch & Co Ltd v Leydon* [1931] AC 90, HL (retention of property by manufacturers in mineral water bottles dispatched to retailers). Cf *Gedding v Marsh* [1920] 1 KB 668, DC. In neither case can the person having a mere option be treated as liable under an agreement to buy or sell, as the case may be, ie under an executory contract.

11 As to consideration generally see CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

12 See *Manders v Williams* (1849) 4 Exch 339 (option to sell; no contract of sale until option exercised); *Marten v Whale* [1917] 2 KB 480, CA (option to buy and conditional agreement to buy distinguished).

13 Sale of Goods Act 1979 s 2(2). See *Beed v Blandford* (1828) 2 Y & J 278; *Nicol v Hennessey* (1896) 1 Com Cas 410. The ownership of personal property may be indefinitely subdivided, eg one person may sell to another an undivided moiety of a chattel: *Nyberg v Handelaar* [1892] 2 QB 202, CA. See PERSONAL PROPERTY vol 35 (Reissue) PARA 1217. Ownership may also be split up, as in the case of a pledge, where the pledgor retains the general property but the pledgee acquires a special property with a right of sale in certain events: see PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARAS 22, 27. Hence the necessity for this provision in the Sale of Goods Act 1979, having regard to the rule that seller and buyer must be different persons. A partner may sell goods to his firm or a firm may sell goods to one of its partners: *Re McLaren, ex p Cooper* (1879) 11 ChD 68, CA. See generally PARTNERSHIP vol 79 (2008) PARAS 107, 120. As a general rule, a person cannot buy his own goods, for there is nothing to buy: 3 Bl Com (14th Edn) 450; *Scotson v Pegg* (1861) 6 H & N 295 at 298. For example, at common law there could be no contract of sale between husband and wife, since in the contemplation of law husband and wife were but one person, but this has not been the case since the Married Women's Property Act 1882: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 224, 274, 276.

It may happen that one person is invested by common law or statute with powers to sell the goods of another, as, eg where goods are sold under a distress (see DISTRESS vol 13 (2007 Reissue) PARAS 1044, 1106, 1118, 1131) or execution (see CIVIL PROCEDURE vol 12 (2009) PARA 1336 et seq), or by a pledgee (see PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 27), or a trustee in bankruptcy (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2)

(2002 Reissue) PARA 458). See also PARAS 16, 18 ante. In such cases the owner may purchase his own goods, since in fact the buyer and seller are different persons: *Kitson v Hardwick* (1872) LR 7 CP 473 at 478 (bankrupt). The seller in such cases cannot as a rule be the purchaser, although he is selling goods in which he has no proprietary right because on grounds of public policy his fiduciary position debars him from so doing: *Kitson v Hardwick* supra at 478-479; *Moore, Nettlefold & Co v Singer Manufacturing Co* [1904] 1 KB 820, CA; *Plasycod Collieries Co Ltd v Partridge, Jones & Co Ltd* [1912] 2 KB 345, DC.

14 Sale of Goods Act 1979 s 2(3). 'Conditional' is here contrasted with 'absolute' and is not to be confused with a 'condition' in the contract which is elsewhere contrasted with a 'warranty': see s 11 (as amended), s 53 (as amended), s 61(1) (as amended); and PARA 62 et seq post. An absolute sale may clearly contain 'conditions' in this latter sense. A contract of sale may be conditional in the sense of s 2(3) in that it is dependent on a condition precedent for coming into existence, eg it may depend on a contingency and the obligations of both parties may be dependent on the happening of some specified event (see s 5(2); and PARA 47 post), eg the safe arrival of goods, or on the placing of a firm order by the buyer (*Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All ER 1496, CA; revsd on other grounds sub nom *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, [1971] 1 All ER 847, HL). The non-fulfilment of such conditions gives no right of action to the other party, but such party is discharged from liability: *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125 at 144-145, Ex Ch, per Bramwell B. See also PARA 47 et seq post. A contract may also be conditional on a state of facts assumed by the parties as the basis of the contract but not stated in the contract (*Bannerman v White* (1861) 10 CBNS 844), ie the doctrine of frustration is applicable: see *Re Shipton, Anderson & Co and Harrison Bros & Co* [1915] 3 KB 676, DC. See also the Sale of Goods Act 1979 s 6; and PARA 54 post. See CONTRACT vol 9(1) (Reissue) PARA 897 et seq. Furthermore, a contract may be conditional in the sense of being dependent on a condition subsequent, eg there may be an actual sale passing the property to the buyer but subject to defeasance on an event: see *Head v Tattersall* (1871) LR 7 Exch 7. Cf *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA; *Allard & Co (Rubber) Ltd v RJ Hawkins & Co (Dudley) Ltd* [1958] 1 Lloyd's Rep 184 (condition subsequent that seller entitled to refuse rejection in certain events). See also the cases cited in PARA 2 note 1 ante; and PARA 47 note 4 post. See generally (1951) 14 Mod LR 173.

UPDATE

27-31 Contracts Within the Sale of Goods Act 1979

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(1) CONTRACTS WITHIN THE SALE OF GOODS ACT 1979/30. Meaning of 'goods'.

30. Meaning of 'goods'.

For the purposes of the Sale of Goods Act 1979, unless the context or subject matter otherwise requires, 'goods' includes:

- 47 (1) all personal chattels other than things in action and money¹;
- 48 (2) in particular, emblements², industrial growing crops³ and things attached to, or forming part of, the land which are agreed to be severed before sale or under the contract of sale⁴; and
- 49 (3) an undivided share in goods⁵.

'Goods' also includes ships⁶, computer disks (but not computer programs)⁷, and containers, packaging and any instructions supplied as well as the goods themselves⁸.

1 Sale of Goods Act 1979 s 61(1). Cf the meaning of 'goods' in the Supply of Goods and Services Act 1982: see PARA 34 post. As to personal chattels see PERSONAL PROPERTY vol 35 (Reissue) PARAS 1204-1205; as to things in

action see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq; and as to goods constituting an interest in land see REAL PROPERTY vol 39(2) (Reissue) PARAS 86-90. Cf *Marshall v Green* (1875) 1 CPD 35; *Morgan v Russell & Sons* [1909] 1 KB 357, DC. Money (ie current money) is necessarily excluded, because in sale the goods and the price are contrasted: see PARA 1 ante. If a person changes a pound note for another, the contract is exchange not sale; but a £5 gold piece which was struck for a special occasion and bought as a curiosity may be treated as goods and not as money: *Moss v Hancock* [1899] 2 QB 111, DC. Electricity is probably not 'goods': cf *Low v Blease* [1975] Crim LR 513, DC. In Canada, steam and gas have been held to be tangible personal property capable of being sold: *Re Social Services Tax Act, Re Central Heat Distribution Ltd* (1970) 74 WWR 246, BC CA (steam); *Bradshaw v Boothe's Marine Co Ltd* [1973] 2 OR 646, Ont SC (propane gas).

2 As to 'emblems', ie vegetable products which are the annual result of agricultural labour see AGRICULTURAL LAND vol 1 (2008) PARA 369.

3 'Industrial growing crops' was added when the provision was originally extended to Scotland; but there seems to be nothing to confine the words to Scotland and the effect may be to put all industrial crops, such as grass, clover etc, on the same footing as emblems for the purposes of the Sale of Goods Act 1979 and to override such cases as *Graves v Weld* (1833) 5 B & Ad 105 (clover not included in emblems). See also *Kingsbury v Collins and Elmes* (1827) 4 Bing 202 (teazles).

4 Sale of Goods Act 1979 s 61(1). For the meaning of 'contract of sale' see PARA 29 ante. The concluding words in head (2) in the text appear to give a general rule for dealing with all things attached to the land other than emblems and industrial growing crops and to get rid of subtle questions whether they were to be severed by buyer or seller or whether they were to get any benefit from remaining attached to the land before severance. Under the Sale of Goods Act 1979 the sole test appears to be whether the thing attached to the land has become by agreement goods, by reason of the contemplation of its severance from the soil. Cf the cases cited in AGRICULTURAL LAND vol 1 (2008) PARAS 370-372. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 172-194. The cases before the Sale of Goods Act 1979 arose mainly on the construction of the words 'goods, wares and merchandise' in the Statute of Frauds (1677) s 16 (repealed). Decisions on these words must be applied with caution to the present definition, which relates to the Sale of Goods Act 1979 as a whole. As regards growing products of the soil, other than emblems see AGRICULTURAL LAND vol 1 (2008) PARAS 370-372; and *Teal v Auty and Dibb* (1820) 2 Brod & Bing 99 (growing poles); but cf *Morgan v Russell & Sons* [1909] 1 KB 357, DC (slag attached to land); *Re Social Services Tax Act, Re Central Heat Distribution Ltd* (1970) 74 WWR 246, BC CA (steam); *Bradshaw v Boothe's Marine Ltd* [1973] 2 OR 646, Ont SC (propane gas); *Low v Blease* [1975] Crim LR 513, DC (electricity probably not 'goods').

5 Sale of Goods Act 1979 s 61(1) (amended by the Sale of Goods (Amendment) Act 1995 s 2(c)). See also *Marson v Short* (1835) 2 Bing NC 118; *Cochrane v Moore* (1890) 25 QBD 57 at 73, CA; *Van Cutsem v Dunraven* (1954) Times, 15 January (all relating to a share of a horse).

6 *Behnke v Bede Shipping Co Ltd* [1927] 1 KB 649. As to the sale of ships and undivided shares in ships see SHIPPING AND MARITIME LAW vol 93 (2008) PARAS 241, 255, 306 et seq.

7 *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481 at 493, CA, per Sir Iain Glidewell. If, however, a disk onto which a program designed and intended to instruct or enable a computer to achieve particular functions has been encoded is sold or hired but the program is defective, so that it will not instruct or enable the computer to achieve the intended purpose, the seller or hirer of the disk will be in breach of the terms about quality or fitness implied by the Sale of Goods Act 1979 s 14 (as amended) (see PARA 77 et seq post) and the Supply of Goods and Services Act 1982 s 9 (as amended) (see PARA 88 et seq post): *St Albans City and District Council v International Computers Ltd* supra at 493 per Sir Iain Glidewell; see also *Horace Holman Group Ltd v Sherwood International Group Ltd* [2001] All ER (D) 83 (Nov).

8 *Wormell v RHM Agriculture (East) Ltd* [1986] 1 All ER 769, [1986] 1 WLR 336; revsd on other grounds [1987] 3 All ER 75, [1987] 1 WLR 1091, CA.

UPDATE

27-31 Contracts Within the Sale of Goods Act 1979

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(1) CONTRACTS WITHIN THE SALE OF GOODS ACT 1979/31. Assignments of contracts of sale.

31. Assignments of contracts of sale.

The rights and obligations under a contract of sale may be assigned under the like conditions and qualifications as in the case of other contracts¹.

¹ *Tolhurst v Associated Portland Cement Manufacturers (1900)* [1903] AC 414, HL (contract to supply a certain quantity of chalk every year for 50 years). See also *Manchester Brewery Co v Coombs* [1901] 2 Ch 608; *Cole v Handasyde & Co* 1910 SC 68, Ct of Sess; *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL (assignment by buyers of cif contract for hops). Cf *Doe d Calvert v Reid* (1830) 10 B & C 849 (agreement to take beer from brewer); *Kemp v Baerselman* [1906] 2 KB 604, CA (contract to supply goods as required by particular purchaser not assignable); *Cooper v Micklefield Coal & Lime Co Ltd* (1912) 107 LT 457 (sale of coal by instalments during two years; specially low prices to buyer). As to the general principle see *Arkansas Valley Smelting Co v Belden Mining Co* 127 US 379 at 387 (1887) per curiam. See further CHOSER IN ACTION vol 13 (2009) PARA 14 et seq; CONTRACT vol 9(1) (Reissue) PARA 757.

As the price, when payable, constitutes an ordinary debt, the seller's right to it may be assigned like any other book debt, even though the contract itself is not assignable: *Crouch v Martin and Harris* (1707) 2 Vern 595 (followed in *Russell & Co Ltd v Austin Fryers* (1909) 25 TLR 414, DC (personal service)); *International Fibre Syndicate v Dawson* (1901) 84 LT 803, HL. Cf CHOSER IN ACTION vol 13 (2009) PARAS 72 et seq, 98-101.

UPDATE

27-31 Contracts Within the Sale of Goods Act 1979

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(2) CONTRACTS WITHIN THE SUPPLY OF GOODS AND SERVICES ACT 1982/32. Contracts for the transfer of goods.

(2) CONTRACTS WITHIN THE

32. Contracts for the transfer of goods.

A 'contract for the transfer of goods' means a contract under which one person transfers or agrees to transfer to another the property¹ in goods², other than an excepted contract³. For these purposes, an 'excepted contract' means any of the following:

- 50 (1) a contract of sale of goods;
- 51 (2) a hire-purchase agreement⁴;
- 52 (3) a transfer or agreement to transfer which is made by deed and for which there is no consideration other than the presumed consideration imported by the deed;
- 53 (4) a contract intended to operate by way of mortgage, pledge, charge or other security⁵.

A contract is a contract for the transfer of goods whether or not services are also provided or to be provided under the contract and⁶ whatever is the nature of the consideration for the transfer or agreement to transfer⁷.

Terms about title etc⁸, transfer by description⁹, quality or fitness¹⁰ and transfer by sample¹¹ are implied in contracts for the transfer of goods¹².

1 For these purposes, 'property', in relation to goods, means the general property in them and not merely a special property: Supply of Goods and Services Act 1982 s 18(1).

2 For the meaning of 'goods' see PARA 34 post.

3 Supply of Goods and Services Act 1982 s 1(1) (amended by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (2)).

4 For these purposes, 'hire-purchase agreement' has the same meaning as in the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 95): Supply of Goods and Services Act 1982 ss 18(1), 19.

5 Ibid s 1(2) (amended by the Regulatory Reform (Trading Stamps) Order 2005, SI 2005/871, art 5(a)).

6 In subject to the Supply of Goods and Services Act 1982 s 1(2): see supra.

7 Ibid s 1(3) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (2)).

8 See the Supply of Goods and Services Act 1982 s 2; and PARA 70 post.

9 See ibid s 3; and PARA 75 post.

10 See ibid s 4 (as amended); and PARAS 83-87 post.

11 See ibid s 5 (as amended); and PARA 95 post.

12 As to the exclusion of implied terms etc see ibid s 11; and PARA 102 post. As to the modification of remedies for breach of a statutory condition in non-consumer cases see s 5A (as added); and PARAS 75, 84-85, 95 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(2) CONTRACTS WITHIN THE SUPPLY OF GOODS AND SERVICES ACT 1982/33. Contracts for the hire of goods.

33. Contracts for the hire of goods.

A 'contract for the hire of goods' means a contract under which one person bails¹ or agrees to bail goods² to another by way of hire, other than a hire-purchase agreement³.

A contract is a contract for the hire of goods whether or not services are also provided or to be provided under the contract, and whatever is the nature of the consideration for the bailment or agreement to bail by way of hire⁴.

Terms about the right to transfer possession etc⁵, hire by description⁶, quality or fitness⁷ and hire by sample⁸ are implied in contracts for the hire of goods⁹.

1 For the meaning of 'bailment' see BAILMENT vol 3(1) (2005 Reissue) PARA 1.

2 For the meaning of 'goods' see PARA 34 post.

3 Supply of Goods and Services Act 1982 s 6(1) (amended by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (6); and the Regulatory Reform (Trading Stamps) Order 2005, SI 2005/871, art 5(b)(i)). For the meaning of 'hire-purchase agreement' see PARA 32 note 4 ante.

4 Supply of Goods and Services Act 1982 s 6(3) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (6); and the Regulatory Reform (Trading Stamps) Order 2005, SI 2005/871, art 5(b)(iii)).

5 See the Supply of Goods and Services Act 1982 s 7; and PARA 71 post.

6 See *ibid* s 8; and PARA 76 post.

7 See *ibid* s 9 (as amended); and PARAS 88-92 post.

8 See *ibid* s 10 (as amended); and PARA 96 post.

9 As to the exclusion of implied terms etc see *ibid* s 11; and PARA 102 post. As to the modification of remedies for breach of a statutory condition in non-consumer cases see s 10A (as added); and PARAS 76, 89-90, 96 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(2) CONTRACTS WITHIN THE SUPPLY OF GOODS AND SERVICES ACT 1982/34. Meaning of 'goods'.

34. Meaning of 'goods'.

For the purposes of the Supply of Goods and Services Act 1982, 'goods' includes:

- 54 (1) all personal chattels, other than things in action and money; and
- 55 (2) in particular, emblements¹, industrial growing crops² and things attached to, or forming part of, the land which are agreed to be severed before the transfer, bailment³ or hire concerned under the contract concerned⁴.

1 As to emblements see PARA 30 note 2 ante.

2 As to industrial growing crops cf para 30 note 3 ante.

3 For the meaning of 'bailment' see BAILMENT vol 3(1) (2005 Reissue) PARA 1.

4 Supply of Goods and Services Act 1982 s 18(1) (amended by the Sale and Supply of Goods Act 1994 ss 6, 7(2), Sch 1 para 2(b), Sch 3). Cf the meaning of 'goods' in the Sale of Goods Act 1979: see PARA 30 ante.

UPDATE

34 Meaning of 'goods'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(2) CONTRACTS WITHIN THE SUPPLY OF GOODS AND SERVICES ACT 1982/35. Contracts for the supply of services.

35. Contracts for the supply of services.

A 'contract for the supply of a service' means a contract under which a person ('the supplier') agrees to carry out a service¹; but a contract of service or apprenticeship is not a contract for the supply of a service².

A contract is³ a contract for the supply of a service whether or not goods are also transferred or to be transferred⁴ or bailed or to be bailed by way of hire⁵, under the contract, and whatever is the nature of the consideration for which the service is to be carried out⁶.

Terms about care and skill⁷, the time for performance⁸ and consideration⁹ are implied in contracts for the supply of services¹⁰. The Secretary of State may, however, by order provide that one or more of the terms so implied is or are not to apply to services of a description specified in the order; and such an order may make different provision for different circumstances¹¹. Accordingly, the term so implied about care and skill¹² does not apply to:

- 56 (1) the services of an advocate in court or before any tribunal, inquiry or arbitrator and in carrying out preliminary work directly affecting the conduct of the hearing¹³;
- 57 (2) the services rendered to a company by a director of the company in his capacity as such¹⁴;
- 58 (3) the services rendered to a building society¹⁵ by a director of the society in his capacity as such¹⁶;
- 59 (4) the services rendered to a society registered or deemed to be registered under the Industrial and Provident Societies Act 1965¹⁷ by any member of the committee of management or other directing body of such a society in his capacity as such¹⁸; and
- 60 (5) the services rendered by an arbitrator, including an umpire, in his capacity as such¹⁹.

1 Supply of Goods and Services Act 1982 s 12(1).

2 Ibid s 12(2).

3 Ie subject to ibid s 12(2): see supra.

4 Ibid s 12(3)(a). As to the terms implied in a contract for the transfer of goods see PARA 32 ante.

5 Ibid s 12(3)(b). As to the terms implied in a contract for the hire of goods see PARA 33 ante.

6 Ibid s 12(3).

7 See ibid s 13; and PARA 97 post.

8 See ibid s 14; and PARA 98 post.

9 See ibid s 15; and PARA 99 post.

10 As to the exclusion of implied terms see ibid s 16; and PARA 102 post. See also PARA 3 note 3 ante.

11 Ibid s 12(4). The power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 12(5). In exercise of the power so conferred the Secretary of State made the Supply of Services (Exclusion of Implied Terms) Order 1982, SI 1982/1771; the Supply of Services (Exclusion of Implied Terms) Order 1983, SI 1983/902; and the Supply of Services (Exclusion of Implied Terms) Order 1985, SI 1985/1: see infra. As to the Secretary of State see PARA 15 ante.

12 Ie the term implied by the Supply of Goods and Services Act 1982 s 13.

13 Supply of Services (Exclusion of Implied Terms) Order 1982, SI 1982/1771, art 2(1). As to the removal of barristers' traditional immunity from liability for negligence see *Arthur JS Hall & Co (a firm) v Simons* [2002] 1 AC 615, [2000] 3 All ER 673, HL; and LEGAL PROFESSIONS vol 66 (2009) PARA 1144.

14 Supply of Services (Exclusion of Implied Terms) Order 1982, SI 1982/1771, art 2(2).

15 For these purposes, 'building society' has the same meaning as in the Building Societies Act 1986 (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1856): Supply of Services (Exclusion of Implied Terms) Order 1983, SI 1983/902, art 2(2); Interpretation Act 1978 s 17(2)(b).

16 Supply of Services (Exclusion of Implied Terms) Order 1983, SI 1983/902, art 2(1)(a).

17 As to the Industrial and Provident Societies Act 1965 see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2394 et seq.

18 Supply of Services (Exclusion of Implied Terms) Order 1983, SI 1983/902, art 2(1)(b).

19 Supply of Services (Exclusion of Implied Terms) Order 1985, SI 1985/1, art 2.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(3) CAPACITY OF PARTIES/36. Capacity in general.

(3) CAPACITY OF PARTIES

36. Capacity in general.

Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property¹.

1 Sale of Goods Act 1979 s 3(1). Although there is no corresponding provision in the Supply of Goods and Services Act 1982, there is nothing in the 1982 Act to indicate that the position regarding capacity is different in the case of contracts within the 1982 Act. As to capacity generally see CONTRACT vol 9(1) (Reissue) PARA 630. The following classes of persons are in law incompetent to contract or are capable of contracting only to a limited extent: bankrupts (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 417 et seq, 707 et seq), minors (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq), mentally disordered persons (see MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq), alien enemies (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARAS 573-575) and drunkards (see CONTRACT vol 9(1) (Reissue) PARA 717). Furthermore, particular rules are applicable in the case of contracts by companies (see COMPANIES vol 14 (2009) PARA 279 et seq) and other corporations (see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1269-1274; LOCAL GOVERNMENT vol 69 (2009) PARA 492 et seq). Aliens (other than enemy aliens) may acquire and dispose of property in the same manner as British subjects (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13), and married women are relieved from disabilities. As to the competency and authority of agents see AGENCY vol 1 (2008) PARAS 9, 10, 29, 30. For the meaning of 'property', in relation to goods see PARA 27 ante.

UPDATE

36-41 Capacity in general ... Use of agents

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(3) CAPACITY OF PARTIES/37. Necessaries.

37. Necessaries.

Where necessities are sold and delivered to a minor¹ or to a person who, by reason of mental incapacity or drunkenness, is incompetent to contract, he must pay a reasonable price² for

them³. In relation to sales⁴ to minors or other incompetent persons, 'necessaries' means goods⁵ suitable to his condition in life and to his actual requirements at the time of the sale and delivery⁶.

Mere luxuries can never be necessities but luxurious articles of utility may come under the definition of 'necessaries' in the special circumstances of a particular case⁷. The standard is always relative⁸.

1 le a person under the age of 18 years: see the Family Law Reform Act 1969 s 1(1), (2); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1.

2 As to what is a reasonable price see the Sale of Goods Act 1979 s 8(3); and PARA 56 post.

3 Ibid s 3(2). See *Cowern v Nield* [1912] 2 KB 419, DC (trading contract). As to minors see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 2 et seq; as to mentally disordered persons see MENTAL HEALTH vol 30(2) (Reissue) PARA 604; and as to drunkards see CONTRACT vol 9(1) (Reissue) PARA 717. As to necessities cf also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 263-266. The obligation of an incompetent person to pay for necessities supplied to him is really quasi-contractual. Cf CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 18; and see PARAS 25-26 ante.

4 As to sales generally see PARA 1 ante. For the statutory meaning of 'sale' see PARA 27 ante.

5 For the meaning of 'goods' see PARA 30 ante.

6 Sale of Goods Act 1979 s 3(3). For the meaning of 'delivery' see PARAS 27 note 6 ante, 163 post. As to necessities generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 18-19. See also *West Ham Union v Pearson* (1890) 62 LT 638, DC (where it was held that expenses incurred by a local authority in looking after a man suffering from delirium tremens, as being necessary expenses, may be recovered from him afterwards). See also *Re Clabbon (an infant)* [1904] 2 Ch 465 (maintenance of minor poor person).

7 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 19. The Sale of Goods Act 1979 s 3 lays down a uniform rule for all incompetent persons but the cases naturally have mainly arisen with regard to minors. Prior to the passing of the Sale of Goods Act 1893 (repealed) the tendency of the decisions was to restrict the liability of minors and the older cases, in which minors were held liable, must be tested with reference to the language of the Sale of Goods Act 1979: see generally CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq.

8 *Peters v Fleming* (1840) 6 M & W 42 at 47 ('articles fit to maintain the particular person in the state, station and degree in life in which he is'). The following have been held to be necessities: silk dresses ordered by a minor in her mother's presence (*Dalton v Gib* (1839) 5 Bing NC 198); a great-coat for an attorney's articulated clerk (*Brayshaw v Eaton* (1839) 5 Bing NC 231); a horse supplied to a minor under medical direction (*Hart v Prater* (1837) 1 Jur 623); a harness and horse clothing sold to a minor manager of a farm (*Hill v Arbon* (1876) 34 LT 125, DC); necessities for the family of a married minor (*Turner v Trisby* (1719) 1 Stra 168); an engagement ring but not other presents (*Elkington & Co Ltd v Amery* [1936] 2 All ER 86, CA). See further the cases cited in CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 19. The following have been held not to be necessities: clothes for a minor already sufficiently supplied (*Steedman v Rose* (1842) Car & M 422); and a hunter worth £150 supplied to a minor who was a member of a hunt (*Skrine v Gordon* (1875) IR 9 CL 479). See also the cases cited in CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 19. The burden of proof is on the person supplying the goods to show that they were necessities: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 18.

UPDATE

36-41 Capacity in general ... Use of agents

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

37 Necessaries

TEXT AND NOTE 3--1979 Act s 3(2) amended to exclude the reference to mental incapacity: Mental Capacity Act 2005 Sch 6 para 24.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(4) FORMALITIES OF THE CONTRACT/38. How a contract is made.

(4) FORMALITIES OF THE CONTRACT

38. How a contract is made.

Subject to the provisions of the Sale of Goods Act 1979¹ and any other Act², a contract of sale³ may be made in writing, either with or without seal⁴, or by word of mouth, or partly in writing and partly by word of mouth⁵, or may be implied from the conduct of the parties⁶. The law relating to corporations is, however, expressly excluded from the operation of this rule and the formalities required for contracts by corporations apply to their contracts for the sale of goods⁷. A sale of goods may be made by deed, by the execution of which the seller transfers the property which he has in the goods to the buyer. Such a document is a bill of sale⁸ and is required by statute to be registered, attested and to set forth the consideration for the transfer⁹. If it fails to satisfy these requirements, while remaining good between the parties, it is void as against certain other persons¹⁰.

1 See, in particular, the Sale of Goods Act 1979 s 62(3); and PARAS 6, 10 ante. As to statutory formalities, and as to brokers see PARA 40 et seq post.

2 Eg the Consumer Credit Act 1974: see CONSUMER CREDIT vol 9(1) (Reissue) PARA 1 et seq. As to the sale of British ships and shares in them see SHIPPING AND MARITIME LAW vol 93 (2008) PARAS 241, 255, 306 et seq; and as to the sale of specific goods see PARA 112 et seq post.

3 For the meaning of 'contract of sale' see PARA 29 ante.

4 Any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual, other than a corporation sole, is abolished: Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b), (10).

5 Eg a written offer to sell goods may be orally accepted or an oral offer may be accepted in writing: see *Watkins v Rymill* (1883) 10 QBD 178 at 188. Goods may be ordered by letter and supplied without further communication (*Taylor v Jones* (1875) 1 CPD 87), or goods may be ordered by letter with subsequent oral alterations and supplied accordingly (*Hoadly v M'Laine* (1834) 10 Bing 482). See CONTRACT vol 9(1) (Reissue) PARAS 620, 685 et seq. 'Writing' prima facie includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form: see the Interpretation Act 1978 ss 5, 22(1), Sch 1, Sch 2 para 4(1)(b); and STATUTES vol 44(1) (Reissue) PARA 1388.

6 Sale of Goods Act 1979 s 4(1). A contract of sale may be implied from conduct as an inference of fact, ie when the parties really intend a sale, but do not express it in words, eg when a person takes up an article in a shop and pays for it, or otherwise appropriates it with the consent of the owner, or goes into a restaurant and orders a meal, or where an unsigned contract is acted on by the parties according to its terms: *Brogden v Metropolitan Rly Co* (1877) 2 App Cas 666, HL. In such cases there is in fact 'an understanding between the parties', which may be called an implied contract: *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234 at 249, CA, per Bowen LJ. See CONTRACT vol 9(1) (Reissue) PARA 618. A contract of sale may also be implied from conduct by inference of law. 'In such a case the law does not require an actual agreement, but implies a contract from the circumstances; in fact, the law itself makes the contract': *Gore v Gibson* (1845) 13 M & W 623 at 626 per Pollock CB. See also *Rumsey v North Eastern Rly Co* (1863) 14 CBNS 641 (contract implied against express intention). See further CONTRACT vol 9(1) (Reissue) PARA 618. As to a party so conducting himself as to be precluded from denying that he intended to be a buyer or seller, as the case may be see PARA 26 ante. Moreover, a new contract may be implied by law from acts done in part performance of a contract of sale, eg where the buyer retains part of the goods delivered: see *Mavor v Pyne* (1825) 3 Bing 285 (contract not performable within a year); *Oxendale v Wetherell* (1829) 9 B & C 386; *Hart v Mills* (1846) 15 M & W 85;

Bartholomew v Markwick (1864) 15 CBNS 711 (repudiation of a contract by buyer). Cf the Sale of Goods Act 1979 s 9(1) (see PARA 60 post) and s 30(1) (see PARA 172 post). As to quasi-contracts see PARAS 25-26 ante.

7 Ibid s 4(2). As to the particular rules applicable in the case of contracts by companies and other corporations see COMPANIES vol 14 (2009) PARA 454 et seq; CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1269-1274; LOCAL GOVERNMENT vol 69 (2009) PARA 492 et seq.

8 Is an absolute bill of sale: see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1838 et seq. As to bills of sale generally see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1620 et seq.

9 As to such consideration, attestation and registration in the case of security bills of sale see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 1702 et seq, 1753 et seq. As to the form, contents, attestation and registration in the case of absolute bills of sale see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1841 et seq.

10 As to the avoidance of an absolute bill of sale see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1847 et seq.

UPDATE

36-41 Capacity in general ... Use of agents

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(4) FORMALITIES OF THE CONTRACT/39. Construction of the contract.

39. Construction of the contract.

A contract of sale¹ reduced into writing² is to be construed and given effect to like any other written contract³; and it is apprehended that the position is the same for contracts for the transfer of goods⁴, contracts for the hire of goods⁵ and contracts for the supply of a service⁶.

In both written and oral contracts, where a right, duty or liability would arise under a contract of sale of goods or under a contract for the transfer of property in goods or for the hire of goods by implication of law, it may, subject to the Unfair Contract Terms Act 1977⁷, be negated or varied by express agreement, or by the course of dealing between the parties, or by such usage⁸ as binds both parties to the contract⁹.

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 As to the meaning of 'writing' see PARA 38 note 5 ante.

3 *Coddington v Paleologo* (1867) LR 2 Exch 193 at 200; cf *Honck v Muller* (1881) 7 QBD 92 at 103, CA. The ordinary rules with regard to the admissibility of oral evidence apply: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 185 et seq. An invoice is not in itself a written contract; it is only evidence of a contract and may be contradicted by the facts: *Holding v Elliott* (1860) 5 H & N 117.

4 For the meaning of 'contract for the transfer of goods' see PARA 32 ante.

5 For the meaning of 'contract for the hire of goods' see PARA 33 ante.

6 For the meaning of 'contract for the supply of a service' see PARA 35 ante.

7 As to the Unfair Contract Terms Act 1977 see PARAS 103-104, 450 et seq post; and CONTRACT vol 9(1) (Reissue) PARA 820 et seq.

8 For the meaning of 'usage', and as to the proof of usage and the circumstances under which parties may be held bound by usage see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 650 et seq.

9 See the Sale of Goods Act 1979 s 55(1), (2) (as amended) (see PARA 100 post); and the Supply of Goods and Services Act 1982 ss 11(1), (2), 16(1), (2) (see PARA 102 post). See also PARA 12 ante. As to the admission of evidence of usage see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 665 et seq. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 182-183, commenting on the maxims *expressum facit cessare tacitum* (ie when there is express mention of certain things, then anything not mentioned is excluded) and *expressio unius est exclusio alterius* (ie the express mention of one person or thing is the exclusion of another).

UPDATE

36-41 Capacity in general ... Use of agents

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(4) FORMALITIES OF THE CONTRACT/40. Statutory formalities.

40. Statutory formalities.

The requirement of the Sale of Goods Act 1893¹ under which a contract for the sale of goods of the value of £10 and upwards was not enforceable by action unless evidenced by a note or memorandum of the contract, or by other formalities, was repealed² in relation to all contracts, whenever made³. The corresponding requirement of the Statute of Frauds⁴ relating to contracts not to be performed within one year was likewise repealed⁵. Consequently, the general rule is that oral agreements for the sale of goods of any value, and however proved, are enforceable⁶.

To this general proposition there are, however, a number of statutory exceptions, for example:

- 61 (1) certain agreements regulated by the Consumer Credit Act 1974 are subject to specified formalities⁷;
- 62 (2) contracts for the sale of certain goods for which special statutory provision is made are subject to special formal requirements⁸;
- 63 (3) contracts signed away from business premises may be cancelled by the consumer within seven days of the making of the contract and are unenforceable against the consumer unless the trader has delivered a written notice to the consumer so informing him⁹;
- 64 (4) a person must not in the course of a business enter into a timeshare agreement as offeror unless the agreement is in writing and complies with the relevant statutory provisions, and any such agreement is unenforceable against the consumer unless the trader has delivered a written notice to the consumer informing him of his right to cancel the agreement¹⁰;
- 65 (5) where a contract for the sale of goods forms part of any contract the consideration for which is an interest in land, the whole contract is unenforceable unless it is made in writing signed by each party to the contract and incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each, evidenced by writing¹¹.

- 1 le the requirements of the Sale of Goods Act 1893 s 4 (repealed: see note 2 infra).
- 2 le by the Law Reform (Enforcement of Contracts) Act 1954 s 2 (repealed).
- 3 Much case law occasioned in connection with the Sale of Goods Act 1893 s 4 (repealed: see note 2 supra) (and its predecessor the Statute of Frauds (1677) s 17 (repealed)), has accordingly been rendered obsolete. The repeal does not, however, affect the ordinary rules as to the interpretation of contracts and admissibility of extrinsic evidence where the intention of the parties has been reduced into writing. As to these matters generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 185 et seq.
- 4 Ibid s 4 (repealed in part: see note 5 infra).
- 5 le by the Law Reform (Enforcement of Contracts) Act 1954 s 1 (repealed).
- 6 See the Sale of Goods Act 1979 s 4(1); and PARA 38 ante.
- 7 See the Consumer Credit Act 1974 ss 60-65 (as amended); para 763 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 160 et seq.
- 8 Thus, eg any transfer of a registered ship, or a share in such a ship, must be effected by a bill of sale satisfying the prescribed requirements, unless the transfer will result in the ship ceasing to have a British connection: see the Merchant Shipping Act 1995 s 16(1), Sch 1 para 2(1); and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 306. See also PARAS 21-22, 24 ante; and PARAS 680 et seq, 763 post.
- 9 See the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, regs 3 (as amended), 4; and PARAS 664-665 post.
- 10 See the Timeshare Act 1992 ss 1A-1D (as added and amended), s 2 (as amended); and PARA 867 et seq post.
- 11 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and SALE OF LAND vol 42 (Reissue) PARA 29 et seq.

UPDATE

36-41 Capacity in general ... Use of agents

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

40 Statutory formalities

TEXT AND NOTE 9--SI 1987/2117 revoked: see now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, regs 5-9, Sch 3.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/ (5) AGENCY AND BROKERS/41. Use of agents.

(5) AGENCY AND BROKERS

41. Use of agents.

A contract of sale¹, like other contracts, may in general be made through the agency of a third person². The usual rules relating to the law of principal and agent determine whether or not the person acting or purporting to act as agent had, originally or by way of ratification of his act,

actual authority to make the contract in question³, or had been held out as having ostensible authority to do so⁴, or had one of the other rarer types of authority such as agency by operation of law⁵ or agency of necessity⁶.

Certain agreements regulated by the Consumer Credit Act 1974 are void if, and to the extent that, they purport to provide that a person acting as, or on behalf of, a negotiator is to be treated as the agent of the debtor or hirer⁷.

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 See the Sale of Goods Act 1979 s 62(2); and PARA 9 ante.

3 As to the method of creation of an agency see AGENCY vol 1 (2008) PARA 14.

4 As to agency by estoppel see AGENCY vol 1 (2008) PARA 25.

5 See the Sale of Goods Act 1979 s 48(3); and PARAS 17 ante, 282 post. See also the Protection of Animals Act 1911 s 7(3); and the Torts (Interference with Goods) Act 1977 s 12(3) (see TORT vol 45(2) (Reissue) PARA 647).

6 As to agency of necessity see AGENCY vol 1 (2008) PARA 24.

7 See the Consumer Credit Act 1974 s 56(3)(a); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 177. As to agency under the Consumer Credit Act 1974 generally see CONSUMER CREDIT vol 9(1) (Reissue) PARAS 176-178.

UPDATE

36-41 Capacity in general ... Use of agents

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/ (5) AGENCY AND BROKERS/42. Functions of brokers.

42. Functions of brokers.

A broker for sale is an agent whose business it is to find buyers for those who wish to sell, and sellers for those who wish to buy, and to negotiate and superintend the making of the bargain between them¹. His duty is to establish privity of contract between the seller and the buyer².

1 See *Mollett v Robinson* (1872) LR 7 CP 84 at 97, Ex Ch, per Hannen J (quoting Blackburn's Contract of Sale (1st Edn) 81 (3rd Edn 831)); revsd sub nom *Robinson v Mollett* (1875) LR 7 HL 802. A broker is a special agent and must duly act within the limits of his authority: *Pitts v Beckett* (1845) 13 M & W 743 at 747 per Parke B. See the position of a broker with regard to the contract and the property in the goods explained by Brett J in *Fowler v Hollins* (1872) LR 7 QB 616 at 623, Ex Ch; affd sub nom *Hollins v Fowler* (1875) LR 7 HL 757. The distinction between a broker and a factor is that factors are a class of agent given possession of the goods to be sold or the documents of title and are, normally, also authorised to sell in their own name: see *Baring v Corrie* (1818) 2 B & Ald 137; *Stevens v Biller* (1883) 25 ChD 31, CA; *Rolls Razor Ltd v Cox* [1967] 1 QB 552, [1967] 1 All ER 397, CA. As to the different classes of agent see further AGENCY vol 1 (2008) PARAS 11, 13; and as to dispositions by mercantile agents see AGENCY vol 1 (2008) PARA 12. See also PARA 158 post.

2 *Robinson v Mollett* (1875) LR 7 HL 802. When he has executed his authority, it is exhausted and he cannot cancel the contract and make another: *White v Benekendorff* (1873) 29 LT 475 at 477 per Brett J.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/ (5) AGENCY AND BROKERS/43. Making of contract through brokers.

43. Making of contract through brokers.

It is a question of fact in the light of any relevant usage when and how any binding contract is intended to be reached where a broker is engaged in its negotiation on behalf of either or each party¹. A contract agreed orally or in correspondence through a broker or brokers may subsequently be reduced to more formal shape, as by the issue by a broker to the parties² or by the exchange between the parties³ of bought and sold notes which are consistent and complete or, in the case of inconsistency between such notes, by the agreement by both parties that one or other note contains the terms of contract between them⁴.

1 *Sievwright v Archibald* (1851) 17 QB 103; *Moore v Campbell* (1854) 10 Exch 323; *Heyworth v Knight* (1864) 17 CBNS 298 (contract by correspondence); *Roe v RA Naylor Ltd* (1918) 87 LJB 958, CA. See also *Goodey and Southwold Trawlers Ltd v Garriock, Mason and Millgate* [1972] 2 Lloyd's Rep 369.

2 As to a written contract or memorandum see PARA 44 post.

3 *Williams Bros Ltd v Ed T Agius Ltd* [1914] AC 510, HL (broker's note; subsequent exchange of bought and sold notes).

4 See *Rowe v Osborne* (1815) 1 Stark 140 (note signed by defendant and sent to plaintiff varying from note sent to defendant by broker) (as explained in *Cowie v Remfrey* (1846) 5 Moo PCC 232); *Higgins v Senior* (1841) 8 M & W 834 (notes exchanged by agents; one intended to be the contract); *Moore v Campbell* (1854) 10 Exch 323 (plaintiff's broker sent note to defendant, who sent substituted note; it was a question of fact whether the defendant intended that one note should constitute the contract). See also *Cowie v Remfrey* supra (custom to contract by two notes) (criticised by Willes J in *Heyworth v Knight* (1864) 17 CBNS 298); *Re Thorp, ex p Thomas* (1865) 11 LT 586 (bought note only delivered but acted on; no note to seller). See also SALE OF LAND vol 42 (Reissue) PARA 40.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/ (5) AGENCY AND BROKERS/44. Written contract or memorandum.

44. Written contract or memorandum.

A broker employed to buy or sell has implied authority to make and sign on behalf of his principal a written contract or memorandum, where necessary, to make the contract enforceable in law¹.

Further, in the absence of special circumstances, a party reaching agreement on terms of sale with the other's broker acting as such² was regarded as giving to the broker implied authority to make and sign on his behalf a written contract or memorandum recording the terms agreed in order to make the contract enforceable³. Changes in the law⁴ and changes in commercial practice make it doubtful whether there remains any need or scope for recognition of any such implied authority.

1 *Rosenbaum v Belson* [1900] 2 Ch 267 (real estate). See also the cases cited in note 3 infra. The repeal of the former statutory requirement of a written note or memorandum of any contract for sale of goods of the value of £10 and upwards (see PARA 40 ante) deprived this principle of most, if not all, of its practical relevance. See also the Consumer Credit Act 1974 s 61 (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 160.

2 Cf *McCaul v Strauss & Co* (1883) Cab & El 106 (where the other party dealt with the broker, believing him to be the principal).

3 *Rucker v Cammeyer* (1794) 1 Esp 105 (following *Simon v Motivos* (1766) 3 Burr 1921); *Hicks v Hankin* (1802) 4 Esp 114; *Chapman v Partridge* (1805) 5 Esp 256 (buyer's express authority); *Buckmaster v Harrop* (1807) 13 Ves 456 at 473 per Lord Erskine; *Henderson v Barnewall* (1827) 1 Y & J 387 per Alexander CB and Garrow B; Blackburn's Contract of Sale (3rd Edn) 85. The position of the party bargaining with the broker is on this basis similar to that of a buyer at an auction with respect to the auctioneer after the fall of the hammer: *Rucker v Cammeyer* supra. See AUCTION vol 2(3) (Reissue) PARA 244. The dealing gives the authority. See the law well stated by Bigelow CJ in *Coddington v Goddard* 82 Mass 436 at 445 (1860), and by the court in *Remick v Sandford* 118 Mass 102 (1875). The broker, being a special agent, must enter the actual contract made, not one in different terms: *Pitts v Beckett* (1845) 13 M & W 743; *Remick v Sandford* supra. As to the distinction between general and special agents see AGENCY vol 1 (2008) PARA 11.

4 See note 1 supra.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/ (5) AGENCY AND BROKERS/45. Bought and sold notes.

45. Bought and sold notes.

The practice of brokers to issue bought and sold notes to their clients¹ to record the terms of sale agreed led to the recognition of the following rules²:

- 66 (1) the bought and sold notes, if they correspond with one another³ and are complete, constitute a contract in writing⁴, but, if they do not correspond or are not complete, they do not constitute a written contract⁵;
- 67 (2) where bought and sold notes are issued by a broker who is for that purpose agent of both parties, either note, if complete, can be relied on as a contract in writing in the absence of proof by the party to be charged that the other note differs⁶.

The repeal of the former statutory requirement of a written note or memorandum of any contract of sale of goods of a value of £10 and upwards⁷ deprives these rules of much, if not all, of their significance. They may perhaps still be relevant to determine whether or not the contract is in, or has been reduced to, writing.

1 As to a broker's implied authority in a case where no other authority exists expressly or by usage see PARA 43 ante.

2 There are many old decisions on brokers' books and bought and sold notes but the Sale of Goods Act 1893 (repealed) and changes of commercial practice rendered much of the old law with regard to brokers' books obsolete. It was at one time thought that, where the broker entered the terms of the contract in his book and signed the entry, and also delivered to the parties bought and sold notes, the entry in the book constituted a contract in writing to the exclusion of the notes. Such was the opinion of three judges in *Sievwright v Archibald* (1851) 17 QB 103, of Parke B in *Thornton v Charles* (1842) 9 M & W 802, and *Pitts v Beckett* (1845) 13 M & W 743 at 746, and of Lord Ellenborough CJ in *Heyman v Neale* (1809) 2 Camp 337, and *Dickenson v Lilwal* (1815) 1 Stark 128. That the contract was contained in the notes was the opinion of Gibbs CJ in *Cumming v Roebuck* (1816) Holt NP 172, of Abbott CJ in *Thornton v Meux* (1827) Mood & M 43 (revoking his contrary opinion in *Grant v Fletcher* (1826) 5 B & C 436, and *Goom v Aflalo* (1826) 6 B & C 117), of Lord Denman CJ in *Hawes v Forster* (1834) 1 Mood & R 368, and *Townend v Drakeford* (1843) 1 Car & Kir 20, of Lord Abinger CB in *Thornton v Charles* supra and of the court in *Richey v Garvey* (1847) 10 ILR 544. Moreover, the report of *Hawes v Forster* supra seems to show that the jury found that by usage the notes were considered as the contract, but this case has been otherwise explained: see *Thornton v Charles* supra per Parke B. At the date of the opinions given in the cases first cited in this note supra it was the duty of brokers in London to make such an entry: see 6 Anne c 68 (City of London (garbling of spices and admission of brokers)) (1707) ss 4, 5 (repealed), and 57 Geo 3 c 60 (Court of Exchequer) (1817) (repealed), under which brokers in the City of London were put under the control of the corporation and by regulations of the corporation were required to enter into a bond, one condition of which

was that they should enter all contracts in a book at the date of making them. This duty was abolished by the London Brokers Relief Act 1870 s 2 (repealed), which abolished the bond, and the London Brokers Relief Act 1884 s 2 (repealed), which finally abolished the corporation's control. It is no longer the practice for brokers to make entries in their books except for their private information. It would seem that such an entry would now not be regarded as the written contract between the parties: see *Thompson v Gardiner* (1876) 1 CPD 777 (where no special efficacy was attributed to the entry other than as a memorandum in writing for the purpose of the Statute of Frauds then in force (see PARA 40 ante)).

3 It is not a variance because one of the parties is named in one note and only described in the other: *Cropper v Cook* (1868) LR 3 CP 194; *Trueman v Loder* (1840) 11 Ad & El 589. Oral evidence may be given to explain any apparent discrepancy so as to show that it is not material (*Bold v Rayner* (1836) 1 M & W 343), eg to show that the discrepancy is a mere memorandum of the broker and not a term of the contract (*Kempson v Boyle* (1865) 3 H & C 763). See also *Maclean v Dunn* (1828) 4 Bing 722.

4 *Goom v Aflalo* (1826) 6 B & C 117. See also *Gale v Wells* (1824) 1 C & P 388 (where two bought notes were delivered); *Trueman v Loder* (1840) 11 Ad & El 589; *Sievwright v Archibald* (1851) 17 QB 103 per curiam. See also SALE OF LAND vol 42 (Reissue) PARA 40. The judgments in the cases do not always differentiate between the notes as a written contract and as a memorandum of a pre-existing oral contract: see *Thompson v Gardiner* (1876) 1 CPD 777. It would seem, however, that the better view is that the two notes together constitute the actual contract and are not merely a memorandum of a prior oral contract: *Hawes v Forster* (1834) 1 Mood & R 368.

5 See *Thornton v Kempster* (1814) 5 Taunt 786 (differing subject matters); *Grant v Fletcher* (1826) 5 B & C 436; *Townend v Drakeford* (1843) 1 Car & Kir 20 (unsigned entry; insufficient notes); *Gregson v Ruck* (1843) 4 QB 737 (differing terms of payment); *Sievwright v Archibald* (1851) 17 QB 103 (no entry; varying subject matters); *Fisenden v Levy* (1863) 11 WR 259 (two sellers, one buyer; two sold notes, one bought). See also SALE OF LAND vol 42 (Reissue) PARA 40.

6 *Hawes v Forster* (1834) 1 Mood & R 368 (note delivered to plaintiff); *Parton v Crofts* (1864) 16 CBNS 11 (note sent to party to be charged); *Thompson v Gardiner* (1876) 1 CPD 777 (note sent to plaintiff).

7 As to this former statutory requirement see PARA 40 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(5) AGENCY AND BROKERS/46. Material alteration of note.

46. Material alteration of note.

A material alteration in a broker's note made by or at the instance of either party without the consent of the other vitiates the note as against the other party¹.

1 *Powell v Divett* (1812) 15 East 29 (action by seller on sale note altered by him); *Mollett v Wackerbarth* (1847) 5 CB 181 (alteration by buyer plaintiff in bought note). In this case the buyer declared on the note in its original form. An alteration by one party may be material, even though it does not alter the duty to be performed by the other party: *Mollett v Wackerbarth* supra. If the broker, at the instance of the seller, materially alters the sold note, he cannot recover from the buyer, as money paid, the price paid by him to the seller: *White v Benekendorff* (1873) 29 LT 475 (alteration of time of delivery). For further consideration of the whole subject see 1 Smith LC (13th Edn) 814 in the notes to *Master v Miller* (1793) 2 Hy Bl 141, Ex Ch (affg (1791) 4 Term Rep 320); and *Suffell v Bank of England* (1882) 9 QBD 555, CA. See also CONTRACT vol 9(1) (Reissue) PARAS 1056-1061.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(6) SUBJECT MATTERS OF A CONTRACT OF SALE/47. Existing or future goods.

(6) SUBJECT MATTERS OF A CONTRACT OF SALE

47. Existing or future goods.

The goods¹ which form the subject of a contract of sale² may be either existing goods, owned or possessed by the seller, or, alternatively, goods to be manufactured or acquired by the seller after the making of the contract of sale, and this second category of goods is called 'future goods'³.

There may be a contract for the sale of goods the acquisition of which by the seller depends on a contingency which may or may not happen⁴. The parties may make what bargain they please⁵. They may expressly or by implication stipulate:

- 68 (1) that the contract is to be conditional on the part of the seller only, the price being payable in any event⁶;
- 69 (2) that it is to be absolute on the part of the seller who is to be liable in damages if the buyer does not get the goods⁷; or
- 70 (3) that the contract is to be conditional on both sides and, if the event does not happen, both parties will be freed from their obligations⁸.

Those are all questions of construction of the particular contract⁹.

Where there is a contract for the sale of goods to arrive or 'on arrival', the seller does not, in the absence of terms creating such a warranty, warrant the arrival of the goods but the contract is on both sides contingent on their arrival and, when a particular ship is named, contingent both on the arrival of the ship in the ordinary course and within the time stated, if any, and on the goods being on board; where there is a warranty that the goods are in a particular ship, the contract is subject to the single contingency of the arrival of the ship¹⁰.

1 For the meaning of 'goods' see PARA 30 ante. As to the position when the subject matter contains articles unknown to the buyer and seller see BAILMENT vol 3(1) (2005 Reissue) PARA 12. For the meaning of 'buyer' see PARA 29 ante; and for the meaning of 'seller' see PARA 27 ante.

2 For the meaning of 'contract of sale' see PARA 29 ante.

3 Sale of Goods Act 1979 ss 5(1), 61(1). See *Wilks v Atkinson* (1815) 6 Taunt 11; *Garbutt v Watson* (1822) 5 B & Ald 613 (flour to be ground from wheat); *Watts v Friend* (1830) 10 B & C 446 (crop not yet sown); *Pinner v Arnold* (1835) 2 Cr M & R 613 (machine to be made); *Hibblewhite v M'Morine* (1839) 5 M & W 462 (shares to be acquired by purchase by seller) (followed in *Mortimer v M'Callan* (1840) 6 M & W 58); *Mortimer v M'Callan* (1840) 7 M & W 20, Ex Ch (stock to be purchased); *Gurr v Scudds* (1855) 11 Exch 190 (manure to be produced by horses); *Langton v Higgins* (1859) 4 H & N 402 (oil to be made from seed); *Ajello v Worsley* [1898] 1 Ch 274 (piano to be purchased from a rival maker). As a seller may contract to sell future goods, he may, subject to an agreement to the contrary, advertise them and at any price, even though he may thereby injure the manufacturer, subject to a liability to the manufacturer or buyer for fraudulent misrepresentation: *Ajello v Worsley* supra at 280; *AG Spalding & Bros v AW Gamage Ltd* (1915) 84 LJ Ch 449, HL. Although there may be a contract of sale of future goods, it is necessary that a sale should be intended, and not a wager, as eg on differences of price at a future date, with no intention that the goods are to be delivered: *Grizewood v Blane* (1851) 11 CB 526; *Thacker v Hardy* (1878) 4 QBD 685, CA. For the meaning of 'sale' see PARA 27 ante. Cf LICENSING AND GAMBLING vol 67 (2008) PARAS 319-323.

4 Sale of Goods Act 1979 s 5(2). See *Watts v Friend* (1830) 10 B & C 446 (turnip seed to be grown; crop produced); *Howell v Coupland* (1876) 1 QBD 258, CA (potatoes to be grown; failure to crop); *HR and S Sainsbury Ltd v Street* [1972] 3 All ER 1127, [1972] 1 WLR 834 (where there was a contract for the sale of 275 tons of barley which were to be harvested later; the crop was only 140 tons, and the buyer conceded that the seller was under no obligation to make good the difference but the seller was held liable in damages for his failure to deliver the 140 tons actually produced). Whether such a provision makes the contract conditional within the Sale of Goods Act 1979 s 2(3) (see PARA 29 ante), and how the rights and obligations of the parties will be affected by the contingency happening or not happening, are questions of interpretation of the contract.

5 *Calcutta and Burmah Steam Navigation Co v De Mattos* (1863) 32 LJQB 322 at 328 per Blackburn J. See also *Hale v Rawson* (1858) 4 CBNS 85 at 95 per Williams J; and PARA 12 ante.

6 *Covas v Bingham* (1853) 2 E & B 836.

7 *Splitd v Heath* (1809) 2 Camp 57n; *Simond v Braddon* (1857) 2 CBNS 324; *Hale v Rawson* (1858) 4 CBNS 85.

8 *Hayward v Scougall* (1809) 2 Camp 56 ('hemp that may be loaded'); but cf *Re Thornett and Fehr and Yuills Ltd* [1921] 1 KB 219, DC (tallow of '1919 make'; one place of manufacture closed in that year; no frustration).

9 Where the fulfilment of the contingency on which the seller's acquisition of the goods depends is within the control of the seller, it is a question of construction whether an obligation on his part will be implied not, at any rate wilfully, to prevent its fulfilment, or whether his contract is not contingent at all: *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, CA.

10 See *Boyd v Siffkin* (1809) 2 Camp 326; *Hawes v Humble* (1809) 2 Camp 327n (name); *Idle v Thornton* (1812) 3 Camp 274 (on arrival by particular ship and date); *Thornton v Simpson* (1816) 6 Taunt 556 (short arrival); *Alewyn v Pryor* (1826) Ry & M 406 (late arrival); *Lovatt v Hamilton* (1839) 5 M & W 639; *Johnson v Macdonald* (1842) 9 M & W 600 (goods to arrive by one ship arrive in another); *Fischel v Scott* (1854) 15 CB 69; *Vernede v Weber* (1856) 1 H & N 311; *Simond v Braddon* (1857) 2 CBNS 324; *Gorissen v Perrin* (1857) 2 CBNS 681; *Hale v Rawson* (1858) 4 CBNS 85 (tallow to be delivered on safe arrival of a named ship then on passage; warranty by seller); *Neill v Whitworth* (1866) LR 1 CP 684, Ex Ch (goods to arrive and to be taken from the quay); *Smith v Myers* (1871) LR 7 QB 139, Ex Ch (specific goods expected to arrive by a named ship; similar goods arrive); *Wyllie v Povah* (1907) 12 Com Cas 317; *Barnett v Javeri & Co* [1916] 2 KB 390 (where the sale of goods was subject to 'safe arrival', no steamer being named, and it was held that the seller's obligation was to ship goods on a ship and words did not relieve him where it was impossible for goods to arrive because they were never delivered to him by his seller). Cf *Hollis Bros & Co Ltd v White Sea Timber Trust Ltd* [1936] 3 All ER 895 at 900 (goods sold subject to shipment; option in sellers to ship or not); *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd* [1960] AC 684, [1960] 2 All ER 100, PC (contract subject 'to force majeure and shipment'; sellers bound). See also *Lewis Emanuel & Son Ltd v Sammut* [1959] 2 Lloyd's Rep 629 (no implied term that contract off if shipping space unavailable). A condition postulating the arrival of the goods will not be fulfilled by the arrival of similar goods consigned to third persons, with which the contract did not purport to deal: *Gorissen v Perrin* (1857) 2 CBNS 681; *Thornton v Simpson* supra. Cf *Fischel v Scott* supra. Cf in general cases where the name of the ship or the time of shipment or delivery is held to be part of the description of the goods themselves, eg *Macpherson Train & Co Ltd v Howard Ross & Co Ltd* [1955] 2 All ER 445, [1955] 1 WLR 640. See further the cases cited in PARA 74 note 8 post.

UPDATE

47-48 Subject Matters of a Contract of Sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(6) SUBJECT MATTERS OF A CONTRACT OF SALE/48. Sale of a chance and present sale of future goods.

48. Sale of a chance and present sale of future goods.

Where the parties clearly intend it, there may be an emptio spei, that is to say, the sale and purchase of the chance of obtaining goods, rather than of the goods themselves¹. Such a contract is contingent on the part of the seller but absolute on the part of the buyer². If there is a contract for the sale of future goods and only part of those goods come into existence, it is a question of construction of the contract in all the circumstances whether the seller is bound to deliver and the buyer to accept those goods or whether the contract is discharged³. Where by a contract of sale⁴ the seller⁵ purports to effect a present sale of future goods⁶, the contract operates as an agreement to sell⁷ the goods⁸.

1 *Hitchcock v Giddings* (1817) 4 Price 135; *Hanks v Palling* (1856) 6 E & B 659; *Buddle v Green* (1857) 27 LJ Ex 33. See also *Covas v Bingham* (1853) 2 E & B 836 (chance of quantity); *Bagueley v Hawley* (1867) LR 2 CP 625.

2 The seller must deliver the goods only if he gets them but the buyer must pay the price in any event.

3 *HR and S Sainsbury Ltd v Street* [1972] 3 All ER 1127, [1972] 1 WLR 834 (seller not excused from delivering lesser quantity if buyer willing to take it).

4 For the meaning of 'contract of sale' see PARA 29 ante.

5 For the meaning of 'seller' see PARA 27 ante.

6 For the meaning of 'future goods' see PARA 47 ante.

7 As to an agreement to sell see PARAS 27-28 ante.

8 Sale of Goods Act 1979 s 5(3). For the meaning of 'goods' see PARA 30 ante. See also *Lunn v Thornton* (1845) 1 CB 379; cf *Heseltine v Siggers* (1848) 1 Exch 856 ('bought and sold'; agreed to be bought and sold); *Vickers v Hertz* (1871) LR 2 Sc & Div 113 at 119 per Lord Westbury. A person cannot sell what he has not got but he can agree to sell property which he expects to acquire and then, when the property is acquired, the agreement to sell attaches. For the meaning of 'property', in relation to goods see PARA 27 ante. As to the passing of the property in the goods and the buyer's equitable interest in them see PARA 128 post.

UPDATE

47-48 Subject Matters of a Contract of Sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(7) PROHIBITED SALES/49. Nature of prohibition.

(7) PROHIBITED SALES

49. Nature of prohibition.

Certain sales of goods are prohibited by statute¹. A prohibition may extend to render the contract of sale itself illegal², it may affect either the offer to supply, an agreement to supply or exposure for supply or even the mere possession for the purpose of supply³, or it may be confined to the performance of the contract, that is to say, the sale itself⁴. The imposition of a penalty for a particular act does not necessarily imply a prohibition of that act⁵.

1 As to contracts of sale of goods otherwise affected by legislation see PARA 17 et seq ante; and as to prohibited contracts generally see CONTRACT vol 9(1) (Reissue) PARAS 867-868.

2 See eg *Commercial Air Hire Ltd v Wrightways Ltd* [1938] 1 All ER 89 (sale of aircraft modified in breach of regulations; contract illegal), followed in *Vinall v Howard* [1953] 2 All ER 515, [1953] 1 WLR 987 (sale of motor vehicle not complying with regulations); revsd on another ground [1954] 1 QB 375, [1954] 1 All ER 458, CA. The effect of the reasoning in these two cases is reversed as to the sale of motor vehicles by the Road Traffic Act 1988 s 75(7): see PARA 810 post; and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 694.

3 As eg under the Consumer Protection Act 1987 s 10(1): see PARA 533 post.

4 See eg *Marles v Philip Trant & Sons Ltd (Mackinnon, third party)* [1953] 1 All ER 645; on appeal [1954] 1 QB 29, [1953] 1 All ER 651, CA (statutory particulars required on sale of seeds; performance of contract only

prohibited). However, as to sale of seeds see now the Plant Varieties and Seeds Act 1964 s 17; and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARAS 906, 908. See further CONTRACT vol 9(1) (Reissue) PARA 867 et seq.

5 See eg *Johnson v Hudson* (1809) 11 East 180 (sale of tobacco in breach of revenue regulations). See also CONTRACT vol 9(1) (Reissue) PARAS 867-868.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(7) PROHIBITED SALES/50. Goods falsely or insufficiently described.

50. Goods falsely or insufficiently described.

Any person who, in the course of a trade or business, applies a false trade description to any goods or supplies or offers to supply any goods to which a false trade description is applied is guilty of an offence¹. The seller may also render himself liable in an action for infringement of copyright², design right³, a patent⁴, a registered design⁵ or a registered trade mark⁶, or in a passing-off action⁷.

The sale of fireworks unless marked with the maker's name or the address of his factory is forbidden⁸.

Intoxicating liquor may be sold only in prescribed measures⁹.

1 See the Trade Descriptions Act 1968 s 1(1); and PARA 475 post.

2 As to infringement of copyright see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 311 et seq.

3 As to infringement of design right see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 526 et seq.

4 As to infringement of patents see PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 521 et seq.

5 As to infringement of registered designs see PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 762 et seq.

6 As to infringement of registered trade marks see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 84 et seq.

7 As to passing-off actions see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 416 et seq.

8 See the Fireworks Act 1951 s 6 (as amended); and EXPLOSIVES vol 17(2) (Reissue) PARA 980. See also PARA 20 ante.

9 In accordance with measures prescribed by the Weights and Measures (Intoxicating Liquor) Order 1988, SI 1988/2039 (as amended); see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 160 et seq.

UPDATE

50 Goods falsely or insufficiently described

NOTE 1--Trade Descriptions Act 1968 s 1 repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(7) PROHIBITED SALES/51. Sales to or by persons under age.

51. Sales to or by persons under age.

Apart from the general law relating to sales to minors¹, there are statutory prohibitions on:

- 71 (1) sales of intoxicating liquor to a person under 18 years of age²;
- 72 (2) sales of tobacco or cigarette papers to a person under 16 years of age³;
- 73 (3) sales of firearms or ammunition to a person under 17 years of age⁴;
- 74 (4) sales of explosives to a person apparently under 16 years of age⁵;
- 75 (5) sales of pets to a child under 12 years of age⁶;
- 76 (6) supplies of a video recording to any person who has not attained the age specified in a classification certificate for the video recording⁷;
- 77 (7) the supply of certain fireworks and assemblies to persons under the age of 18 years⁸;
- 78 (8) the sale of a National Lottery ticket by or to a person who has not attained the age of 16 years⁹;
- 79 (9) the purchase of old metal from persons apparently under the age of 16 by certain dealers¹⁰;
- 80 (10) the sale of certain publications harmful to children or young persons¹¹;
- 81 (11) the sale of aerosol paint to children under the age of 16¹².

1 See PARA 37 ante; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq.

2 See the Licensing Act 1964 s 168 (as amended), ss 169A-169H (as added and amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 143. The Licensing Act 1964 is repealed by the Licensing Act 2003 s 99, Sch 7, as from a day to be appointed. At the date at which this volume states the law, no such day had been appointed. See *Haringey London Borough Council v Marks & Spencer plc*; *Liverpool City Council v Somerfield Stores plc* [2004] EWHC 1141 (Admin), [2004] 3 All ER 868, DC; and LICENSING AND GAMBLING.

3 See the Children and Young Persons Act 1933 s 7(1) (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 634.

4 See the Firearms Act 1968 s 24(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 668.

5 See the Explosives Act 1875 ss 31 (as amended), 39; para 801 post; and EXPLOSIVES vol 17(2) (Reissue) PARA 974. The Explosives Act 1875 s 31 (as amended) is repealed by the Fireworks Act 2003 s 15, Schedule, as from a day to be appointed. At the date at which this volume states the law, no such day had been appointed.

6 See the Pet Animals Act 1951 s 3; and ANIMALS vol 2 (2008) PARA 936.

7 See the Video Recordings Act 1984 s 11(1); para 893 post; and LICENSING AND GAMBLING vol 67 (2008) PARA 286.

8 See the Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 6 (amended by SI 2004/1372); and PARA 608 post.

9 See the National Lottery Regulations 1994, SI 1994/189, reg 3; and LICENSING AND GAMBLING vol 68 (2008) PARA 709.

10 See the Scrap Metal Dealers Act 1964 s 5(1) (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 630.

11 See the Children and Young Persons (Harmful Publications) Act 1955 ss 1, 2 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 623.

12 See the Anti-social Behaviour Act 2003 s 54; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 617; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 345.

UPDATE

51 Sales to or by persons under age

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--Day now appointed. SI 2005/3056.

TEXT AND NOTE 3--For '16' read '18': 1933 Act s 7(1) (amended by the Children and Young Persons (Sale of Tobacco etc) Order 2007, SI 2007/767.

TEXT AND NOTE 4--1968 Act s 24(1) substituted: Violent Crime Reduction Act 2006 s 33(4) (in force 1 October 2007: SI 2007/2180).

See further 1968 Act s 24A (added by 2006 Act s 40(1)) (supplying imitation firearms to minors); and CRIMINAL LAW, EVIDENCE AND PROCEDURE.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(7) PROHIBITED SALES/52. Sales without necessary licences or other authority.

52. Sales without necessary licences or other authority.

Licences, certificates and similar authorisations are required by statute to be held by the seller or buyer in various cases¹, and, if they are not so held, the sale is, in general, prohibited². Thus, licences are required for the sale of intoxicating liquor³, game⁴, live or dead wild birds and their eggs⁵, and methylated spirits⁶. Similarly, no person may keep or use radioactive material on any premises unless either he is registered in respect of those premises or is exempted from registration⁷. Poisons may, in general, be sold only by authorised sellers⁸; and medicines may be sold by retail only by authorised persons⁹. Ammunition and firearms may not in general be sold except to the holder of a firearm certificate¹⁰.

Producers of products subject to agricultural marketing schemes¹¹ who are not registered or exempt from registration may not sell the regulated products¹².

In addition, the importation of goods into the United Kingdom and the exportation of goods from the United Kingdom, are subject to prohibitions and restrictions¹³.

1 As to excise licences to carry on a trade or business see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 622 et seq.

2 As to the effect of the imposition of a penalty for a particular act see PARA 49 text and note 5 ante. See also CONTRACT vol 9(1) (Reissue) PARAS 867-868.

3 As to the licensing system in relation to intoxicating liquor generally see LICENSING AND GAMBLING vol 67 (2008) PARA 26 et seq.

4 See the Game Act 1831; the Game Licences Act 1860; ANIMALS vol 2 (2008) PARA 816; and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 856.

5 See the Wildlife and Countryside Act 1981 ss 6, 16 (as amended); and ANIMALS vol 2 (2008) PARAS 1006-1007.

6 See the Alcoholic Liquor Duties Act 1979 s 75 (as amended); CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 506; and TRADE AND INDUSTRY vol 97 (2010) PARA 832.

7 See the Radioactive Substances Act 1993 ss 6, 7 (as amended); and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARAS 1439-1444.

8 See the Poisons Act 1972 ss 3-6 (as amended); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 293 et seq.

9 See the Medicines Act 1968 Pt II (ss 6-50) (as amended), Pt III (ss 51-68) (as amended); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 44 et seq, 133 et seq.

10 See the Firearms Act 1968 s 3(1), (2); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARAS 636-637.

11 See PARA 21 ante; and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1082 et seq.

12 See the Agricultural Marketing Act 1958 s 6(1) (repealed in relation to milk and potatoes); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1084. See also PARA 21 ante.

13 As to such prohibitions and restrictions see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 950 et seq, 999 et seq; and TRADE AND INDUSTRY vol 97 (2010) PARA 808 et seq. Goods imported without the necessary licence are liable to forfeiture: see the Import, Export and Customs Powers (Defence) Act 1939 s 3 (as amended) (see TRADE AND INDUSTRY vol 97 (2010) PARA 810); and the Customs and Excise Management Act 1979 s 49 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 993). Cf *Customs and Excise Comrs v Hebbson Ltd*, *Customs and Excise Comrs v DS Blaiber & Co Ltd* [1953] 2 Lloyd's Rep 382. The importation of certain goods, such as indecent or obscene books and prints (see the Customs Consolidation Act 1876 s 42 (as amended)), publications harmful to children (see the Children and Young Persons (Harmful Publications) Act 1955 s 4; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 623) and foreign prison-made goods, other than goods in transit or not imported for the purposes of trade, or a description not manufactured in the United Kingdom or originating or in free circulation in another member state (see the Foreign Prison-made Goods Act 1897 s 1 (as amended); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 998), is absolutely prohibited.

UPDATE

52 Sales without necessary licences or other authority

NOTE 4--1860 Act repealed: Regulatory Reform (Game) Order 2007, SI 2007/2007.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(7) PROHIBITED SALES/53. Sales outside particular seasons, times or places.

53. Sales outside particular seasons, times or places.

Sales outside certain seasons are prohibited in the case of salmon, trout, freshwater fish¹, oysters, crabs and lobsters², game³, and hares⁴. There is power to prohibit the landing of sea fish in certain areas during certain seasons⁵. Intoxicating liquor may not normally be sold outside permitted hours⁶. There are no restrictions on sales in shops on weekdays⁷; and trading on Sundays is restricted only in the case of large shops⁸. Certain sales of animals as pets in public places are forbidden⁹.

1 See AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 876.

2 See AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARAS 1044-1047.

3 See the Game Act 1831 s 4 (as amended); and ANIMALS vol 2 (2008) PARA 805.

4 See the Hares Preservation Act 1892 ss 2-4 (as amended); and ANIMALS vol 2 (2008) PARA 806.

5 See AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 990.

6 See the Licensing Act 1964 s 59(1) (repealed by the Licensing Act 2003 s 199, Sch 7 as from a day to be appointed); and LICENSING AND GAMBLING vol 67 (2008) PARA 26 et seq.

7 Shop opening hours were formerly restricted by the Shops Act 1950 Pt I (ss 1-16) (as amended) (see TRADE AND INDUSTRY vol 97 (2010) PARA 907 et seq); but those restrictions were removed by the Deregulation and Contracting Out Act 1994 ss 23, 81(1), (2), Sch 17 (s 23 now repealed).

8 Trading on Sunday was formerly severely restricted by the provisions of the Shops Act 1950 Pt IV (ss 47-67) (as amended); but those restrictions were repealed by the Sunday Trading Act 1994 ss 1(2), 9(2), Sch 5. As to Sunday trading generally see TRADE AND INDUSTRY vol 97 (2010) PARA 908 et seq.

9 See the Pet Animals Act 1951 s 2 (as amended); and ANIMALS vol 2 (2008) PARA 936.

UPDATE

53 Sales outside particular seasons, times or places

NOTE 3--As to the penalty for the sale of birds of game, see the 1831 Act s 3A (added by the Regulatory Reform (Game) Order 2007, SI 2007/2007). 1831 Act s 4 repealed: Regulatory Reform (Game) Order 2007, SI 2007/2007.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/ (8) PERISHING OF SPECIFIC GOODS/54. Before the contract.

(8) PERISHING OF SPECIFIC GOODS

54. Before the contract.

Where there is a contract for the sale¹ of specific goods and the goods² without the knowledge of the seller³ have perished⁴ at the time when the contract is made, the contract is void⁵. Unless the context or subject matter otherwise requires, 'specific goods'⁶ means goods identified and agreed on at the time a contract of sale is made and includes an undivided share, specified as a fraction or percentage, of goods so identified and agreed on⁷.

1 As by its definition 'contract of sale' includes both a sale and an agreement to sell (see PARA 29 ante), the Sale of Goods Act 1979 s 6 applies whether the contract purports to be the one or the other. However s 7 (see PARA 55 post) applies only to agreements to sell. As to sales and agreements to sell see PARAS 27-28 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'seller' see PARA 27 ante.

4 Goods may have perished when they are so damaged as no longer to answer to the description under which they have been sold: see *Barr v Gibson* (1838) 3 M & W 390 (stranded ship); *Asfar & Co v Blundell* [1896] 1 QB 123, CA (dates contaminated with sewage); *Palace Shipping Co v Spillers and Bakers Ltd* (1908) Times, 18 May (wheat submerged, but good as cattle food); *Montreal Light, Heat and Power Co v Sedgwick* [1910] AC 598, PC (cement turned by water into stone). Cf *Horn v Minister of Food* [1948] 2 All ER 1036 (potatoes deteriorated but not perished). See also *Dakin v Oxley* (1864) 15 CBNS 646 per curiam; and note the analogy of cases as to total loss cited in INSURANCE vol 25 (2003 Reissue) PARAS 458-465.

5 Sale of Goods Act 1979 s 6. See *Couturier v Hastie* (1856) 5 HL Cas 673 (cargo of corn sold while at sea); *Smith v Myers* (1871) LR 7 QB 139, Ex Ch (cargo expected to arrive by particular ship); *Scott v Coulson* [1903] 2 Ch 249, CA (sale of life policy after death of assured). Cf *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 (sale of non-existent tanker; seller liable on implied warranty that goods existed). The provision applies only to specific goods, but extends to cases where only part of the specific goods have perished: *Barrow, Lane and Ballard Ltd v Phillip Phillips & Co Ltd* [1929] 1 KB 574.

6 Specific goods must be distinguished from unascertained or generic goods, ie goods defined only by description. It follows from the statutory definition (see text and note 7 infra) that under a contract for the sale of specific goods the seller does not fulfil his contract by delivering any goods other than those agreed upon. Under a contract for the sale of generic goods the seller may deliver any goods which answer to the description.

In borderline cases it is not always easy to distinguish between specific and unascertained or generic goods: see *Re Wait* [1927] 1 Ch 606, CA.

7 Sale of Goods Act 1979 s 61(1) (amended by the Sale of Goods (Amendment) Act 1995 s 2(d)). In *Howell v Coupland* (1876) 1 QBD 258, CA, there was a contract for the sale of 200 tons of potatoes from a crop to be grown on the land of the seller and, on failure of the crop, the seller was excused performance. Such contracts for the sale of future goods do not fall under the Sale of Goods Act 1979 s 6 or s 7 (see PARA 55 post), but under the general common law doctrine of impossibility of performance, which is preserved by s 62(2) (see PARA 9 ante), or under s 5(2) (see PARA 47 ante): see *Re Wait* [1927] 1 Ch 606 at 631, CA, per Atkin LJ; *HR and S Sainsbury Ltd v Street* [1972] 3 All ER 1127, [1972] 1 WLR 834. Cf *Barrow, Lane and Ballard Ltd v Phillip Phillips & Co Ltd* [1929] 1 KB 574 at 583 per Wright J. For the meaning of 'future goods' see PARA 47 ante. See also *Lord Eldon v Hedley Bros* [1935] 2 KB 1, CA (where a sale of a stack of hay, with only hay clear of mould to be delivered, was held to be a sale of specific goods).

Whether or not such contracts fall within the Sale of Goods Act 1979 ss 6, 7 is relevant to the Law Reform (Frustrated Contracts) Act 1943, which provides for adjustments on frustration and expressly excludes from its operation contracts within the Sale of Goods Act 1979 s 7 and certain other contracts for the sale of specific goods: see the Law Reform (Frustrated Contracts) Act 1943 s 2(5)(c) (as amended); para 55 text and notes 10-13 post; and CONTRACT vol 9(1) (Reissue) PARAS 909-919.

If the seller knows that the goods have perished, then, by implication from the terms of the Sale of Goods Act 1979 s 6 and according to general principles (see *Smith v Hughes* (1871) LR 6 QB 597, DC), the seller but not the buyer will be estopped from asserting that no contract exists. For the meaning of 'buyer' see PARA 29 ante.

Where, however, the Sale of Goods Act 1979 s 6 applies, the contract is void from the outset and the price, if paid, may be recovered. It is money paid under a mistake of fact, for the contract is founded on mutual mistake: *Strickland v Turner (Executrix of Lane)* (1852) 7 Exch 208 (sale of annuity). See generally CONTRACT vol 9(1) (Reissue) PARA 894; MISTAKE vol 32 (2005 Reissue) PARA 67 et seq.

UPDATE

54-55 Perishing of Specific Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/ (8) PERISHING OF SPECIFIC GOODS/55. After the contract.

55. After the contract.

Where there is an agreement to sell¹ specific goods² and subsequently the goods³, without any fault⁴ on the part of the seller⁵ or buyer⁶ perish⁷ before the risk⁸ passes to the buyer, the agreement is avoided⁹. The Law Reform (Frustrated Contracts) Act 1943¹⁰, which provides for adjustments between the parties on the frustration of contracts, does not apply to contracts within this provision¹¹ or to other contracts for the sale, or for the sale and delivery, of specific goods¹², where the contract is frustrated by reason of the fact that the goods have perished¹³.

1 For the meaning of 'agreement to sell' see PARA 27 ante. See also PARA 28 ante.

2 For the meaning of 'specific goods' see PARA 54 ante.

3 For the meaning of 'goods' see PARA 30 ante.

4 For the meaning of 'fault' for these purposes see PARA 148 note 2 post. Where either party is at fault, he is liable, if the seller, for non-delivery, and, if the buyer, he must pay for the goods, although they are not delivered: see PARAS 207 et seq, 292 et seq post.

5 For the meaning of 'seller' see PARA 27 ante.

6 For the meaning of 'buyer' see PARA 29 ante.

7 As to the meaning of 'perish' see PARA 54 note 4 ante. If a portion of a specific bulk remains undestroyed, it will depend on the true construction of the contract and the circumstances of the case whether the contract is wholly discharged or whether the seller must deliver or the buyer take as much as he can: see *Lovatt v Hamilton* (1839) 5 M & W 639 (goods to arrive); *Barrow, Lane and Ballard Ltd v Phillip Phillips & Co Ltd* [1929] 1 KB 574 (buyer not compelled to take the goods which did not perish); *HR and S Sainsbury Ltd v Street* [1972] 3 All ER 1127, [1972] 1 WLR 834 (where only a part of the goods (ie a crop of feed barley) which were the subject of the contract came into existence and it was held that the seller was not excused from delivering that lesser quantity if the buyer was willing to take it).

8 As to the passing of the risk see the Sale of Goods Act 1979 s 20; and PARAS 142, 148 post. If the contract were a sale (see PARA 27 ante), the risk from the outset would prima facie attach to the buyer. Some complicated questions may arise under s 7, and under s 20, where either party by his fault delays delivery. As to the case where the buyer is liable, and the goods perish before the price is fixed see PARAS 56, 214 post.

9 Ibid s 7. Section 7 is a specific application of the general rule as to impossibility of performance, and deals with cases where the contract is not void from the outset, as under s 6 (see PARA 54 ante), but where performance is on either side excused as from the time of the perishing of the goods. The specific provisions of ss 6, 7 are not exhaustive of the doctrine of frustration in relation to the sale of goods, the common law doctrine being preserved by s 62(2): see PARA 9 ante; and *Re Wait* [1927] 1 Ch 606 at 631, CA, per Atkin LJ. See also *Re Badische Co Ltd* [1921] 2 Ch 331 (contract for the sale of unascertained goods frustrated). See further *Rugg v Minett* (1809) 11 East 210 (goods consumed by fire before property passed) (as explained by *Taylor v Caldwell* (1863) 3 B & S 826); *Howell v Coupland* (1874) LR 9 QB 462 (cited in PARA 54 note 7 ante); cf *Hayward Bros Ltd v James Daniel & Sons* (1904) 91 LT 319 (crops not identified as the produce of particular land); *Elphick v Barnes* (1880) 5 CPD 321 (death of horse delivered within time limited for sale or return); *Chapman v Withers* (1888) 20 QBD 824 (injury to horse preventing return within stipulated time). See also *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311. As to impossibility of performance generally see CONTRACT vol 9(1) (Reissue) PARA 897 et seq.

10 As to the effect of subsequent impossibility or frustration see CONTRACT vol 9(1) (Reissue) PARA 909 et seq.

11 Ie the Sale of Goods Act 1979 s 7: see the text and notes 1-9 supra.

12 Such other contracts presumably include sales (as contrasted with agreements to sell, with which ibid s 7 is alone concerned) where it is agreed that the risk does not pass with the property, and possibly also agreements for the sale of goods, originally unascertained, which are subsequently appropriated to the contract before the risk passes. They can scarcely include contracts where the risk has passed before the goods perish since the doctrine of frustration cannot apply in such cases in any event.

13 Law Reform (Frustrated Contracts) Act 1943 s 2(5)(c) (amended by the Sale of Goods Act 1979 s 63(1), Sch 2 para 2). Since the buyer could, at common law, recover any money which he had paid where the goods perished before the property passed (see *Rugg v Minett* (1809) 11 East 210; *Taylor v Caldwell* (1863) 3 B & S 826), the practical effect of the exclusion of the Law Reform (Frustrated Contracts) Act 1943 is merely that the seller cannot retain or recover expenses from the buyer under s 1(2) and neither party can recover payment for valuable benefits under s 1(3). Apart from these exceptions, the Law Reform (Frustrated Contracts) Act 1943 applies to contracts for the sale of goods which have been frustrated (eg to contracts for the sale of specific goods frustrated otherwise than by the perishing of the goods or contracts for the sale of unascertained goods which have been frustrated) as it does to contracts in general which have been frustrated: see s 1(1); and CONTRACT vol 9(1) (Reissue) PARAS 909-919.

UPDATE

54-55 Perishing of Specific Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

(9) THE PRICE

56. How the price is fixed.

The price¹ in a contract of sale² may be fixed by the contract or may be left to be fixed in a manner agreed by the contract, as, for example, by the valuation of a third person³, or may be determined by the course of dealing between the parties⁴. Where the price is not determined in any of these ways, the buyer⁵ must pay a reasonable price⁶. What is a reasonable price is a question of fact dependent on the circumstances of each particular case⁷.

1 The price is an essential element of a contract of sale: see PARA 29 ante. As to misleading price indications see PARA 702 et seq post.

2 For the meaning of 'contract of sale' see PARA 29 ante.

3 *Smith v Peters* (1875) LR 20 Eq 511. See also *Cannan v Fowler* (1853) 14 CB 181. There may be a valuation if it only remains to calculate the price mathematically: see *Gordon v Whitehouse* (1856) 18 CB 747. See further PARA 60 post.

4 Sale of Goods Act 1979 s 8(1); *Valpy v Gibson* (1847) 4 CB 837 at 864; *Joyce v Swann* (1864) 17 CBNS 84 at 93. See also *Churchill v Wilkins* (1786) 1 Term Rep 447; *Smith v Blandy* (1825) Ry & M 257 at 260 (buyer to pay customs duty; discount deductible only on net price); *Cannan v Fowler* (1853) 14 CB 181 (interpretation of 'fair value' by previous valuation); *Orchard v Simpson* (1857) 2 CBNS 299; *Birchgrove Steel Co Ltd v Shaws Brow Iron Co* (1891) 7 TLR 246, HL (average of weekly official prices); *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 934, CA, per Farwell LJ and Kennedy LJ ('net cash'; no deduction by rebate or otherwise and no credit); *Charrington & Co Ltd v Wooder* [1914] AC 71, HL; *Harrower Welsh & Co v M'William & Sons* 1928 SC 326, Ct of Sess. As to a course of dealing see *Re Marquis of Anglesey*, *Willmot v Gardner* [1901] 2 Ch 548, CA (agreement to pay interest implied from a course of dealing). See also *Brown v Byrne* (1854) 3 E & B 703 (freight subject by usage to discount); *Amos and Wood Ltd v Kaprow* (1948) 64 TLR 110, CA (full price payable when time for discount elapsed). Where the price is left to be agreed, the contract may be held void for uncertainty: *May and Butcher Ltd v R* [1934] 2 KB 17n, HL. Cf, however, *Foley v Classique Coaches Ltd* [1934] 2 KB 1, CA. See further CONTRACT vol 9(1) (Reissue) PARA 672; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 851 et seq.

5 For the meaning of 'buyer' see PARA 29 ante.

6 Sale of Goods Act 1979 s 8(2); *Mack and Edwards (Sales) Ltd v McPhail Bros (a firm)* (1968) 112 Sol Jo 211, CA (goods delivered and used notwithstanding disagreement as to price). See also *Alstom Signalling Ltd (t/a Alstom Transport Information Solutions) v Jarvis Facilities Ltd* [2004] EWHC 1232 (TCC), [2004] All ER (D) 02 (Jun).

7 Sale of Goods Act 1979 s 8(3). See *Clunnes v Pezzey* (1807) 1 Camp 8; *Laing v Fidgeon* (1815) 6 Taunt 108 (order for goods at '24s to 26s'; reasonable price about those figures); *Acebal v Levy* (1834) 10 Bing 376 (executed contract); *Hoadly v M'Laine* (1834) 10 Bing 482 (executory contract); *Valpy v Gibson* (1847) 4 CB 837 at 864. The current or market price is not necessarily the measure of reasonable price: *Acebal v Levy* supra at 383 per Tindal CJ; *Glynwed Distribution Ltd v S Koronka & Co* 1977 SLT 65, Ct of Sess.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(9) THE PRICE/57. Price dependent on weighing etc.

57. Price dependent on weighing etc.

Where the ascertainment of the price depends on the goods being weighed, tested or counted, or on some other act or thing being done to or in relation to them, and such act has become impossible by the perishing¹ of the goods, the buyer, if liable to pay the price, must pay a sum reasonably estimated².

1 As to the meaning of 'perish' see PARA 54 note 4 ante.

2 This may perhaps be regarded as an extension of the doctrine of reasonable price. See *Martineau v Kitching* (1872) LR 7 QB 436 at 456 per Blackburn J (weighing on delivery); *Castle v Playford* (1872) LR 7 Exch 98, Ex Ch (weighing on arrival). As to the perishing of specific goods see PARAS 54-55 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(9) THE PRICE/58. Price involving wager.

58. Price involving wager.

If the ascertainment of the price involves a wager, as, for example, where there is an alternative price in the nature of a bet, the contract is void as being a gaming contract¹.

1 *Brogden v Marriott* (1836) 3 Bing NC 88. Cf *Cave v Coleman* (1828) 3 Man & Ry KB 2. See LICENSING AND GAMBLING VOL 67 (2008) PARAS 319-323.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(9) THE PRICE/59. Adjustment of contracts on changes in customs or excise duties or value added tax.

59. Adjustment of contracts on changes in customs or excise duties or value added tax.

Whoever may be liable and on whatever event for the payment of customs¹ or excise² duty or VAT³, the amount of the duty is usually passed on to the buyer as part of the price⁴.

It is the responsibility of the seller to quote an inclusive price if he wishes, and, if he fails to do so, he cannot later recover the duty payable as an addition to the contract price⁵. Where, however, any new customs or excise duty is imposed, or where any customs or excise duty is increased, and any goods in respect of which the duty is payable are delivered after the day on which the new or increased duty takes effect in pursuance of a contract made before that day, the seller of the goods may, in the absence of agreement to the contrary⁶, recover, as an addition to the contract price, a sum equal to any amount paid by him in respect of the goods on account of the new duty or the increase of duty, as the case may be⁷. Where any customs or excise duty is repealed or decreased, and any goods affected by the duty are delivered after the day on which the duty ceases or the decrease in the duty takes effect in pursuance of a contract made before that day, the purchaser of the goods, in the absence of agreement to the contrary, may, if the seller of the goods has had in respect of those goods the benefit of the repeal or decrease of the duty, deduct from the contract price a sum equal to the amount of the duty or decrease of duty, as the case may be⁸. Where any addition to, or deduction from, the contract price may be made under the above provisions⁹ on account of any new or repealed duty, such sum as may be agreed on or, in default of agreement, determined by the Commissioners for Her Majesty's Revenue and Customs¹⁰, as representing, in the case of a new duty, any new expenses incurred and, in the case of a repealed duty, any expenses saved may be included in the addition to or deduction from the contract price and may be recovered or deducted accordingly¹¹.

Where, after the making of a contract for the supply¹² of goods or services and before the goods or services are supplied, there is a change in the VAT charged on the supply¹³, then, unless the

contract otherwise provided, there must be added to or deducted from the consideration¹⁴ for the supply an amount equal to the change¹⁵.

1 As to customs duties see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 1 et seq.

2 As to excise duties see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 389 et seq.

3 As to value added tax see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 1 et seq.

4 See *Love v Norman Wright (Builders) Ltd* [1944] KB 484 at 490, [1944] 1 All ER 618 at 620, CA, per Goddard LJ. As to payment of import and export duties in international sale contracts see PARAS 341, 358 post.

5 *Love v Norman Wright (Builders) Ltd* [1944] KB 484, [1944] 1 All ER 618, CA.

6 Eg where the original contract does not include the duty: see *Love v Norman Wright (Builders) Ltd* [1944] KB 484 at 490, [1944] 1 All ER 618 at 620, CA, per Goddard LJ. See also *Lanificio di Manerbio SA v I and R Gold* (1932) 76 Sol Jo 289; cf *Corn Products Co Ltd v Fry & Sons* [1917] WN 224; *American Commerce Co Ltd v Frederick Boehm Ltd* (1919) 35 TLR 224; *Occidental Crude Sales Inc v Latsis* [1976] 2 Lloyd's Rep 412.

7 Finance Act 1901 s 10(1) (amended by the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 12, Table Pt I). The Finance Act 1901 s 10 (as amended) applies even though the goods have undergone a process of manufacture or preparation, or have become a part or ingredient of other goods: Finance Act 1902 s 7. See *Conway Bros and Savage v Mulhern & Co Ltd* (1901) 17 TLR 730; *Newbridge Rhondda Brewery Co v Evans* (1902) 86 LT 453, DC.

8 Finance Act 1901 s 10(2) (amended by the Customs and Excise Management Act 1979 Sch 4 para 12, Table Pt I).

9 Ie under the Finance Act 1901 s 10 (as amended).

10 Note that the Inland Revenue and Her Majesty's Customs and Excise have merged to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005.

11 Finance Act 1901 s 10(3) (amended by the Statute Law (Repeals) Act 1989 s 1(1), Sch 1 Pt II); Commissioners for Revenue and Customs Act 2005 s 50.

12 For the meaning of 'supply' see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 27.

13 For these purposes, references to a change in the VAT charged on a supply include references to a change to or from no VAT being charged on the supply (including a change attributable to the making of an election to waive exemption under the Value Added Tax Act 1994 s 51(1), Sch 10 para 2 (as amended) (see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 157): s 89(3). See *Jaymarke Development Ltd v Elinacre Ltd (in liquidation)* [1992] STC 575, Ct of Sess (contract for sale and purchase of parcel of land for a price which, the contract stated, was 'deemed to be inclusive of VAT'; the vendors did not elect to waive exemption, in consequence of which the sale was an exempt supply of land; it was held that the purchasers were not entitled to claim to recover an amount of the price equal to the VAT which would have been charged, had the election to waive exemption been made); *BJ Rice & Associates v Customs and Excise Comrs* [1996] STC 581, CA (where Staughton LJ indicated that it was open to question whether the Value Added Tax Act 1994 s 89 was applicable in a case where, between the time of the contract and the time of supply, the supplier became registered for VAT).

14 For the meaning of 'consideration' generally see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 95.

15 Value Added Tax Act 1994 s 89(1). Section 89(1) applies in relation to a tenancy or lease as it applies in relation to a contract, except that a term of a tenancy or lease is not to be taken to provide that the rule contained in s 89(1) is not to apply in the case of the tenancy or lease if the term does not specifically refer to VAT or s 89: s 89(2).

UPDATE

59 Adjustment of contracts on changes in customs or excise duties or value added tax

TEXT AND NOTES 1-11--The Finance Act 1901 s 10 applies whether the goods have undergone a process of manufacture or preparation, or have become a part or ingredient of other goods: Finance Act 1901 s 10(3A) (added by Statute Law (Repeals) Act 2008).

NOTE 7--Finance Act 1902 repealed: Statute Law (Repeals) Act 2008.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(9) THE PRICE/60. Valuer's failure to act.

60. Valuer's failure to act.

Where there is an agreement to sell¹ goods² on the terms that the price is to be fixed by the valuation of a third person³, and he cannot or does not make the valuation, the agreement is avoided⁴; but, if the goods or any part of them have been delivered⁵ to and appropriated by the buyer⁶, he must pay a reasonable price for them⁷.

Where, however, on its proper construction the agreement is one to sell at a fair and reasonable price, and the provision for a valuation is merely convenient machinery for ascertaining the price, the contract will not fail for want of a valuation⁸.

1 For the meaning of 'agreement to sell' see PARA 27 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 As to the price being fixed by valuation see PARA 56 note 3 ante.

4 See *Thurnell v Balbirnie* (1837) 2 M & W 786 (action for non-acceptance). Cf SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 833. See also *Re Nudgee Bakery Pty Ltd's Agreement* [1971] Qd R 24 (where there was an agreement to buy for five years at prices fixed by X from time to time but X ceased to fix prices after one year, and it was held that the agreement was suspended). The valuation cannot be delegated: *Ess v Truscott* (1837) 2 M & W 385. See further VALUERS AND SURVEYORS vol 49(1) (Reissue) PARA 401 et seq. Valuation is to be distinguished from arbitration, which is in the nature of a judicial proceeding to decide an existing dispute: *Bos v Helsham* (1866) LR 2 Exch 72; *Re Carus-Wilson and Greene* (1886) 18 QBD 7, CA. Even where a question of fixing of the price is involved, there may be an arbitration, as distinguished from a mere valuation, as where different prices are offered by two parties and a third person is to decide: *Thomson v Anderson* (1870) LR 9 Eq 523. A valuation may be included in the term 'arbitration' as used in a particular statute: *Stewart v Williamson* [1910] AC 455, HL. It is thought that the agreement is avoided, not from the time of the failure of the valuation, but from the outset, so that the buyer, if not at fault, could recover any sum paid as a deposit. For the meaning of 'buyer' see PARA 29 ante; and for the meaning of 'fault' see PARA 55 note 4 ante.

5 For the meaning of 'delivery' see PARAS 27 note 6 ante, 163 post.

6 For the meaning of 'buyer' see PARA 29 ante.

7 Sale of Goods Act 1979 s 9(1); *Clarke v Westrope* (1856) 18 CB 765.

8 *Sudbrooke Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL, overruling *Vickers v Vickers* (1867) LR 4 Eq 529.

UPDATE

60-61 Valuer's failure to act ... Valuation prevented by a party

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(9) THE PRICE/61. Valuation prevented by a party.

61. Valuation prevented by a party.

Where the third person is prevented from making the valuation by the fault¹ of the seller² or buyer³, the party not at fault may maintain an action⁴ for damages against the party at fault⁵; and, where the provision for a valuation is only machinery for ascertaining a fair and reasonable price, the party not at fault may apply to the court to determine the price⁶.

1 For the meaning of 'fault' see PARA 55 note 4 ante.

2 For the meaning of 'seller' see PARA 27 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 For the meaning of 'action' see PARA 14 ante.

5 Sale of Goods Act 1979 s 9(2). See *Thomas v Fredricks* (1847) 10 QB 775. The party at fault may be restrained by injunction from preventing the valuer from acting: *Smith v Peters* (1875) LR 20 Eq 511. 'Action for damages' seems to mean an action for preventing the valuation. Where a valuer is appointed, there is no promise implied on the part of the person making the appointment that the valuer will act: *Cooper v Shuttleworth* (1856) 25 LJ Ex 114. For a contract on the terms that, on either party's default, the other party's valuer should value alone see *Tew v Harris* (1847) 11 QB 7. It is an implied term that neither party will do anything unfair to secure an advantageous decision: *Essoldo Ltd v Ladbroke Group Ltd* (1976) 121 Sol Jo 83.

6 *Sudbrooke Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL, overruling *Vickers v Vickers* (1867) LR 4 Eq 529.

UPDATE

60-61 Valuer's failure to act ... Valuation prevented by a party

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(i) Construction and Effect of Conditions and Warranties/62. Stipulations and mere representations distinguished.

(10) CONDITIONS AND WARRANTIES

(i) Construction and Effect of Conditions and Warranties

62. Stipulations and mere representations distinguished.

It depends on the intention of the parties to a contract whether any statement made with reference to the goods is a stipulation¹ in the contract and so a term of it or whether the statement is an expression of opinion or other mere representation and does not form part of the contract². The intention of the parties is to be ascertained from their conduct³.

To form part of the contract the statement need not be made simultaneously with the conclusion of the bargain⁴; and the fact that the bargain is subsequently committed to writing does not necessarily prevent a previous oral statement not expressed in the written document from amounting to a stipulation⁵. Subject to the rules of evidence, the fundamental test is whether the parties contracted on the basis that the statement should form part of the contract⁶ or not⁷.

1 A stipulation is not necessarily a condition or a warranty. Many are of an intermediate type, the effect of which depends on the breach: see *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, [1975] 3 All ER 739, CA. For the meaning of 'warranty' see PARA 63 post; and as to the distinction between warranties, conditions and innominate or intermediate terms see PARA 64 post.

2 *Crosse v Gardner* (1688) Carth 90; *Medina v Stoughton* (1700) 1 Salk 210; *Pasley v Freeman* (1789) 3 Term Rep 51 (cited with approval in *Heilbut, Symons & Co v Buckleton* [1913] AC 30, HL). A statement may be both a representation and a term of the contract, in which case the right, if any, of the other party to rescind for misrepresentation is not lost just because the misrepresentation has become a term of the contract: see the Misrepresentation Act 1967 s 1; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 704, 784.

3 *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623, CA (where a representation as to the mileage of a secondhand car amounted to a warranty).

4 It is sufficient that the statement should be 'given during the course of the dealing which leads to the bargain and should then enter into the bargain as part of it': *De Lassalle v Guildford* [1901] 2 KB 215 at 221, CA. See also *Mew v Russel* (1683) 2 Show 284; *Lysney v Selby* (1705) 2 Ld Raym 1118; *Cowdy v Thomas* (1876) 36 LT 22. A representation made after the conclusion of the bargain can be no part of it, and new consideration is required to give it contractual force: *Roscorla v Thomas* (1842) 3 QB 234. Similarly, a representation made before the bargain is ineffectual, except as the basis of an action of deceit (*Wright v Crookes* (1840) 1 Scott NR 685, Ex Ch) unless it is shown that the bargain was grounded on it (*Hopkins v Tanqueray* (1854) 15 CB 130). Cf *Percival v Oldacre* (1865) 18 CBNS 398; *Malcolm v Cross* (1898) 35 SLR 794, Ct of Sess; *Schawel v Reade* (1912) 46 ILT 281, HL; *Heilbut, Symons & Co v Buckleton* [1913] AC 30, HL; *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA. See further PARA 63 post.

5 In such a case the oral statement is, however, not generally admissible to contradict the terms of the written document: see *Edward Lloyd Ltd v Sturgeon Falls Pulp Co Ltd* (1901) 85 LT 162; *T & J Harrison v Knowles and Foster* [1917] 2 KB 606 (affd [1918] 1 KB 608, CA); *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113. An oral stipulation may, however, override written conditions of sale: see *Couchman v Hill* [1947] KB 554, [1947] 1 All ER 103, CA; *Webster v Higgin* [1948] 2 All ER 127, CA; *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA. As to the avoidance of exclusion clauses see further PARAS 78, 100-101, 105 post; and CONTRACT vol 9(1) (Reissue) PARAS 801-802.

6 In determining whether a statement is a promise, whether by way of warranty or condition, it may be relevant to consider whether the seller asserts a fact of which the buyer is ignorant, or merely states his own opinion without special knowledge: *Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 50, HL, per Lord Moulton (explaining *De Lassalle v Guildford* [1901] 2 KB 215, CA and the dictum in *Cave v Coleman* (1828) 3 Man & Ry KB 2). See also *Gee v Lucas* (1867) 16 LT 357; *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, CA; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623, CA (cited in note 3 supra). Statements in writing, alleged to be promises, may, by the terms of the writing, be shown not to be such: *Taylor v Bullen* (1850) 5 Exch 779. See also the cases dealing with statements concerning the condition of horses cited in note 7 infra.

7 As to the distinction between contractual terms and mere representations generally see CONTRACT vol 9(1) (Reissue) PARA 768. As to statements regarding pictures see *Jendwine v Slade* (1797) 2 Esp 572 (explained in *Power v Barham* (1836) 4 Ad & El 473 and *Gee v Lucas* (1867) 16 LT 357); *Lomi v Tucker* (1829) 4 C & P 15 ('a couple of Poussins'; condition of genuineness); *De Sewhanberg v Buchanan* (1832) 5 C & P 343 (question of warranty for jury); *Power v Barham* supra ('four pictures, Canaletto'; question for jury); *Hyslop v Shirlaw* (1905) 7 F 875, Ct of Sess ('received for two pictures by P and G'; facts show representation only). Cf *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693, CA. As to horses see *Geddes v Pennington* (1817) 5 Dow 159, HL (written warranty of soundness; verbal representation of place of origin of horse); *Richardson v Brown* (1823) 1 Bing 344 ('gelding driven in plough - warranted'; soundness only warranted); *Hort v Lord Newry* (1823) 1 LJOSKB 237 (description of horse intended to be reported to buyer); *Budd v Fairmaner* (1831) 8 Bing 48 ('grey four-year colt, warranted sound'; no warranty of age); *Hopkins v Tanqueray* (1854) 15 CB 130 (assurance of soundness on day before sale; mere representation); *Anthony v Halstead* (1877) 37 LT 433; *Schawel v Reade* (1912) 46 ILT 281, HL. As to motor vehicles see *Routledge v McKay* [1954] 1 All ER 855, [1954] 1 WLR 615, CA (statement by seller and entry in log book as to date of manufacture mere representations); *Andrews v Hopkinson* [1957] 1 QB 229, [1956] 3 All ER 422 (statement by seller of car: 'It's a good little bus. I would stake my life on it. You will have no trouble with it'; warranty). See also *Oscar Chess Ltd*

v Williams [1957] 1 All ER 325, [1957] 1 WLR 370, CA; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623, CA (cited in note 3 supra); and the other cases cited in PARA 63 note 6 post. As to other goods see *Button v Corder* (1817) 1 Moore CP 109; *Camac v Warriner* (1845) 1 CB 356 (materials described as 'roofing or flooring' ten months after sold as 'materials'; no warranty); *Stucley v Baily* (1862) 1 H & C 405 (condition of yacht; seller's opinion only); *Hopkins v Hitchcock* (1863) 14 CBNS 65 (iron 'S and H (crown) bars'; brand referring to quality, not manufacture); *Walker v Milner* (1866) 4 F & F 745 (safe; only a representation of future soundness); *Chalmers v Harding* (1868) 17 LT 571 ('Wood's patent reaper will work efficiently'; puff only of patent generally); *Osborn v Hart* (1871) 23 LT 851 ('Superior old port'; warranty, not puff); *Cowdy v Thomas* (1876) 36 LT 22 ('tubes of engine are copper'; warranty).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(i) Construction and Effect of Conditions and Warranties/63. Meaning of 'warranty'.

63. Meaning of 'warranty'.

'Warranty' means an agreement with reference to goods¹ which are the subject of a contract of sale², but collateral to the main purpose of such a contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated³. In order to satisfy the definition, therefore, a warranty must, first, be an agreement, a promise that the representation is or will be true⁴; and, secondly, the agreement must be collateral to the main purpose of the contract, such purpose being the transfer of the property in, and the possession of, goods of the description contracted for⁵. A warranty may be given in consideration of an agreement to enter into a contract of sale of the goods to which the warranty relates with a party other than the person giving the warranty⁶.

1 For the meaning of 'goods' see PARA 30 ante.

2 For the meaning of 'contract of sale' see PARA 29 ante.

3 Sale of Goods Act 1979 s 61(1). See *Chanter v Hopkins* (1838) 4 M & W 399 at 404; *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at 1012, CA, per Fletcher Moulton LJ (approved [1911] AC 394 at 396, 399, HL). A statutory definition of warranty was required because, before the Sale of Goods Act 1893 (repealed), the term had no settled meaning. Cf *Parker v Palmer* (1821) 4 B & Ald 387; *Behn v Burness* (1863) 3 B & S 751 at 755, Ex Ch; *Heyworth v Hutchinson* (1867) LR 2 QB 447 at 451. Much of the confusion arose from the fact that, where goods have been accepted by the buyer, terms which in their origin were conditions, the breach of which would entitle the buyer to reject the goods, must be treated, for remedial purposes, ex post facto as warranties, for the breach of which compensation may be sought in damages only: see the Sale of Goods Act 1979 s 11(4) (as amended) (see PARA 66 post) and s 53(1) (see PARA 307 post). For the meaning of 'buyer' see PARA 29 ante. See also *Graves v Legg* (1854) 9 Exch 709 at 717.

The Sale of Goods Act 1979 throughout contrasts the terms 'condition' and 'warranty' and further provides that a stipulation may be a condition, although called a warranty in the contract: see s 11(3); and PARA 64 post. See also CONTRACT vol 9(1) (Reissue) PARAS 993-995. Since the amendment of the Sale of Goods Act 1979 by the Sale and Supply of Goods Act 1994 the distinction between conditions and warranties has become more blurred, in that the Sale of Goods Act 1979 as so amended now contemplates a breach of condition which is so slight as to make it unreasonable for the buyer to reject the goods, in which case, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but as a breach of warranty: see s 15A (as added); and PARAS 73, 78, 80, 94 post. See also *Hi-Flyers Ltd v Linde Gas Ltd* [2004] EWHC 105 (QB), [2004] All ER (D) 321 (Jan). As to the meaning of 'dealing as consumer' see PARA 73 note 8 post. The Supply of Goods and Services Act 1982 s 5A (as added) (see PARAS 75, 84-85, 95 post) and s 10A (as added) (see PARAS 76, 89-90, 96 post) envisage similar types of breach in relation to contracts covered by that Act. As to the distinction between warranties, conditions and innominate or intermediate terms see further PARA 64 post.

4 *Behn v Burness* (1863) 3 B & S 751 at 755, Ex Ch; *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274, CA. It is, therefore, distinguished from mere representations, not intended to be promises: see *Heilbut, Symons & Co v Buckleton* [1913] AC 30, HL; *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, CA; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623, CA; and PARA 62 ante. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 774-780.

5 *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at 1012, CA, per Fletcher Moulton LJ; approved [1911] AC 394 at 396, 399, HL. The warranty is collateral because the breach of it, unlike the breach of a condition, is not the breach of the whole consideration moving from the party bound: *Wallis, Son and Wells v Pratt and Haynes* supra at 1011 per Vaughan Williams LJ. The question is one of construction: see the Sale of Goods Act 1979 s 11(3); and PARA 64 post. As to the distinction between dependent and independent agreements see CONTRACT vol 9(1) (Reissue) PARAS 966-967.

6 See *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854, [1951] 2 All ER 471 (agreement by A to procure C to buy paint from B, in return for B's warranty to A as to its quality); cf *Brown v Sheen and Richmond Car Sales Ltd* [1950] 1 All ER 1102 (warranty by B consideration for A's agreement to enter into a hire-purchase agreement with C); applied in *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd* [1965] 2 QB 170, [1964] 1 All ER 41. See also *Andrews v Hopkinson* [1957] 1 QB 229, [1956] 3 All ER 422; and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 23-24. The parties to the agreement may be the same as those to the contract: *Couchman v Hill* [1947] KB 554, [1947] 1 All ER 103, CA (offer of warranty by auctioneer accepted by bidding); *Webster v Higgin* [1948] 2 All ER 127, CA (offer of warranty accepted by signature to a hire-purchase agreement). Cf *Bannerman v White* (1861) 10 CBNS 844 (where a preliminary statement was held to render the contract conditional): see PARA 29 ante. It is questionable whether warranties and conditions equivalent to those contained in eg the Sale of Goods Act 1979 s 14 (as amended) (see PARA 77 et seq post) can be implied in a preliminary agreement of this kind, which is not itself a contract of sale: see *Drury v Victor Buckland Ltd* [1941] 1 All ER 269, CA; cf *Andrews v Hopkinson* supra at 234, 424 per McNair J.

UPDATE

63-69 Meaning of 'warranty' ... Title, quiet possession and freedom from charges in contracts of sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(i) Construction and Effect of Conditions and Warranties/64. Warranties, conditions and innominate or intermediate terms distinguished.

64. Warranties, conditions and innominate or intermediate terms distinguished.

Where a stipulation¹ in a contract of sale² is a warranty³, its breach may give rise to a claim for damages but not to a right to reject the goods⁴ and treat the contract as repudiated; but, where a stipulation in a contract of sale is a condition, its breach may give rise not only to a claim for damages but also generally to a right to treat the contract as repudiated. Where, however, a seller is in breach of any one of three of the terms implied in a contract of sale by the Sale of Goods Act 1979⁵ or of any one of three of the conditions implied in a contract for the transfer of property in goods or, as the case may be, in a contract for the hire of goods by the Supply of Goods and Services Act 1982⁶, and where the breach is so slight that it would be unreasonable for the buyer to reject the goods, then, if the buyer does not deal as consumer⁷, the breach is not to be treated as a breach of condition but as a breach of warranty⁸. Where the buyer deals as consumer and requires the seller to repair or replace the goods⁹, then he must not reject the goods and terminate the contract for breach of condition until he has given the seller a reasonable time in which to repair or replace the goods¹⁰. Where a stipulation in a contract of sale or in a contract for the transfer of property in goods or in a contract for the hire of goods is neither a condition nor a warranty, then, as in the general law of contract¹¹, the stipulation is an intermediate or innominate term, the effect of the breach of which will depend on the nature of the breach, the injured party being entitled to terminate the contract if the breach goes to the root of it, but not otherwise¹².

Whether a stipulation in a contract of sale is a warranty, condition or an intermediate or innominate term depends in each case on the construction of the contract. The contract or the Sale of Goods Act 1979 may provide expressly or by implication that a term is one any breach of which will entitle the injured party to terminate the contract, or that it is a term any breach of which will give rise only to a claim for damages¹³. A stipulation may be a condition, even though it is called a warranty in the contract¹⁴.

1 The reference to damages in the text shows that 'stipulation' includes a promise but not a collateral contingency beyond the control of either party, as eg in sales of goods 'to arrive'. Such cases are governed by the Sale of Goods Act 1979 s 2(3): see s 62(2) (saving the common law); note 13 *infra*; and PARA 9 *ante*.

2 For the meaning of 'contract of sale' see PARA 29 *ante*.

3 For the meaning of 'warranty' see PARA 63 *ante*.

4 For the meaning of 'goods' see PARA 30 *ante*.

5 Ie the terms implied by the Sale of Goods Act 1979 s 13 (as amended) (sale by description: see PARAS 72-73 *post*), s 14 (as amended) (implied terms about quality or fitness: see PARA 77 *et seq post*) and s 15 (as amended) (sale by sample: see PARAS 93-94 *post*). So far as concerns England and Wales, the terms so implied are conditions: see s 13(1A) (as added) (see PARA 73 *post*), s 14(6) (as substituted) (see PARAS 78, 80 *post*) and s 15(3) (as substituted) (see PARA 94 *post*).

6 Ie the conditions implied by the Supply of Goods and Services Act 1982 s 3 (transfer of goods by description: see PARA 75 *post*), s 4 (as amended) (implied terms about quality or fitness: see PARAS 84-87 *post*), s 5(2)(a), (c) (as amended) (transfer of goods by sample: see PARA 95 *heads (1), (3) post*), s 8 (hire by description: see PARA 76 *post*), s 9 (as amended) (implied terms about quality or fitness: see PARA 88-89 *post*) and s 10(2)(a), (c) (as amended) (hire by sample: see PARA 96 *heads (1), (3) post*).

7 As to the meaning of 'dealing as consumer' see PARA 73 note 8 *post* (contracts for the sale of goods) and PARA 75 note 10 *post* (contracts for the supply of goods and services).

8 See the Sale of Goods Act 1979 s 15A (as added) (see PARAS 73, 78, 80, 94 *post*); and the Supply of Goods and Services Act 1982 s 5A (as added) (see PARAS 75, 84-85, 95 *post*) and s 10A (as added) (see PARAS 76, 89-90, 96 *post*).

9 Ie under the Sale of Goods Act 1979 s 48A(2) (as added): see PARA 307 *post*.

10 See *ibid* s 48D (added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 5). See also PARA 307 *post*.

11 See CONTRACT vol 9(1) (Reissue) PARA 995.

12 *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, [1975] 3 All ER 739, CA; *Bunge Corp v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL. As to conditions see *Graves v Legg* (1854) 9 Exch 709; *Behn v Burness* (1863) 3 B & S 751, Ex Ch; *Oppenheim v Fraser* (1876) 34 LT 524. Cf *Woolfe v Horne* (1877) 2 QBD 355 at 360-361; *Benabu & Co v Produce Brokers' Co Ltd* (1921) 37 TLR 851, CA (sale of goods per steamship 'afloat' when goods in fact already discharged; the word 'afloat' a condition, and buyers entitled to reject the goods); *Baldry v Marshall* [1925] 1 KB 260, CA (car to be suitable for touring; condition); *V Berg & Sons v Landauer* (1925) 42 TLR 142 (date of bill of lading to be stated in provisional invoice; condition, and incorrect date not remedied by 'E & OE'); *Montague L Meyer Ltd v Kivisto* (1929) 46 TLR 162, CA (provision as to seasoning timber; warranty); *Montague L Meyer Ltd v Travaru A/B H Cornelius of Gamleby* (1930) 46 TLR 553 (timber 'under deck'; condition); *White Sea Timber Trust Ltd v WW North Ltd* (1932) 49 TLR 142 ((1) 'under deck'; condition; (2) 'buyers shall not reject goods herein specified' meant the goods 'described' as carried under deck); *Couchman v Hill* [1947] KB 554, [1947] 1 All ER 103, CA (heifer 'unserved'; condition); *Luis de Ridder Ltd v André & Cie SA (Lausanne)* [1941] 1 All ER 380 (service of notice of appropriation; condition); *Tsakiroglou & Co Ltd v Transgrains SA* [1958] 1 Lloyd's Rep 562 (time for nominating port of shipment; condition).

13 Sale of Goods Act 1979 s 11(3). The rules of common law as to the classification of terms are preserved by s 62(2), except in so far as they are inconsistent with the express provisions of the Sale of Goods Act 1979: see PARA 9 *ante*. They apply to provisions in contracts for the sale of goods other than the terms implied by ss 12-15 (as amended) (see PARA 69 *et seq post*): *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, [1975] 3 All ER 739, CA; *Tradax International SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL; *Bunge Corp v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL. See also CONTRACT vol 9(1) (Reissue) PARAS 993-995;

Bentsen v Taylor, Sons & Co (No 2) [1893] 2 QB 274 at 281, CA, per Bowen LJ; *T & J Harrison v Knowles and Foster* [1917] 2 KB 606 at 610 per Bailhache J.

The Sale of Goods Act 1979 s 11(3) applies only to express stipulations in the contract and not to those conditions implied by law which are dealt with in ss 12-15 (as amended), and its application to stipulations as to time of payment is modified by s 10 (see PARA 68 post); but the enumeration of the implied conditions in ss 12-15 (as amended) is helpful to show the kind of stipulation which is considered in law as going to the whole consideration of the other party. As to the principles governing dependent or independent agreements generally see CONTRACT vol 9(1) (Reissue) PARAS 966-967; and as to matters relating to interpretation see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 164-180, 266-270.

14 Ibid s 11(3). Before the Sale of Goods Act 1893 (repealed), terms relating to the quality of the goods were, in spite of judicial protests, continually referred to as warranties, although they were given effect to as conditions: see eg *Chanter v Hopkins* (1838) 4 M & W 399 at 404; *Bannerman v White* (1861) 10 CBNS 844. The Sale of Goods Act 1893 (repealed), and its successor the Sale of Goods Act 1979, discriminates and provides that, although the parties may use the old language, if a term is really a condition, it is to be given effect to as such: *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394 at 397, HL. Cf the position in relation to insurance law, where a warranty is equivalent to a condition: see INSURANCE vol 25 (2003 Reissue) PARA 235 et seq.

UPDATE

63-69 Meaning of 'warranty' ... Title, quiet possession and freedom from charges in contracts of sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(i) Construction and Effect of Conditions and Warranties/65. Parties' voluntary election as regards conditions.

65. Parties' voluntary election as regards conditions.

Where a contract of sale¹ is subject to a condition to be fulfilled by the seller², the buyer³ may, where the breach of condition would entitle him to reject the goods⁴, waive the condition or may elect to treat the breach of the condition as a breach of warranty⁵ and not as a ground for treating the contract as repudiated⁶. The position of the seller is the same in relation to a condition to be fulfilled by the buyer⁷.

A party will be treated as having waived a stipulation if his conduct is reasonably interpreted by the other party and relied on by him as amounting to a waiver, provided that it clearly and unambiguously bears that interpretation, even if the first party did not intend to waive the stipulation⁸.

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 For the meaning of 'seller' see PARA 27 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 A breach of one of the conditions implied by the Sale of Goods Act 1979 s 13 (as amended) (see PARAS 72-73 post), s 14 (as amended) (see PARA 77 et seq post) or s 15 (as amended) (see PARAS 93-94 post) or the Supply of Goods and Services Act 1982 s 3 (see PARA 75 post), s 4 (as amended) (see PARAS 84-85 post), s 5(2)(a), (c) (as amended) (see PARA 95 heads (1), (3) post), s 8 (see PARA 76 post), s 9 (as amended) (see PARAS 88-90 post), s 10(2)(a), (c) (as amended) (see PARA 96 heads (1), (3) post) would not entitle the buyer to reject the goods in the circumstances envisaged by the Sale of Goods Act 1979 s 15A (as added) (see PARAS 73, 78, 80, 94 post) or,

as the case may be, the Supply of Goods and Services Act 1982 s 5A (as added) (see PARAS 75, 84-85, 95 post) or s 10A (as added) (see PARAS 76, 89-90, 96 post): see PARA 64 ante.

5 For the meaning of 'warranty' see PARA 63 ante; and as to the distinction between warranties, conditions and innominate or intermediate terms see PARA 64 ante.

6 Sale of Goods Act 1979 s 11(2). See *Ellen v Topp* (1851) 6 Exch 424 at 431; *Behn v Burness* (1863) 3 B & S 751, Ex Ch; *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473, CA; *Hartley v Hymans* [1920] 3 KB 475; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA; *Plasticmoda SpA v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, CA; *Enrico Furst & Co v WE Fischer Ltd* [1960] 2 Lloyd's Rep 340; *Harlow and Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509; and the cases cited in PARA 62 notes 5, 7 ante. The principle that a party may voluntarily waive a stipulation which is for his own benefit is a general rule of contract law preserved by the Sale of Goods Act 1979 s 62(2): see PARA 9 ante. It is to a voluntary waiver that s 11(2) seems to apply, whereas s 11(4) (as amended) (see PARA 66 post) refers to two specific cases of waiver compulsorily presumed by law: *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at 1013, CA, per Fletcher Moulton LJ; approved [1911] AC 394 at 396, 399, HL. The Sale of Goods Act 1979 s 11(6) (see PARA 67 post) refers to other cases of compulsory waiver.

7 See eg *Levey & Co v Goldberg* [1922] 1 KB 688 (delivery postponed at buyer's request); *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL.

8 *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL; *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep 508, CA; *Toepfer v Warinco AG* [1978] 2 Lloyd's Rep 569. As to the waiver of a remedy see *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53, CA.

UPDATE

63-69 Meaning of 'warranty' ... Title, quiet possession and freedom from charges in contracts of sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(i) Construction and Effect of Conditions and Warranties/66. Buyer's compulsory election.

66. Buyer's compulsory election.

Subject to the buyer's right of partial rejection¹, where a contract of sale² is not severable³ and the buyer⁴ has accepted the goods⁵ or part of them⁶, the breach of a condition to be fulfilled by the seller⁷ can only be treated as a breach of warranty⁸ and not as a ground for rejecting the goods and treating the contract as repudiated⁹, unless there is an express or implied term of the contract to that effect¹⁰.

1 The subject to the Sale of Goods Act 1979 s 35A (as added): see PARA 200 post.

2 For the meaning of 'contract of sale' see PARA 29 ante.

3 If the contract is not severable at the time when the buyer has to decide how to treat the breach of condition, it is irrelevant that it could have been severed at an earlier time: *J Rosenthal & Sons Ltd v Esmail* [1965] 2 All ER 860, [1965] 1 WLR 1117, HL.

4 For the meaning of 'buyer' see PARA 29 ante.

5 For the meaning of 'goods' see PARA 30 ante.

6 The reference to part acceptance shows that these words are not confined to cases where the subject matter of the contract is physically one but that they include contracts intended to be treated as unseverable. An illustration of a severable contract is one for delivery of the goods by instalments where the price of the instalments is separately payable. As to such contracts see the Sale of Goods Act 1979 s 31; and PARA 176 et seq post. See also *Simpson v Crippin* (1872) LR 8 QB 14; *Brandt v Lawrence* (1876) 1 QBD 344, CA; *Jackson v Rotax Motor and Cycle Co* [1910] 2 KB 937, CA, approving *Tarling v O'Riordan* (1878) 2 LR 1r 82, 1r CA. As to divisible and entire contracts see also CONTRACT vol 9(1) (Reissue) PARA 922. As to acceptance see the Sale of Goods Act 1979 ss 34, 35 (as amended), s 35A (as added); and PARA 196 et seq post.

7 For the meaning of 'seller' see PARA 27 ante.

8 For the meaning of 'warranty' see PARA 63 ante; and as to the distinction between warranties, conditions and innominate or intermediate terms see PARA 64 ante.

9 See *Champion v Short* (1807) 1 Camp 53; *Gompertz v Denton* (1832) 1 Cr & M 207; *Graves v Legg* (1854) 9 Exch 709 at 717; *Harnor v Groves* (1855) 15 CB 667; *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394, HL; *William Barker (Junior) & Co Ltd v Ed T Agius Ltd* (1927) 43 TLR 751; *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693, CA; *Long v Lloyd* [1958] 2 All ER 402, [1958] 1 WLR 753, CA. The words 'treated as a breach of warranty' do not mean 'become a warranty ex post facto', but that the remedy of the buyer after an acceptance of the goods, whether voluntary or compulsory, is an action for damages as if the condition were a warranty; see *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at 1015, CA, per Fletcher Moulton LJ (Sale of Goods Act 1893 s 11(1) (repealed) 'does not state that a condition becomes a warranty if the goods are accepted but only that the legal remedies for the breach of a condition become ... limited to the single remedy which exists in the case of a warranty, namely, suing for damages. Whether an obligation is a condition or a warranty is decided ... by the contract itself and not by matters subsequent to the contract'); approved [1911] AC 394, HL.

10 Sale of Goods Act 1979 s 11(4) (amended by the Sale and Supply of Goods Act 1994 s 3(2)). In relation to a contract made before 22 April 1967 (ie the date on which the Misrepresentation Act 1967 came into operation: see s 6(2)) in the Sale of Goods Act 1979 s 11(4) (as so amended), after the words 'or part of them' there are to be inserted the words 'or where the contract is for specific goods, the property in which has passed to the buyer': s 11(7), Sch 1 paras 1(1), 2. For the meaning of 'contract' see PARA 5 note 12 ante; for the meaning of 'specific goods' see PARA 54 ante; and for the meaning of 'property', in relation to goods see PARA 27 ante. As to the final words of the provision see *Bannerman v White* (1861) 10 CBNS 844; *Head v Tattersall* (1871) LR 7 Exch 7; cf *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431, [1958] 1 WLR 1126. Where it subsequently appears that the seller had no title to sell, acceptance of the goods is no waiver within the provision: see *Rowland v Divall* [1923] 2 KB 500 at 507, CA, per Atkin LJ; *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286. In such a case there is a total failure of consideration. Under the Sale of Goods Act 1893 s 11(1)(c) (repealed) this rule also applied where the contract was for specific goods, the property in which had passed to the buyer; but that part of s 11(1)(c) was repealed by the Misrepresentation Act 1967 s 4 (repealed).

The Sale of Goods Act 1979 s 11(4) (as so amended) does not apply to a conditional sale agreement where the buyer deals as consumer within the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended) (see PARA 450 post; and CONTRACT vol 9(1) (Reissue) PARA 820 et seq): Supply of Goods (Implied Terms) Act 1973 s 14(1) (substituted by the Consumer Credit Act 1974 s 192(3)(a), Sch 4 paras 35, 36; amended by the Unfair Contract Terms Act 1977 s 31(3), Sch 3; and the Sale of Goods Act 1979 s 63(1), Sch 2 para 16). For these purposes, 'conditional sale agreement' means an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller, notwithstanding that the buyer is to be in possession of the goods, until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled: Supply of Goods (Implied Terms) Act 1973 s 15(1) (substituted by the Consumer Credit Act 1974 Sch 4 paras 35, 36). As to the meaning of 'dealing as consumer' see PARA 75 note 10 post. See also CONSUMER CREDIT vol 9(1) (Reissue) PARA 46.

UPDATE

63-69 Meaning of 'warranty' ... Title, quiet possession and freedom from charges in contracts of sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(i) Construction and Effect of Conditions and Warranties/67. Impossibility etc as an excuse.

67. Impossibility etc as an excuse.

Nothing in the statutory provisions as to when a condition of a contract is to be treated as a warranty¹ affects a condition or warranty² whose fulfilment is excused by law by reason of impossibility³ or otherwise⁴.

1 The provisions of the Sale of Goods Act 1979 s 11(2)-(4) (as amended): see PARAS 64-66 ante.

2 For the meaning of 'warranty' see PARA 63 ante; and as to the distinction between warranties, conditions and innominate or intermediate terms see PARA 64 ante.

3 As to impossibility see the Sale of Goods Act 1979 ss 6, 7; and PARAS 54-55 ante. See also *Re Shipton, Anderson & Co and Harrison Bros & Co* [1915] 3 KB 676, DC; *Re Weis & Co Ltd and Crédit Colonial et Commercial, Antwerp* [1916] 1 KB 346; *Bolckow, Vaughan & Co Ltd v Compania Minera de Sierra Menera* (1916) 86 LJKB 439, CA; *Re Anglo-Russian Merchant Traders and John Batt & Co (London) Ltd* [1917] 2 KB 679, CA; *Ross T Smyth & Co Ltd (Liverpool) v WN Lindsay Ltd (Leith)* [1953] 2 All ER 1064, [1953] 1 WLR 1280; *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL (overruling *Carapanayoti & Co Ltd v ET Green Ltd* [1959] 1 QB 131, [1958] 3 All ER 115). 'Impossibility' covers impossibility in fact and by law. See generally CONTRACT vol 9(1) (Reissue) PARA 897 et seq.

4 Sale of Goods Act 1979 s 11(6). The words 'or otherwise' would seem to cover other cases than those mentioned in s 11(4) (as amended) (see PARA 66 ante) in which a waiver of a condition is compulsorily presumed by law, as where the other party has prevented its performance (*Hothan v East India Co* (1787) 1 Term Rep 638 at 645 per Ashurst J; *Mackay v Dick* (1881) 6 App Cas 251, HL; *Kleinert v Abosso Gold Mining Co Ltd* (1913) 58 Sol Jo 45, PC), or has rendered himself unable to perform his own part (*Planché v Colburn* (1831) 8 Bing 14), or has absolutely refused to perform it (*Cort v Ambergate, Nottingham and Boston and Eastern Junction Rly Co* (1851) 17 QB 127; *Braithwaite v Foreign Hardwood Co* [1905] 2 KB 543, CA. Cf *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48, HL. See also CONTRACT vol 9(1) (Reissue) PARA 962 et seq.

The conditions alluded to in the Sale of Goods Act 1979 s 11(6) are the conditions performable by the seller referred to in s 11(2)-(4) (as amended): see PARAS 64-66 ante. For the meaning of 'seller' see PARA 27 ante. As to conditions performable by the buyer, the common law is saved by s 62(2): see PARA 9 ante. For the meaning of 'buyer' see PARA 29 ante.

UPDATE

63-69 Meaning of 'warranty' ... Title, quiet possession and freedom from charges in contracts of sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(ii) Stipulations as to Time in Contracts for the Sale of Goods/68. When stipulations as to time are conditions.

(ii) Stipulations as to Time in Contracts for the Sale of Goods

68. When stipulations as to time are conditions.

Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale¹. Whether any other stipulation as to time is or is not of the essence of the contract depends on the terms of the contract².

Apart from express agreement, or a notice to the party in default from a party who has been subjected to unreasonable delay, making time of the essence³, the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties. Broadly speaking, time will be considered of the essence in international sale contracts⁴ and in other cases where the nature of the contract or of the subject matter or the circumstances of the case require precise compliance⁵. Thus, as a general rule in international sale contracts, such as fob and cif contracts, stipulations as to time, other than stipulations as to the time of payment, are of the essence of the contract⁶. Accordingly, such stipulations have often been treated by the courts as part of the essential description of the goods themselves and thus falling within the rule as to implied conditions in relation to description contained in the Sale of Goods Act 1979⁷.

As with other conditions⁸, a condition as to time may be waived. The party waiving the condition may make time of the essence again only by giving reasonable notice in clear terms of his intention to do so⁹.

In a contract of sale 'month' prima facie means calendar month¹⁰.

1 Sale of Goods Act 1979 s 10(1). See *Martindale v Smith* (1841) 1 QB 389; *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434, HL. Cf the Law of Property Act 1925 s 41 ('stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also to be construed and have effect at law in accordance with the same rules'). See also CONTRACT vol 9(1) (Reissue) PARAS 931-932. For the meaning of 'contract of sale' see PARA 29 ante. For terms as to time of performance in contracts for the supply of a service see PARA 98 post.

The reason for the assumption that terms as to time are not conditions is that failure in punctual payment does not go to the whole consideration for the sale. The express or implied terms of the contract may, however, make the time of payment an essential condition: *Bishop v Shillito* (1819) 2 B & Ald 329n; *Ebbw Vale Steel, Iron and Coal Co Ltd v Blaina Iron and Tinsplate Co Ltd* (1901) 6 Com Cas 33, CA; *Ryan v Ridley & Co* (1902) 8 Com Cas 105; *Thames Sack and Bag Co Ltd v Knowles & Co Ltd* (1918) 88 LJB 585. See also CONTRACT vol 9(1) (Reissue) PARA 928 et seq. By virtue of the Sale of Goods Act 1979 s 48(3) (see PARA 282 post), where payment is to be made on or before delivery, payment for perishable goods within a reasonable time will be of the essence of the contract and the seller will be able to make time of payment of the essence in relation to other goods by giving notice to the buyer of his intention to resell. For the meaning of 'delivery' see PARA 27 note 6 ante, 163 post; for the meaning of 'goods' see PARA 30 ante; for the meaning of 'seller' see PARA 27 ante; and for the meaning of 'buyer' see PARA 29 ante. As to payment of a deposit see *Portaria Shipping Co v Gulf Pacific Navigation Co Ltd, The Selene G* [1981] 2 Lloyd's Rep 180.

2 Sale of Goods Act 1979 s 10(2). See *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA (stipulation making time of the essence waived but later reimposed); *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431, [1958] 1 WLR 1126 (yacht required for use in particular season); *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [2003] All ER (D) 212 (Apr) (whether notice can make time of the essence only in cases where time was originally of the essence but temporarily waived).

3 As to making time of the essence see note 1 supra.

4 As to international sale contracts generally see PARA 322 et seq post.

5 *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL, citing with approval the material now contained in CONTRACT vol 9(1) (Reissue) PARAS 931-932.

6 *Alewyn v Pryor* (1826) Ry & M 406 (arrival of goods on ship); *Wimshurst v Deeley* (1845) 2 CB 253 (engines for ship); *Tew v Harris* (1847) 11 QB 7 (time of appointment of valuer of goods); *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239 at 246, 249, CA; *Sharp v Christmas* (1892) 8 TLR 687, CA; *Elmdove Ltd v Keech* (1969) 113 Sol Jo 871, CA; *Olearia Tirrena SpA v Algemeene Oliehandel NV, The Osterbek* [1973] 2 Lloyd's Rep 86, CA (time for providing vessel); *Jacobson Van den Berg & Co (UK) Ltd v Biba Ltd* (1977) 121 Sol Jo 333, CA (date for delivery a bank holiday; delivery on next day too late); *Bunge GmbH v CCV Landbouwbelaag GA* [1978] 1 Lloyd's Rep 217 (notice of appropriation) (affd [1980] 1 Lloyd's Rep 458, CA); *Toepfer v Lenersan-Poortmann NV* [1980] 1 Lloyd's Rep 143, CA (commodity contract); *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL (notice of readiness of vessel); *Cie Commerciale Sucres et Denrées v C Czarnikow Ltd, The Naxos*

[1990] 3 All ER 641, [1990] 1 WLR 1337, HL (obligation in respect of immediate loading of cargo condition of contract). See also *Harley v Hymans* [1920] 3 KB 475 at 484. Cf *Woolfe v Horne* (1877) 2 QBD 355 (clearance of goods sold at auction); *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 at 336, CA (punctual delivery of bill of lading not ordinarily a condition); *Paton & Sons v Payne & Co* (1897) 35 SLR 112, HL (delivery of printing machine; time not essential). The reason for the general rule is obvious. An international sale contract is not always an isolated transaction but a link in a chain of transactions, and, if A does not keep his contract with B, then B may not be able to keep his contract with C, so that punctual performance may go to the whole consideration for the sale. As to shipment generally see PARA 330 post.

7 As to the rule relating to implied conditions in sales by description see the Sale of Goods Act 1979 s 13 (as amended); and PARA 72 et seq post. See *Bowes v Shand* (1877) 2 App Cas 455, HL; *Re General Trading Co and Van Stolk's Commissiehandel* (1911) 16 Com Cas 95 ('shipment to be made and bill of lading dated during December or January'). Cf *Gattorno v Adams* (1862) 12 CBNS 560. See also *Busk v Spence* (1815) 4 Camp 329 (names of vessels to be declared as soon as goods are shipped); *Graves v Legg* (1854) 9 Exch 709; *Gattorno v Adams* supra (specific cargo shipped as per bill of lading dated September or October); *Alexander v Vanderzee* (1872) LR 7 CP 530, Ex Ch (for shipment in June and July); *Brandt v Lawrence* (1876) 1 QBD 344, CA (shipment by steamer or steamers during February); *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239, CA (name of vessel or vessels, marks and other particulars to be declared within 60 days of date of bill of lading); *Ashmore & Son v CS Cox & Co* [1899] 1 QB 436 (to be shipped by sailor or sailors from the Philippines between 1 May and 31 July); *Thalman Frères & Co v Texas Flour Mills* (1900) 5 Com Cas 321, CA (clearance not later than 31 May); *Nickoll and Knight v Ashton, Edridge & Co* [1901] 2 KB 126, CA (to be shipped from Egypt during February per ship O); *J Aron & Co Inc v Comptoir Wegimont* [1921] 3 KB 435 ('shipment by steamer during October'); *Sanday & Co v Keighley Maxted & Co* (1922) 91 LJBK 624, CA ('expected ready to load late September'); *Wilson v Wright* [1937] 4 All ER 371, CA ('for Saturday's steamer'); *MacPherson Train & Co Ltd v Howard Ross & Co Ltd* [1955] 2 All ER 445, [1955] 1 WLR 640 ('afloat per SS Morton Bay due London approximately 8 June'). Cf *Kidston & Co v Monceau Ironworks Co* (1902) 7 Com Cas 82 (delivery of specification at particular time not a condition); *Tsakiroglou & Co Ltd v Transgrains SA* [1958] 1 Lloyd's Rep 562 (time for nomination of port of shipment by buyer); *Macpherson Train & Co Ltd v J Milhem & Sons* [1955] 2 Lloyd's Rep 396 ('shipment per SS Isonzo scheduled to sail 15 March'); and the cases cited in PARA 47 note 10 ante. Like other conditions, conditions as to time may be waived: see the Sale of Goods Act 1979 s 11(2); and PARA 65 ante. See also *Alexander v Gardner* (1835) 1 Bing NC 671; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA; and the cases on time for opening credit cited in PARA 376 post. See generally CONTRACT vol 9(1) (Reissue) PARA 928 et seq.

8 See the Sale of Goods Act 1979 s 11(2); and PARA 65 ante.

9 See the cases cited in PARA 65 note 6 ante; *Enrico Furst & Co v WE Fischer Ltd* [1960] 2 Lloyd's Rep 340; *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367.

10 Sale of Goods Act 1979 s 10(3). This meaning also applies in relation to all instruments executed on or after 1 January 1926: see the Law of Property Act 1925 s 61(a); and TIME vol 97 (2010) PARA 310. It is also the rule in international sale contracts generally: *Webb v Fairmaner* (1838) 3 M & W 473. See, however, *P Phipps & Co (Northampton and Towcester Breweries) Ltd v Rogers* [1925] 1 KB 14, CA. By usage 'month' may have a special trade meaning in a particular trade: see *Bissell v Beard* (1873) 28 LT 740; and CUSTOM AND USAGE vol 12(1) (Reissue) PARA 670. See generally TIME vol 97 (2010) PARA 307 et seq.

UPDATE

63-69 Meaning of 'warranty' ... Title, quiet possession and freedom from charges in contracts of sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(iii) Implied Undertakings as to Title in Contracts for the Sale and Supply of Goods/A. CONTRACTS FOR THE SALE OF GOODS/69. Title, quiet possession and freedom from charges in contracts of sale.

(iii) Implied Undertakings as to Title in Contracts for the Sale and Supply of Goods

A. CONTRACTS FOR THE SALE OF GOODS

69. Title, quiet possession and freedom from charges in contracts of sale.

In a contract of sale¹, other than one in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller² should only transfer such title as he or a third person may have³, there is:

- 82 (1) an implied term⁴ on the part of the seller that, in the case of a sale⁵, he has a right to sell⁶ the goods⁷, and, in the case of an agreement to sell⁸, he will have such a right at the time when the property⁹ is to pass¹⁰;
- 83 (2) an implied term¹¹ that the goods are free and will remain free until the time when the property is to pass from any charge or incumbrance not disclosed or known to the buyer¹² before the contract is made¹³; and
- 84 (3) an implied term¹⁴ that the buyer will enjoy quiet possession of the goods, except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or incumbrance so disclosed or known¹⁵.

In a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have, there is:

- 85 (a) an implied term¹⁶ that all charges or incumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made¹⁷; and
- 86 (b) an implied term¹⁸ that none of the following will disturb the buyer's quiet possession of the goods, namely:

1

- 1. (i) the seller;
- 2. (ii) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person; and
- 3. (iii) anyone claiming through or under the seller or that third person otherwise than under a charge or incumbrance disclosed or known to the buyer before the contract is made¹⁹.

2

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 For the meaning of 'seller' see PARA 27 ante.

3 Ie other than a contract of sale to which the Sale of Goods Act 1979 s 12(3) (as amended) applies: see the text and notes 16-17 infra.

4 As regards England and Wales, the term so implied is a condition: *ibid* s 12(5A) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 5(1), (3)(b)). As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

5 For the meaning of 'sale' see PARA 27 ante.

6 The expression 'a right to sell' bears its natural meaning; it is not limited to a right to pass the property, and accordingly a sale which would be a breach of patent, copyright or trade mark rights may be repudiated by the buyer: *Niblett Ltd v Confectioners' Materials Co Ltd* [1921] 3 KB 387, CA, overruling *Monforts v Marsden* (1895) 12 RPC 266. However, the condition involves no promise about the seller's own proprietary rights, only

that he will be able to create the appropriate rights in the buyer: *Karlshamns Oljefabriker v Eastport Navigation Corpn, The Elafi* [1982] 1 All ER 208 at 215, [1981] 2 Lloyd's Rep 679 at 685. A breach of this condition is not one which is waived by 'acceptance' of the goods, if the seller's title was, unknown to the buyer, defective: *Rowland v Divall* [1923] 2 KB 500, CA (where the buyer was held entitled to recover the whole purchase price of a stolen car purported to be sold to him, although he had the use of it for several months); *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286 (purported sale in breach of hire-purchase agreement; no title). Cf *Robin and Rambler Coaches Ltd v Turner* [1947] 2 All ER 284 (voidable contract). As to the effect of a seller having a voidable title see further PARA 154 post; and as to implied terms in hire-purchase agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 24.

7 For the meaning of 'goods' see PARA 30 ante.

8 For the meaning of 'agreement to sell' see PARAS 27-28 ante.

9 For the meaning of 'property', in relation to goods see PARA 27 ante.

10 Sale of Goods Act 1979 s 12(1) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 5(1), (3) (a)). See *Allen v Hopkins* (1844) 13 M & W 94 at 102; *Eichholz v Bannister* (1864) 17 CBNS 708 (job lot of goods sold in shop); *Raphael & Sons v Burt & Co* (1884) Cab & El 325; *Edwards v Pearson* (1890) 6 TLR 220, CA. The old common law rule was that, on the sale of a specific chattel, there was no implied undertaking as to title (Noy's Maxims c 42; *Paget v Wilkinson* (1696) cited in 2 East 448; *Ormrod v Huth* (1845) 14 M & W 651 at 664, Ex Ch); but, as Lord Campbell CJ said in 1851, 'the exceptions have well nigh eaten up the rule' (*Sims v Marryat* (1851) 17 QB 281 at 291).

In relation to a contract made before 18 May 1973 (ie the date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3)) the condition and warranties implied by the Sale of Goods Act 1979 s 12 (as amended) apply unless the circumstances of the contract were such as to show a different intention (see s 12(6), Sch 1 paras 1(1), 3); but the wording of the warranties is slightly different (see notes 13, 15 infra). For the meaning of 'contract' see PARA 5 note 12 ante; and for the meaning of 'warranty' see PARA 63 ante.

In the following cases decided before the Sale of Goods Act 1893 (repealed) there was held to be no implied warranty of title: *Peto v Blades* (1814) 5 Taunt 657 (qualified warranty by sheriff); *Morley v Attenborough* (1849) 3 Exch 500 (sale of unredeemed pledges); *Chapman v Speller* (1850) 14 QB 621 (purchase of another person's bargain at sale by sheriff); *Smith v Neale* (1857) 2 CBNS 67 (assignment of patent; no warranty that invention new); *Baguley v Hawley* (1867) LR 2 CP 625 (purchase of secondhand boiler bought at auction); *Re Rogers, ex p Villars* (1874) 9 Ch App 432 at 437, CA (no implied warranty of title by sheriff); *Dorab Ally Khan v Abdool Azeez* (1878) LR 5 Ind App 116 (qualified warranty by sheriff). See also the following cases decided after the Sale of Goods Act 1893 (repealed): *Payne v Elsdon* (1900) 17 TLR 161 (sale by auctioneer of goods under invalid distress); *Warming Used Cars Ltd v Tucker* [1956] SASR 249 (S Aus) (A buys a car at request of B and immediately resells it to B; A is not liable to B if car turns out to be stolen). The sale of a ship by the master as such implies no warranty: see the dictum in *Page v Cowasjee Eduljee* (1866) LR 1 PC 127 at 144.

11 As regards England and Wales, the term so implied is a warranty: Sale of Goods Act 1979 s 12(5A) (as added: see note 4 supra).

12 For the meaning of 'buyer' see PARA 29 ante.

13 Sale of Goods Act 1979 s 12(2)(a) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 5(1), (3)(a)). That an express stipulation to the same effect would not be a condition at common law is shown by the reasoning of Brett MR in *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 at 337, CA. In relation to a contract made before 18 May 1973 (see note 10 supra), the implied term is that the goods will be free from any charge or incumbrance in favour of any third person, not declared or known to the buyer before or at the time when the contract is made: Sale of Goods Act 1979 Sch 1 paras 1(1), 3.

14 As regards England and Wales, the term so implied is a warranty: *ibid* s 12(5A) (as added: see note 4 supra).

15 *Ibid* s 12(2)(b) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 5(1), (3)(a)). The distinction between the condition as to title and the warranty of quiet possession is that, if the title is defective, the buyer may, under the Sale of Goods Act 1979 s 12(1) (as amended: see note 10 supra), reject the goods, but, if he has accepted them and is afterwards disturbed, he has, under s 12(2) (as amended), his remedy by action for breach of the warranty of quiet possession, the right of action arising on disturbance. Moreover, the warranty in the Sale of Goods Act 1979 s 12(2) (as amended) extends to cover disturbance by title paramount: see *Mason v Birmingham* [1949] 2 KB 545 at 563, [1949] 2 All ER 134 at 144, CA, per Lord Greene MR. This is so even where the title paramount giving the right to interfere did not exist at the date of the sale: *Microbeads AC v Vinhurst Road Markings Ltd* [1975] 1 All ER 529, [1975] 1 WLR 218, CA.

In relation to a contract made before 18 May 1973 (see note 10 supra), the implied warranty is that the buyer will have and enjoy quiet possession of the goods: Sale of Goods Act 1979 Sch 1 paras 1(1), 3. Following the

analogy of realty, 'will enjoy' would seem to cover the obtaining of possession: *Ludwell v Newman* (1795) 6 Term Rep 458. See also *Hawkes v Orton* (1836) 5 Ad & El 367. In this sense the Sale of Goods Act 1979 s 12(2) (b) (as amended) is, however, unnecessary, having regard to s 27 (see PARA 161 post) and s 28 (see PARA 162 post). The implied warranty gives the buyer a contractual remedy not only in respect of lawful acts of third persons but also in respect of unlawful acts by the seller: *Montforts v Marsden* (1895) 12 RPC 266 at 269; *Niblett Ltd v Confectioners' Materials Co Ltd* [1921] 3 KB 387 at 403, CA, per Atkin LJ; *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584, Aust HC. Cf *Anderson v Ryan* [1967] IR 34 (where the contrary was held, but on a basis which seems inconsistent with *Microbeads AC v Vinhurst Road Markings Ltd* supra). See also *Foster and Wilson v Mapes* (1590) Cro Eliz 212; *Chantflower v Priestly and Waterhouse* (1603) Cro Eliz 914 (quiet possession of goods); 2 Wms Saund (1871 Edn) 526; *Nash v Palmer* (1816) 5 M & S 374; *Niblett Ltd v Confectioners' Materials Co Ltd* supra (goods labelled in such a way that they could not be sold without infringement of a third person's trade mark).

16 As regards England and Wales, the term so implied is a warranty: Sale of Goods Act 1979 s 12(5A) (as added: see note 4 supra).

17 Ibid s 12(3), (4) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 5(1), (3)(a)).

18 As regards England and Wales, the term so implied is a warranty: Sale of Goods Act 1979 s 12(5A) (as added: see note 4 supra).

19 Ibid s 12(3), (5) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 5(1), (3)(a)). These limited warranties were introduced into the Sale of Goods Act 1893 (repealed) by the Supply of Goods (Implied Terms) Act 1973 s 1 (repealed). Therefore, in relation to a contract made before 18 May 1973 (see note 10 supra), no such warranties are implied by the Sale of Goods Act 1979: see Sch 1 paras 1(1), 3.

UPDATE

63-69 Meaning of 'warranty' ... Title, quiet possession and freedom from charges in contracts of sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(iii) Implied Undertakings as to Title in Contracts for the Sale and Supply of Goods/B. CONTRACTS FOR THE TRANSFER OF GOODS/70. Title, quiet possession and freedom from charges in contracts for the transfer of goods.

B. CONTRACTS FOR THE TRANSFER OF GOODS

70. Title, quiet possession and freedom from charges in contracts for the transfer of goods.

In a contract for the transfer of goods¹, other than one in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the transferor² should transfer only such title as he or a third person may have³, there is:

- 87 (1) an implied condition⁴ on the part of the transferor that, in the case of a transfer of the property⁵ in the goods, he has a right to transfer the property and, in the case of an agreement to transfer the property in the goods, he will have such a right at the time when the property is to be transferred⁶;
- 88 (2) an implied warranty⁷ that the goods are free, and will remain free until the time when the property is to be transferred, from any charge or incumbrance not disclosed or known to the transferee⁸ before the contract is made⁹; and

- 89 (3) an implied warranty that the transferee will enjoy quiet possession of the goods, except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or incumbrance so disclosed or known¹⁰.

In a contract for the transfer of goods in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the transferor should transfer only such title as he or a third person may have, there is:

- 90 (a) an implied warranty that all charges or incumbrances known to the transferor and not known to the transferee have been disclosed to the transferee before the contract is made¹¹; and
- 91 (b) an implied warranty that none of the following will disturb the transferee's quiet possession of the goods, namely:
- 3
4. (i) the transferor;
 5. (ii) in a case where the parties to the contract intend that the transferor should transfer only such title as a third person may have, that person;
 6. (iii) anyone claiming through or under the transferor or that third person otherwise than under a charge or incumbrance disclosed or known to the transferor before the contract is made¹².

4

1 For the meaning of 'contract for the transfer of goods' see PARA 32 ante; and for the meaning of 'goods' see PARA 34 ante.

2 For these purposes, 'transferor', in relation to a contract for the transfer of goods, means (depending on the context) a person who transfers the property in the goods under the contract, or a person who agrees to do so, or a person to whom the duties under the contract of either of those persons have passed: Supply of Goods and Services Act 1982 s 18(1). The reference to duties passing is to their passing by assignment, operation of law or otherwise: s 18(2) (amended by the Sale and Supply of Goods Act 1994 s 6, Sch 1 para 3).

3 Ie other than a contract for the transfer of goods to which the Supply of Goods and Services Act 1982 s 2(3) applies: see *infra*. See also *Hi-Tech Autoparts Ltd v Towergate Two Ltd (No 2)* [2002] FSR 1.

4 As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

5 For the meaning of 'property', in relation to goods see PARA 32 note 1 ante.

6 Supply of Goods and Services Act 1982 s 2(1). As to exclusion of implied terms generally see PARA 102 post. Liability for breach of the obligations arising under the Supply of Goods and Services Act 1982 s 2 cannot be excluded or restricted by reference to any contract term, whether or not the person as against whom liability is sought to be excluded is dealt with as consumer: see the Unfair Contract Terms Act 1977 s 7(3A) (as added); and PARA 450 post. As to the meaning of 'dealing as consumer' see PARA 450 note 10 post.

7 For the meaning of 'warranty' see PARA 63 ante.

8 For these purposes, 'transferee', in relation to a contract for the transfer of goods, means (depending on the context) a person to whom the property in the goods is transferred under the contract, or a person to whom the property is to be transferred, or a person to whom the rights under the contract of either of those persons have passed: Supply of Goods and Services Act 1982 s 18(1). The reference to rights passing is to their passing by assignment, operation of law or otherwise: s 18(2) (as amended: see note 2 *supra*).

9 *Ibid* s 2(2)(a).

10 *Ibid* s 2(2)(b).

11 *Ibid* s 2(3), (4).

12 *Ibid* s 2(3), (5).

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C. CONTRACTS FOR THE HIRE OF GOODS

71. Implied terms about the right to transfer possession etc in contracts for the hire of goods.

In a contract for the hire of goods¹ there is:

- 92 (1) an implied condition² on the part of the bailor³ that, in the case of a bailment, he has a right to transfer possession of the goods by way of hire for the period of the bailment and, in the case of an agreement to bail, he will have such a right at the time of the bailment⁴; and
- 93 (2) an implied warranty⁵ that the bailee⁶ will enjoy quiet possession of the goods for the period of the bailment, except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or incumbrance disclosed or known to the bailee before the contract is made⁷.

The above provisions do not affect the right of the bailor to repossess the goods under an express or implied term of the contract⁸.

1 For the meaning of 'contract for the hire of goods' see PARA 33 ante; and for the meaning of 'goods' see PARA 34 ante.

2 As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

3 For these purposes, 'bailor', in relation to a contract for the hire of goods, means (depending on the context) a person who bails the goods under the contract, or a person who agrees to do so, or a person to whom the duties under the contract of either of those persons have passed: Supply of Goods and Services Act 1982 s 18(1). The reference to duties passing is to their passing by assignment, operation of law or otherwise: s 18(2) (amended by the Sale and Supply of Goods Act 1994 s 6, Sch 1 para 3)).

4 Supply of Goods and Services Act 1982 s 7(1). As to exclusion of implied terms generally see PARA 102 post. Liability in respect of the right to give possession and the assurance of quiet possession under the Supply of Goods and Services Act 1982 s 7 cannot be excluded or restricted by reference to any contract term, except in so far as the term satisfies the requirement of reasonableness: see the Unfair Contract Terms Act 1977 s 7(1), (4) (as amended); and PARAS 103-104, 450 et seq post.

5 For the meaning of 'warranty' see PARA 63 ante.

6 For these purposes, 'bailee', in relation to a contract for the hire of goods, means (depending on the context) a person to whom the goods are bailed under the contract, or a person to whom they are to be so bailed, or a person to whom the rights under the contract of either of those persons have passed: Supply of Goods and Services Act 1982 s 18(1). The reference to rights passing is to their passing by assignment, operation of law or otherwise: s 18(2) (as amended: see note 3 supra).

7 Ibid s 7(2).

8 Ibid s 7(3).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(iv) Sale by Description in Contracts for the Sale and Supply of Goods/A. CONTRACTS FOR THE SALE OF GOODS/72. Meaning of 'sale by description'.

(iv) Sale by Description in Contracts for the Sale and Supply of Goods

A. CONTRACTS FOR THE SALE OF GOODS

72. Meaning of 'sale by description'.

Goods are sold by description where the buyer enters into the contract of sale in which the goods are in terms described by or on behalf of the seller¹. Unascertained² or future³ goods can only be identified by what is said with regard to them and it follows that most, if not all, such sales will be sales by description. There may, however, be a sale by description although the goods are specific⁴; and goods may be sold by description although sold across the counter⁵.

A sale⁶ of goods⁷ is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer⁸. Where words are used in a contract with reference to goods sold, it is a question of construction whether those words form part of the description under which the goods are sold or amount only to a condition or warranty or are no more than a means of identifying the goods⁹.

1 In relation to the term implied by the Sale of Goods Act 1979 s 13(1) (as amended), that the goods sold must correspond with the description, reliance by the buyer on the description of the goods given by the seller is not an essential ingredient: *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 QB 564 at 579, [1990] 1 All ER 737 at 747, CA, per Stuart-Smith LJ and at 584 and 752 per Slade LJ, Nourse LJ dissenting at 574 and 744. Incorporation of the description as a term of the contract is essential for the operation of the Sale of Goods Act 1979 s 13(1) (as amended); and, in deciding whether or not the description is a term of the contract, the general principles of incorporation of terms into contracts are to be applied (*Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* supra); but the absence of reliance on the description may be a relevant factor in resolving that issue (*Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* supra at 584 and 752 per Slade LJ). If it is clear on the evidence that the parties did not intend a description given by the seller to be a term of the contract, failure to comply with the description is not a breach of the Sale of Goods Act 1979 s 13(1) (as amended) (*Drake v Thos Agnew & Sons Ltd* [2002] EWHC 294 (QB), [2002] All ER (D) 107 (Mar)), although the buyer may have remedies for misrepresentation which operate only if the misrepresentation was material and relied on: see generally CONTRACT vol 9(1) (Reissue) PARAS 767 et seq, 987; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 701 et seq.

2 As to unascertained goods see PARA 124 post.

3 For the meaning of 'future goods' see PARA 47 ante.

4 *Varley v Whipp* [1900] 1 QB 513. See also *Kirkpatrick v Gowan* (1875) IR 9 CL 521 (stack of coal described as 'of C and W coal mixed'). However, not every description of specific goods renders the sale one 'by description'. The circumstances may show that the buyer is buying specific goods such as they are, any description of the goods made by the seller not being essential to their identity: *Joseph Travers & Sons Ltd v Longel Ltd* (1947) 64 TLR 150. See also *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All ER 1496 at 1511, CA (revsd on other grounds sub nom *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, [1971] 1 All ER 847, HL). See also *Cavendish Woodhouse Ltd v Manley* (1984) 148 JP 299, DC (where a customer bought a suite of furniture in a sale, the cash sale invoice given to him at the time containing the statement 'bought as seen'; it was held that the statement 'bought as seen' was not void by virtue of the Unfair Contract Terms Act 1977 s 6 (as amended) (see PARA 450 post) because it did not purport to exclude the implied terms in the Sale of Goods Act 1979 s 13 (as amended) (see PARA 73 post) and s 14 (as amended) (see PARA 77 et seq post), the statement 'bought as seen' merely confirming that the purchaser had seen the goods).

5 *Morelli v Fitch and Gibbons* [1928] 2 KB 636, DC (Stone's ginger wine sold over counter); *Grant v Australian Knitting Mills Ltd* [1936] AC 85, PC (underpants); *Daniels and Daniels v R White & Sons Ltd and Tarbard* [1938] 4 All ER 258 (lemonade); *Godley v Perry* [1960] 1 All ER 36, [1960] 1 WLR 9 (catapult).

6 For the meaning of 'sale' see PARA 27 ante.

7 For the meaning of 'goods' see PARA 30 ante.

8 Sale of Goods Act 1979 s 13(3). For the meaning of 'buyer' see PARA 29 ante. Section 13(3) was introduced into the Sale of Goods Act 1893 s 13 (repealed) by the Supply of Goods (Implied Terms) Act 1973 s 2 (repealed) and does not apply in relation to a contract made before 18 May 1973 (ie the date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3)): Sale of Goods Act 1979 s 13(4), Sch 1 paras 1(1), 4. For the meaning of 'contract' see PARA 5 note 12 ante. Section 13(3) would, however seem to be purely declaratory, and not to have altered the law: see eg *Beale v Taylor* [1967] 3 All ER 253, [1967] 1 WLR 1193, CA (deviation from description not apparent). Cf the cases cited in PARA 74 note 10 post.

9 *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570, [1976] 1 WLR 989, HL. See also *Allan v Lake* (1852) 18 QB 560 at 566. See further PARAS 73-74 post.

UPDATE

72-76 Sale by Description in Contracts for the Sale and Supply of Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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73. Conformity with description a condition.

Where there is a contract for the sale¹ of goods² by description, there is an implied term³ that the goods will correspond with the description⁴. If the description of goods tendered is different from that of the goods agreed to be sold, it is not the article bargained for and the buyer is not bound to take it⁵. However, where, in the case of a contract of sale:

94 (1) the buyer⁶ would, but for this provision, have the right to reject goods by reason of a breach on the part of the seller⁷ of a term so implied as to description; but

95 (2) the breach is so slight that it would be unreasonable for him to reject them,

then, if the buyer does not deal as consumer⁸, and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty⁹. It is for the seller to show that a breach fell within head (2) above¹⁰.

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 As regards England and Wales, the term so implied is a condition: Sale of Goods Act 1979 s 13(1A) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 5(1), (4)(b)). As to the distinction between warranties, conditions and innominate or intermediate terms see PARA 64 ante.

4 Sale of Goods Act 1979 s 13(1) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 5(1), (4) (a)). For the meaning of 'description' see PARA 74 post. See also *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 QB 564, [1990] 1 All ER 737, CA (cited in PARA 72 note 1 ante). As against

a person dealing as consumer, liability for breach of the obligation arising from the Sale of Goods Act 1979 s 13 (as amended) cannot be excluded or restricted by reference to any contract term (see the Unfair Contract Terms Act 1977 s 6(2)(a) (as amended); and PARA 450 post); and as against a person dealing otherwise than as consumer, such liability can be excluded or restricted by reference to a contract term only in so far as the term satisfies the requirement of reasonableness: see s 6(3); and PARAS 103-104, 450 et seq post. As to the meaning of 'dealing as consumer' see PARA 450 note 10 post.

5 *Kennedy v Panama New Zealand and Australian Royal Mail Co* (1867) LR 2 QB 580 at 588. See also *Wieler v Schilizzi* (1856) 17 CB 619 at 624-625 per Willes J ('Calcutta linseed'); *Bowes v Shand* (1877) 2 App Cas 455 at 480, HL, per Lord Blackburn.

6 For the meaning of 'buyer' see PARA 29 ante.

7 For the meaning of 'seller' see PARA 27 ante.

8 For these purposes, references to dealing as consumer are to be construed in accordance with the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended) (see PARA 450 note 10 post); and, for the purposes of the Sale of Goods Act 1979, it is for a seller claiming that the buyer does not deal as consumer to show that he does not: s 61(5A) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 5(1), (9)(c)). As to the buyer's rights when the buyer is a consumer and the goods bought do not conform to their description see PARA 307 post.

9 Sale of Goods Act 1979 s 15A(1), (2) (added by the Sale and Supply of Goods Act 1994 s 4(1)).

10 Sale of Goods Act 1979 s 15A(3) (added by the Sale and Supply of Goods Act 1994 s 4(1)).

UPDATE

72-76 Sale by Description in Contracts for the Sale and Supply of Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(iv) Sale by Description in Contracts for the Sale and Supply of Goods/A. CONTRACTS FOR THE SALE OF GOODS/74. Meaning of 'description'.

74. Meaning of 'description'.

The application of the rule that goods sold by description are to conform with the description¹ has been the subject of judicial decisions in many cases where pictures², ships³, seeds⁴, provisions⁵ and other goods⁶ have been sold by description.

'Description' usually means a particular class or kind of goods, but it also includes any statement which constitutes a substantial ingredient of the identity of the thing sold⁷. The question is whether the untruth of the statement makes the goods delivered or tendered different things from what were contracted for⁸.

The course of dealing between the parties may show the meaning of the terms used and so may establish a sale by description⁹. Examination of bulk or sample does not necessarily negative a sale by description¹⁰, nor does a clause excluding the liability of the seller or the buyer's right of rejection or providing for arbitration¹¹. Oral evidence may be given of the trade meaning of the description contained in the contract¹². Where goods, whether specific¹³ or unascertained¹⁴, are sold under a known trade description, without misrepresentation or breach of warranty, the fact that both parties are unaware that the goods of that description lack any particular quality is irrelevant¹⁵. If the sale is by sample¹⁶ as well as by description, it is not

sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description¹⁷.

1 le the application of the Sale of Goods Act 1979 s 13 (as amended): see PARA 73-74 ante.

2 See eg *Lomi v Tucker* (1829) 4 C & P 15 (name of painter); and the cases cited in PARA 62 note 7 ante.

3 See *Shepherd v Kain* (1821) 5 B & Ald 240; *Barr v Gibson* (1838) 3 M & W 390 (wrecked ship may be a 'ship'); *Taylor v Bullen* (1850) 5 Exch 779 ('barque, teak built, A1; without allowance for error'; only description 'barque').

4 See *Poulton v Lattimore* (1829) 9 B & C 259; *Allan v Lake* (1852) 18 QB 560 ('Skirving's swedes turnip seed'); *Wieler v Schilizzi* (1856) 17 CB 619 ('Calcutta linseed'); *Randall v Raper* (1858) EB & E 84 (Chevalier seed barley); *Carter v Crick* (1859) 4 H & N 412 (seed professedly unknown, called 'seed barley'); *Lovegrove v Fisher* (1860) 2 F & F 128 (rape seed by sample; delivery of turnip seed); *Pinder v Button* (1862) 11 WR 25 (mangold-wurzel seed 'of good growing stock'); *Wagstaff v Shorthorn Dairy Co* (1884) Cab & El 324 ('early rose regents potatoes'); *Howcroft v Laycock* (1898) 14 TLR 460, DC (cabbage seed; tree cabbage seed delivered; clause excluding warranty); *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152 (St Malo barley 'about as per sample'); *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394, HL; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1981] 1 Lloyd's Rep 476; on appeal [1983] QB 284, [1983] 1 All ER 108, CA; affd in part [1983] 2 AC 803, [1983] 2 All ER 737, HL. A statement given in pursuance of seeds regulations constitutes a statutory warranty in certain cases: see the Plant Varieties and Seeds Act 1964 s 17(1); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 908. As to the statutory requirements on the sale of seeds see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 906 et seq.

5 See *Yates v Pym* (1816) 6 Taunt 446 ('P's prime singed bacon'; inconsistent usage); *Powell v Horton* (1836) 2 Bing NC 668 ('mess pork of Scott & Co'; trade meaning); *Smith v Jeffries* (1846) 15 M & W 561 ('ware potatoes'; written contract conclusive as to kind); *Harnor v Groves* (1855) 15 CB 667; *Vernede v Weber* (1856) 1 H & N 311 (Aracan Necrensie rice; some latitude by agreement allowed); *Simond v Braddon* (1857) 2 CBNS 324 ('fair average Nicranzi rice'); *Osborn v Hart* (1871) 23 LT 851 ('superior old port'); *Bowes v Shand* (1877) 2 App Cas 455, HL (rice to be shipped in specified months); *Wren v Holt* [1903] 1 KB 610, CA (beer sold over counter); *Moore & Co v Landauer & Co* [1921] 2 KB 519, CA (canned fruits 'in cases containing 30 tins each'); *Ballantine & Co v Cramp and Bosman* (1923) 129 LT 502 (carcasses of frozen meat 'average not to exceed 60 lb'); *Rapalli v KL Take Ltd* [1958] 2 Lloyd's Rep 469, CA (onions of specified quality; de minimis rule does not apply where 6% to 7% defective). See also FOOD vol 18(2) (Reissue) PARA 360.

6 See *Tye v Fynmore* (1813) 3 Camp 462 ('sassafras wood'); *Bridge v Wain* (1816) 1 Stark 504 ('scarlet cuttings' of cloth); *Pettitt v Mitchell* (1842) 4 Man & G 819 (woollen goods sold in specific lots by the yard 'with all faults and errors of description'; subsequent adjustment of price); *Jones v Clarke* (1858) 2 H & N 725 ('pitch pine timber of fair average quality from Savannah'; place of origin part of description); *Lucas v Bristow* (1858) EB & E 907 ('best oil; wet and inferior, if any, at fair allowance'); *Taylor v Dalton* (1862) 3 F & F 263 ('Haswell Wallsend coals'); *Josling v Kingsford* (1863) 13 CBNS 447 (oxalic acid); *Frith v Mitchell* (1865) 4 F & F 464 (wool; special trade meaning of description); *Azémar v Casella* (1867) LR 2 CP 677, Ex Ch (long-staple Salem cotton by sample); *Kirkpatrick v Gowan* (1875) IR 9 CL 521 ('Cumberland and Welsh coal mixed'; admixture of other coal, when fatal); *Easterbrook v Gibb* (1887) 3 TLR 401, CA (gas-pipe vices, partly defective, but answering description as a whole lot); *Varley v Whipp* [1900] 1 QB 513 (secondhand reaper); *Vigers Bros v Sanderson Bros* [1901] 1 KB 608 (laths 'of about the specification' as to length); *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725 ('sulphuric acid commercially free from arsenic'); *Re North Western Rubber Co Ltd and Hüttenbach & Co* [1908] 2 KB 907, CA ('fair usual quality Banjermassin jelutong rubber'; inconsistent usage); *Dominion Coal Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293, PC (coal 'reasonably free from stone and shale'); *American Can Co v Stewart* (1915) 50 ILT 132 (adding machine); *Re L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348, CA (carriage of goods by specified routes); *Wimble, Sons & Co v Lillico & Son (London)* (1922) 38 TLR 296 (sale of cotton cake 'containing approximately 40% protein and 10% oil, but guarantee of quality or analysis is given'); *Grenfell v EB Meyrowitz Ltd* [1936] 2 All ER 1313, CA (goggles fitted with 'safety-glass lenses'); *Messers Ltd v Morrison's Export Co Ltd* [1939] 1 All ER 92 (timber 'to be loaded on deck one-third'); *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co* [1953] 2 All ER 1471, [1953] 1 WLR 1468; *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136, [1954] 1 WLR 963 (machinery to be supplied with X's certificate of reconditioning). See also PARA 107 post; *Nicholson and Venn v Smith Marriott* (1947) 177 LT 189 ('Charles I tablecloths'); *M'Ivor v Michie* 1953 SLT (Sh Ct) 53 (eight horsepower car sold as ten horsepower). Cf *Morris Motors Ltd v Lilley (t/a G and L Motors)* [1959] 3 All ER 737, [1959] 1 WLR 1184 (meaning of 'new' car); *Morris Motors Ltd v Phelan* [1960] 2 All ER 208n, [1960] 1 WLR 352n, 566n. See, however, *Standard Motor Co Ltd and Triumph Motor Co (1945) Ltd v Grantchester Garage Ltd* [1960] RPC 211; *Beale v Taylor* [1967] 3 All ER 253, [1967] 1 WLR 1193, CA (car constructed out of different models); *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, [1971] 1 All ER 847, HL (contaminated herring meal); *Gill and Duffus SA v Berger & Co Inc* [1982] 1 Lloyd's Rep 101; revsd on other grounds sub nom *Berger & Co Inc v Gill and Duffus SA* [1984] AC 382, [1984] 1 All ER 438, HL (Bolita beans sold with commercially significant quantity

of other beans; admixture may affect value without affecting description). As to the meaning of trade descriptions see the cases cited in CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 669-670, 687 et seq.

7 Every item in a description which constitutes a substantial ingredient in the 'identity' of the thing sold is a condition: *Couchman v Hill* [1947] KB 554 at 559, [1947] 1 All ER 103 at 105, CA, per Scott LJ; *M'lvor v Michie* 1953 SLT (Sh Ct) 53 (eight horsepower car sold as ten horsepower). Cf *Morris Motors Ltd v Lilley (t/a G and L Motors)* [1959] 3 All ER 737, [1959] 1 WLR 1184 (meaning of 'new' car); *Morris Motors Ltd v Phelan* [1960] 2 All ER 208n, [1960] 1 WLR 352n, 566n; *Standard Motor Co Ltd and Triumph Motor Co (1945) Ltd v Grantchester Garage Ltd* [1960] RPC 211. See also *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA (undertaking by vendor to take back animal of unsound condition); *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570 at 576, [1976] 1 WLR 989 at 998 per Lord Wilberforce, who criticised earlier cases as excessively technical and due for fresh examination in the House of Lords, but stressed that it may be necessary to take a strict and technical view as regards the description of unascertained future goods, such as commodities, as to which each detail of the description must be assumed to be vital.

8 See *Gompertz v Bartlett* (1853) 2 E & B 849 (inland bill sold as foreign); *Jones v Clarke* (1858) 2 H & N 725 (pitch pine to arrive from Savannah); *Makin v London Rice Mill Co Ltd* (1869) 20 LT 705 (rice 'in double bags'); *Bowes v Shand* (1877) 2 App Cas 455, HL (shipment in particular month); *Fisher, Reeves & Co Ltd v Armour & Co Ltd* [1920] 3 KB 614, CA (goods stored in lighters afloat sold as 'ex store'); *Benabu & Co v Produce Brokers' Co Ltd* (1921) 37 TLR 851, CA (goods 'afloat'); *J Aron & Co Inc v Comptoir Wegimont* [1921] 3 KB 435 (goods on board named ship); *Montague L Meyer Ltd v Osakeyhtio Carelia Timber Co Ltd* (1930) 36 Com Cas 17, CA (goods 'to be ready for shipment' on special date); *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470, HL (goods held not to satisfy description, although merchantable under the contract); *Rapalli v KL Take Ltd* [1958] 2 Lloyd's Rep 469, CA (sale of onions of specified quality; de minimis rule does not apply where 6% to 7% defective). Cf *Joseph Travers & Sons Ltd v Longel Ltd* (1947) 64 TLR 150 (description statement of boots as 'waders'; no sale by description). See further PARA 72 ante; and the cases cited in PARA 68 note 7 ante.

9 *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725. A particular description may attach to the goods by estoppel. Thus, on a sale of 'oats', the seller may be aware that the buyer thinks that he is being promised old oats: *Smith v Hughes* (1871) LR 6 QB 597, DC.

10 *Tye v Fynmore* (1813) 3 Camp 462; *Josling v Kingsford* (1863) 13 CBNS 447 (latent defect). See also the cases cited in PARA 80 note 9 post. An examination where at least the nature of the goods is discoverable may, however, show that the buyer bought on his own judgment and not by description: *Prosser v Hooper* (1817) 1 Moore CP 106 (article called saffron bought at damage price and examined by buyer); *Parsons v Sexton* (1847) 4 CB 899; *Attwater v Kinnes* (1906) cited in Benjamin on Sale (7th Edn) at 641, HL (Arctic mica). The sample will be evidence of the description: *Boshali v Allied Commercial Exporters Ltd* [1961] Nigerian LR 917, PC.

11 *Azémar v Casella* (1867) LR 2 CP 677, Ex Ch; *Gorton v Macintosh Co* [1883] WN 103, CA; *Vigers Bros v Sanderson Bros* [1901] 1 KB 608. Where, however, several statements are made about the goods, a clause excluding liability for errors of description may turn one or more of such statements into mere representation: *Taylor v Bullen* (1850) 5 Exch 779 (barque described as 'teak built, A1, and fitted for passenger ship'); *Reynolds v Wrench* (1888) 23 LJNC 27 (seed sold as 'Yellow Tankard turnip'); *Howcroft and Watkins v Perkins* (1900) 16 TLR 217 (celery seed also described as 'Clayworth prize'). It is doubtful, however, how far these cases would now be followed: see *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394, HL; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1981] 1 Lloyd's Rep 476 (on appeal [1983] QB 284, [1983] 1 All ER 108, CA). Cf *Couchman v Hill* [1947] KB 554, [1947] 1 All ER 103, CA (catalogue excluding errors of description valid, but overridden by oral stipulation).

12 *Powell v Horton* (1836) 2 Bing NC 668 ('mess pork of Scott & Co'); *Woodhouse v Swift* (1836) 7 C & P 310 ('sound timber'); *Lucas v Bristow* (1858) EB & E 907 ('best oil'); *Ryder v Woodley* (1862) 10 WR 294 ('St Gilles Marais Wheat'; mixture of barley). See CUSTOM AND USAGE vol 12(1) (Reissue) PARA 665 et seq. However, on ordinary principles oral evidence is not admissible to vary or to negative the description contained in the written contract: *Gardiner v Gray* (1815) 4 Camp 144; *Smith v Jeffries* (1846) 15 M & W 561; *Harnor v Groves* (1855) 15 CB 667; *Schweir v Thorns* (1862) 3 F & F 243. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 185 et seq. As to goods sold under name see also *Scaliaris v E Ofverberg & Co* (1921) 37 TLR 307, CA (saccharine sold as being of a particular brand must bear manufacturer's label put on them in ordinary course and need not be accepted without it, although made by manufacturer); *Harris & Sons v Plymouth Varnish and Colour Co Ltd* (1933) 49 TLR 521 (a buyer ordering an article by its trade name is to be taken to have ordered it as manufactured at date of order, whatever its previous composition). As to criminal offences relating to false trade descriptions see PARA 471 et seq post.

13 For the meaning of 'specific goods' see PARA 54 ante.

14 As to unascertained goods see PARA 124 post.

15 *Harrison and Jones Ltd v Bunten and Lancaster Ltd* [1953] 1 QB 646, [1953] 1 All ER 903; *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, [1953] 2 All ER 739, CA. A misdescription may

possibly result in a mutual mistake avoiding the contract: *Nicholson and Venn v Smith Marriott* (1947) 177 LT 189 at 191-192 per Hallett J obiter (Georgian tablecloths described as Charles I); but cf *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693, CA.

16 As to sales by sample see PARA 94 post.

17 Sale of Goods Act 1979 s 13(2). See *Nichol v Godts* (1854) 10 Exch 191; *Lovegrove v Fisher* (1860) 2 F & F 128 (turnip seed delivered for rape seed); *Azémar v Casella* (1867) LR 2 CP 677, Ex Ch; *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394, HL. See also *Towerson v Aspatria Agricultural Co-operative Society Ltd* (1872) 27 LT 276, Ex Ch (guaranteed analysis of bulk to accompany sample). The case contemplated is a sale by sample as well as by description. Sometimes, however, the sample is the only description, as where the subject matter of the sale is a thing of which the character is unknown. Here accordance of the bulk with the sample satisfies the contract: *Carter v Crick* (1859) 4 H & N 412 (seed); *Mody v Gregson* (1868) LR 4 Exch 49 at 53, Ex Ch.

UPDATE

72-76 Sale by Description in Contracts for the Sale and Supply of Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(iv) Sale by Description in Contracts for the Sale and Supply of Goods/B. CONTRACTS FOR THE TRANSFER OF GOODS/75. Implied term as to description in contracts for the transfer of goods.

B. CONTRACTS FOR THE TRANSFER OF GOODS

75. Implied term as to description in contracts for the transfer of goods.

Where, under a contract for the transfer of goods¹, the transferor² transfers or agrees to transfer the property³ in the goods by description⁴, there is an implied condition⁵ that the goods will correspond with the description⁶. A contract for the transfer of goods is not prevented from being by description by reason only that, being exposed for supply, the goods are selected by the transferee⁷.

If the transferor transfers or agrees to transfer the property in the goods by sample⁸ as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description⁹.

Where, in the case of a contract for the transfer of goods:

- 96 (1) the transferee would, but for this provision, have the right to treat the contract as repudiated by reason of a breach on the part of the transferor of a term so implied as to description; but
- 97 (2) the breach is so slight that it would be unreasonable for him to do so,

then, if the transferee does not deal as consumer¹⁰, and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty¹¹. It is for the transferor to show that a breach fell within head (2) above¹².

For the meaning of 'contract for the transfer of goods' see PARA 32 ante; and for the meaning of 'goods' see PARA 34 ante.

2 For the meaning of 'transferor' see PARA 70 note 2 ante.

3 For the meaning of 'property', in relation to goods see PARA 32 note 1 ante.

4 The expression 'by description' is not defined for these purposes; but cf the meaning of 'by description' in the Sale of Goods Act 1979: see PARA 72 et seq ante.

5 As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

6 Supply of Goods and Services Act 1982 s 3(1), (2). As to the exclusion of implied terms generally see PARA 102 post. As against a person dealing as consumer, liability in respect of the goods' correspondence with description cannot be excluded by reference to any contract term (see the Unfair Contract Terms Act 1977 s 7(1), (2); and PARA 450 post); and as against a person dealing otherwise than as consumer, such liability can be excluded only in so far as the contract term referred to satisfies the requirement of reasonableness (see s 7(1), (3); and PARAS 103-104, 450 et seq post). As to the meaning of 'dealing as consumer' see PARA 450 note 10 post. As to the transferee's rights where the transferee is a consumer and the goods transferred do not conform to their description see PARA 307 post.

7 Supply of Goods and Services Act 1982 s 3(4). For the meaning of 'transferee' see PARA 70 note 8 ante.

8 As to sales by sample see PARA 94 post.

9 Supply of Goods and Services Act 1982 s 3(3).

10 For these purposes, references to dealing as consumer are to be construed in accordance with the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended) (see PARA 450 note 10 post); and, for the purposes of the Supply of Goods and Services Act 1982, it is for the transferor or bailor claiming that the transferee or bailee does not deal as consumer to show that he does not: s 18(4) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (10)). For the meaning of 'bailor' see PARA 71 note 3 ante; and for the meaning of 'bailee' see PARA 71 note 6 ante.

11 Supply of Goods and Services Act 1982 s 5A(1), (2) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (5)).

12 Supply of Goods and Services Act 1982 s 5A(3) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (5)).

UPDATE

72-76 Sale by Description in Contracts for the Sale and Supply of Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(iv) Sale by Description in Contracts for the Sale and Supply of Goods/C. CONTRACTS FOR THE HIRE OF GOODS/76. Implied term as to description in contracts for the hire of goods.

C. CONTRACTS FOR THE HIRE OF GOODS

76. Implied term as to description in contracts for the hire of goods.

Where, under a contract for the hire of goods¹, the bailor² bails or agrees to bail the goods by description³, there is an implied condition⁴ that the goods will correspond with the description⁵.

A contract for the hire of goods is not prevented from being by description by reason only that, being exposed for supply, the goods are selected by the bailee⁶.

If under the contract the bailor bails or agrees to bail the goods by reference to a sample⁷ as well as a description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description⁸.

Where, in the case of a contract for the hire of goods:

- 98 (1) the bailee would, but for this provision, have the right to treat the contract as repudiated by reason of a breach on the part of the bailor of a term so implied as to description; but
- 99 (2) the breach is so slight that it would be unreasonable for him to do so,

then, if the bailee does not deal as consumer⁹, and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty¹⁰. It is for the bailor to show that a breach fell within head (2) above¹¹.

1 For the meaning of 'contract for the hire of goods' see PARA 33 ante; and for the meaning of 'goods' see PARA 34 ante.

2 For the meaning of 'bailor' see PARA 71 note 3 ante.

3 The expression 'by description' is not defined for these purposes; but cf the meaning of 'by description' in the Sale of Goods Act 1979: see PARA 72 et seq ante.

4 As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

5 Supply of Goods and Services Act 1982 s 8(1), (2). As to the exclusion of implied terms generally see PARA 102 post. As against a person dealing as consumer, liability in respect of the goods' correspondence with description cannot be excluded or restricted by reference to any contract term (see the Unfair Contract Terms Act 1977 s 7(1), (2); and PARA 450 post); and as against a person dealing otherwise than as consumer, such liability can be excluded or restricted only in so far as the contract term referred to satisfies the requirement of reasonableness (see s 7(1), (3); and PARA 450 et seq post). As to the meaning of 'dealing as consumer' in the Unfair Contract Terms Act 1977 see PARA 450 note 10 post. As to the transferee's rights where the transferee is a consumer and the goods transferred do not conform to their description see PARA 307 post.

6 Supply of Goods and Services Act 1982 s 8(4). For the meaning of 'bailee' see PARA 71 note 6 ante.

7 As to the hire of goods by sample see PARA 96 post.

8 Supply of Goods and Services Act 1982 s 8(3).

9 As to the meaning of 'dealing as consumer' see PARA 75 note 10 ante.

10 Supply of Goods and Services Act 1982 s 10A(1), (2) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (9)).

11 Supply of Goods and Services Act 1982 s 10A(3) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (9)).

UPDATE

72-76 Sale by Description in Contracts for the Sale and Supply of Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(v) Implied Terms about Quality or Fitness in Contracts for the Sale and Supply of Goods/A. CONTRACTS FOR THE SALE OF GOODS/77. General rule.

(v) Implied Terms about Quality or Fitness in Contracts for the Sale and Supply of Goods

A. CONTRACTS FOR THE SALE OF GOODS

77. General rule.

Except as otherwise provided by the Sale of Goods Act 1979¹ and subject to any other enactment², there is no implied term about the quality or fitness for any particular purpose of goods³ supplied under a contract of sale⁴. An implied term about quality or fitness for a particular purpose may be annexed to a contract of sale by usage⁵.

1 le by the Sale of Goods Act 1979 ss 14, 15 (as amended): see *infra*; and PARA 78 et seq post.

2 The general exceptions in *ibid* ss 14, 15 (as amended) are supplemented by certain statutory provisions as to particular classes of goods: see eg the Consumer Protection Act 1987 s 41(3); and PARA 543 post. See also PARA 19 ante. As to usages to the same effect see the cases cited in CUSTOM AND USAGE vol 12(1) (Reissue) PARA 670.

3 For the meaning of 'goods' see PARA 30 ante.

4 Sale of Goods Act 1979 s 14(1) (amended by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 5(1), (5)(a)). The Sale of Goods Act 1979 s 14(1) (as amended) applies to contracts made on or after 18 May 1973 (ie the date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3)): Sale of Goods Act 1979 s 14(7), Sch 1 paras 1(1), 5. Similar provision was made in relation to contracts made before 18 May 1973: see Sch 1 paras 1(1), 6. For the meaning of 'contract of sale' see PARA 29 ante. The general rule as to quality or fitness is caveat emptor, but it has become in reality largely the exception. The same rule applies to goods given in exchange: *La Neuville v Nourse* (1813) 3 Camp 351.

Illustrations of sales are: *Chandelor v Lopus* (1603) Cro Jac 4, Ex Ch; 2 Smith LC (13th Edn) 57 at 75; *Barr v Gibson* (1838) 3 M & W 390 at 399 (ship sold at sea); *Chanter v Hopkins* (1838) 4 M & W 399 (smoke-consuming furnace); *Burnby v Bollett* (1847) 16 M & W 644 (carcase of meat; seller not dealer); *Emmertton v Mathews* (1862) 7 H & N 586 (carcase of meat; seller a dealer); *Hall v Conder* (1857) 2 CBNS 22 at 40 (patent); *Horsfall v Thomas* (1862) 1 H & C 90 (defective gun); *Kennedy v Panama, New Zealand and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580 at 587; *Jones v Just* (1868) LR 3 QB 197 at 202 (rule stated). In *Wallis v Russell* [1902] 2 IR 585 at 615, Ir CA (unwholesome crab), Fitzgibbon LJ says, 'Caveat emptor does not mean in law or Latin that the buyer must take a chance, it means that he must take care. It applies to the purchase of specific things, eg to a horse or a picture upon which the buyer can and usually does exercise his own judgment. It applies also whenever the buyer voluntarily chooses what he buys. It applies also whenever by usage or otherwise it is a term of the contract express or implied that the buyer shall not rely on the skill or judgment of the seller'. As to warranties of sale on animals generally see ANIMALS vol 2 (2008) PARA 725 et seq.

5 Sale of Goods Act 1979 s 14(4) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 5(1), (5)(a)). The Sale of Goods Act 1979 s 14(4) (as amended) applies to contracts made on or after 18 May 1973: see note 4 *supra*. In relation to contracts made before 18 May 1973 an implied condition or warranty about quality or fitness for a particular purpose could be annexed by the usage of trade: see Sch 1 paras 1(1), 6. See also PARA 6 ante. In relation to a contract made before 18 May 1973, an express condition or warranty does not negative a condition or warranty implied by the Sale of Goods Act 1979 unless inconsistent with it: Sch 1 paras 1(1), 6.

UPDATE

77-82 Contracts for the Sale of Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(v) Implied Terms about Quality or Fitness in Contracts for the Sale and Supply of Goods/A. CONTRACTS FOR THE SALE OF GOODS/78. When an implied term about fitness of goods is a condition.

78. When an implied term about fitness of goods is a condition.

Where the seller¹ sells goods² in the course of a business³ and the buyer⁴, expressly or by implication⁵, makes known:

- 100 (1) to the seller⁶; or
- 101 (2) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit broker⁷ to the seller, to that credit broker⁸,

any particular purpose⁹ for which the goods are being bought, there is an implied term¹⁰ that the goods supplied¹¹ under the contract are reasonably fit¹² for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely¹³, on the skill or judgment of the seller or credit broker¹⁴.

Where, in the case of a contract of sale:

- 102 (a) the buyer would, but for this provision, have the right to reject goods by reason of a breach on the part of the seller of a term so implied as to description; but
- 103 (b) the breach is so slight that it would be unreasonable for him to reject them,

then, if the buyer does not deal as consumer¹⁵, and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty¹⁶. It is for the seller to show that a breach fell within head (b) above¹⁷.

In the case of contracts made before 18 May 1973 the goods had to be of a description which it was in the course of the seller's business to supply, whether he was the manufacturer or not¹⁸. In the case of contracts made on or after 18 May 1973 it is both necessary and sufficient that the sale is an integral part of the business in question¹⁹, and until 19 May 1985, in relation to an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, any reference to the seller in the above rule²⁰ includes a reference to the person by whom any antecedent negotiations²¹ are conducted²².

An implied term about fitness for a particular purpose covers latent defects²³, but the parties may agree that a fixed period of trial, without the discovery of any unfitness of the goods, is to be conclusive²⁴. Fraud apart²⁵, a third person will not have a right of action in respect of any damage incurred in consequence of a breach of the implied term about fitness as such, although he may have a right of action in negligence²⁶.

Subject to the Unfair Contract Terms Act 1977²⁷ and the Unfair Terms in Consumer Contracts Regulations 1999²⁸, the implied term about fitness for a particular purpose may in theory be

excluded by express agreement²⁹. The tendency of the courts is, however, against such exclusion, and clauses purporting to exclude the implied condition are narrowly construed³⁰.

1 For the meaning of 'seller' see PARA 27 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 For these purposes, 'business' includes a profession and the activities of any government department or local or public authority: Sale of Goods Act 1979 s 61(1). In relation to a contract made on or after 18 May 1973 (ie the date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3)) and before 1 February 1978 (ie the date on which the Unfair Contract Terms Act 1977 came into force: see s 31(1)), in the definition of 'business' in the Sale of Goods Act 1979 s 61(1), for the words 'or local or public authority' there are to be substituted the words 'local authority or statutory undertaker': s 61(6), Sch 1 paras 1(1), 14. In relation to a contract made before 18 May 1973 the definition of 'business' in s 61(1) is to be omitted: Sch 1 paras 1(1), 15. For the meaning of 'contract' see PARA 5 note 12 ante. See also the text and note 18 infra.

4 For the meaning of 'buyer' see PARA 29 ante.

5 Knowledge may be imparted by matters outside the contract itself, even when it is in writing, or by the very description of the goods themselves: *Gillespie Bros & Co v Cheney, Eggar & Co* [1896] 2 QB 59 at 63; *Jacobs v Scott & Co* (1899) 2 F (HL) 70, Ct of Sess; *Preist v Last* [1903] 2 KB 148, CA (hot-water bottle).

6 Sale of Goods Act 1979 s 14(3)(a).

7 For these purposes, 'credit broker' means a person acting in the course of a business of credit brokerage carried on by him, ie a business of effecting introductions of individuals desiring to obtain credit: (1) to persons carrying on any business, so far as it relates to the provision of credit; or (2) to other persons engaged in credit brokerage: *ibid* s 61(1). For the meaning of 'credit brokerage' see the Consumer Credit Act 1974 s 145(2)-(4) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 272.

8 Sale of Goods Act 1979 s 14(3)(b). Section 14(3)(b) does not apply to contracts made on or after 18 May 1973 and before 19 May 1985: s 14(7), (8), Sch 1 paras 1(1), 5; Sale of Goods Act 1979 (Appointed Day) Order 1983, SI 1983/1572, art 2.

9 'Particular purpose' means purpose known or communicated, not special as distinguished from general purpose: *Preist v Last* [1903] 2 KB 148, CA. See also *Wallis v Russell* [1902] 2 IR 585, Ir CA; *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL. The buyer must make known to the seller any idiosyncrasy or abnormality from which he suffers: *Griffiths v Peter Conway Ltd* [1939] 1 All ER 685, CA (Harris tweed coat; buyer's sensitive skin); *Ingham v Emes* [1955] 2 QB 366, [1955] 2 All ER 740, CA (hair dye); *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545, [1968] 2 All ER 886, CA (goods required for resale in Persia); *Slater v Finning Ltd* [1997] AC 473, [1996] 3 All ER 398, HL (installation of new type of camshaft in fishing vessel's engine with particular propensity to produce excessive resonance), approving *Griffiths v Peter Conway Ltd* supra. Cf *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, [1971] 1 All ER 847, HL; *Jewson Ltd v Kelly* [2003] EWCA Civ 1030, [2004] 1 Lloyd's Rep 505 (suppliers of boilers needed to be given more information in order to form a view as to the effect which the boilers might have on the owner's flats' SAP ratings).

10 As regards England and Wales, the term so implied is a condition: Sale of Goods Act 1979 s 14(6) (substituted by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 5(1), (5)(b)). As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante. As to the relationship between this condition and the condition as to satisfactory quality see PARA 80 note 6 post.

11 The condition extends to all goods supplied in purported compliance with the contract including goods which are not sold but remain the property of the seller: see the cases cited in PARA 80 note 5 post.

12 Goods may be reasonably fit for a purpose despite minor defects: *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 KB 831 at 841, CA; *Rapalli v KL Take Ltd* [1958] 2 Lloyd's Rep 469, CA; *Millars of Falkirk Ltd v Turpie* 1976 SLT (Notes) 66, Ct of Sess. Where the goods sold are fit for the purpose for which they are bought only if certain precautions are taken, and the buyer cannot be assumed to know this, they will not be reasonably fit if sold without any warning to the buyer to take those precautions: *Willis v FMC Machinery and Chemicals Ltd* (1976) 68 DLR (3d) 127, PEI SC. See also *Shields (t/a W Ryder & Co Ltd) v Honeywill & Stein Ltd* [1953] 1 Lloyd's Rep 357, CA; *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88, [1969] 3 All ER 1681 (compromised on appeal [1971] 1 QB 111n, [1970] 3 All ER 553n, CA); *Lem v Barotto Sports Ltd* (1976) 69 DLR (3d) 276, Alta CA. Cf *Heil v Hedges* (1951) 1 TLR 512 (trichinosis caused by pork insufficiently cooked by buyer; seller not liable). Inaccurate or misleading instructions supplied with goods can render goods of an unsatisfactory quality or unfit for the purpose for which they are supplied: *Wormell v RHM Agriculture (East) Ltd* [1986] 1 All ER 769, [1986] 1 WLR 336; *revsd* on other grounds [1987] 3 All ER 75, [1987] 1 WLR 1091, CA. See

also *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] EWCA Civ 548, [2002] 2 All ER (Com) 321 (carbon dioxide contaminated by benzene; no warranty imposed by relevant British Standard Specification in respect of quality and fitness).

Prima facie the burden of proof of fitness is on the seller: *Hayden v Hayward* (1808) 1 Camp 180. The relevant time is the time of sale: *Manchester Liners Ltd v Rea Ltd* [1922] 2 AC 74 at 89, HL, per Lord Sumner. If the goods were then apparently satisfactory, the onus is on the buyer to prove that the condition was broken: see *AB Kemp Ltd v Tolland* [1956] 2 Lloyd's Rep 681 (where there was a satisfactory examination of peaches at the time of sale; there was held to be a failure by the buyers to show breach). For the cases where fitness is to be certified by a third person see PARA 107 post. As to terms about fitness implied in a contract for work and materials see BAILMENT vol 3(1) (2005 Reissue) PARA 69; and as to terms about fitness implied in a contract of hiring see BAILMENT vol 3(1) (2005 Reissue) PARA 59. See also PARA 77 ante; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 76; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 7 et seq.

13 As to such reliance see PARA 79 post.

14 Sale of Goods Act 1979 s 14(3) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 5(1), (5) (a)).

15 As to the meaning of 'dealing as consumer' see PARA 73 note 8 ante. As to the buyer's rights where the buyer is a consumer and the goods bought are not fit for their purpose see PARA 307 post.

16 Sale of Goods Act 1979 s 15A(1), (2) (added by the Sale and Supply of Goods Act 1994 s 4(1)).

17 Sale of Goods Act 1979 s 15A(3) (added by the Sale and Supply of Goods Act 1994 s 4(1)).

18 Sale of Goods Act 1979 Sch 1 paras 1(1), 6. The seller had, therefore, to be a dealer: *Turner v Mucklow* (1862) 8 Jur NS 870; *Wilson v Dunville* (1879) 4 LR Ir 249. It was sufficient if the goods were of a kind which the seller supplied in the course of his business, even though he had never sold goods of that exact description: *Spencer Trading Co Ltd v Devon* [1947] 1 All ER 284; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, [1971] 1 All ER 847, HL. For other decisions prior to 18 May 1973 see *Holcombe v Hewson* (1810) 2 Camp 391; *Brown v Edgington* (1841) 2 Man & G 279 (rope for hoisting casks); *Camac v Warriner* (1845) 1 CB 356 (alternative use of material; no particular use mentioned); *Stancliffe v Clarke* (1852) 7 Exch 439 (beer supplied by brewer to publican); *Black v Elliot* (1859) 1 F & F 595 (sheep wash); *Jackson v Harrison* (1862) 2 F & F 782 (refuse product of seed crushing bought as cattle food; no purpose mentioned); *Turner v Mucklow* supra (refuse produce of calico printing bought as dye; seller not dealer); *Bigge v Parkinson* (1862) 7 H & N 955, Ex Ch (troop stores for ship); *Mallan v Radloff* (1864) 17 CBNS 588 (specific soap frames; express warranty); *Macfarlane v Taylor* (1868) LR 1 Sc & Div 245, HL (whisky to be coloured like rum for African trade); *Osborn v Hart* (1871) 23 LT 851 (port fit for laying down); *Beer v Walker* (1877) 46 LJB 677 (rabbits); *Randall v Newson* (1877) 2 QBD 102, CA (latent defect) (apparently overruling *Bluett v Osborne* (1816) 1 Stark 384 (defective bowsprit)); *Hall v Burke* (1886) 3 TLR 165, CA (machinery for sawing marble); *Drummond v Van Ingen* (1887) 12 App Cas 284, HL (worsted coatings); *Burrows v Smith* (1894) 10 TLR 246 (partridges); *Gillespie Bros & Co v Cheney, Eggart & Co* [1896] 2 QB 59 (coal for bunkering); *Jacobs v Scott & Co* (1899) 2 F (HL) 70, Ct of Sess (hay for tram company); *Williamson v Rover Cycle Co* [1901] 2 IR 615, Ir CA (limited warranty; express exclusion of the Sale of Goods Act 1893 s 14 (repealed)); *Wallis v Russell* [1902] 2 IR 585, Ir CA (crab for supper); *Preist v Last* [1903] 2 KB 148, CA (hot-water bottle). See also *Clarke v Army and Navy Co-operative Society* [1903] 1 KB 155, CA (tin of disinfecting powder dangerous to open; tort); *Strongitharm v North Lonsdale Iron and Steel Co Ltd* (1905) 21 TLR 357, CA (limestone for smelting from second-grade quarry); *Frost v Aylesbury Dairy Co* [1905] 1 KB 608, CA (contaminated milk; latent defect); *Chapronière v Mason* (1905) 21 TLR 633, CA (Bath bun with stone in it; negligence); *Crichton and Stevenson v Love* 1908 SC 818 (bunkering coal); *Jackson v Watson & Sons* [1909] 2 KB 193, CA (tinned salmon); *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293, PC (coal for steel manufacture); *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 KB 831, CA (motor omnibus etc); *Manchester Liners Ltd v Rea Ltd* [1922] 2 AC 74, HL (Welsh coal for bunkering); *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] AC 402, HL (propeller for specific ship); *Lockett v A and M Charles Ltd* [1938] 4 All ER 170 (whitebait); *Watson v Buckley, Osborne, Garrett & Co Ltd and Wyrovoys Products Ltd* [1940] 1 All ER 174 (hair dye); *Samuels v Davis* [1943] KB 526, [1943] 2 All ER 3, CA (dentures). Cf *Shields (t/a W Ryder & Co Ltd) v Honeywill and Stein Ltd* [1953] 1 Lloyd's Rep 357, CA (alcohol for essences); *Ingham v Emes* [1955] 2 QB 366, [1955] 2 All ER 740, CA (same); *Godley v Perry* [1960] 1 All ER 36, [1960] 1 WLR 9 (catapult).

19 *Haivering London Borough v Stevenson* [1970] 3 All ER 609, [1970] 1 WLR 1375, DC; *Peter Symmons & Co v Cook* (1981) 131 NLJ 758 (decided under the Unfair Contract Terms Act 1977 s 12 (see PARA 450 post)); *Buchanan-Jardine v Hamilink* 1983 SLT 149, Ct of Sess (where the sale of a business was held to be a sale in the course of that business).

20 Ie the rule contained in the Sale of Goods Act 1979 s 14(3) (as amended): see supra.

21 For these purposes, the Hire-Purchase Act 1965 s 58(3), (5) (repealed) (meaning of antecedent negotiations and related expressions) applies as in relation to that Act but as if a reference to any such

agreement for the sale of goods under which the purchase price or part of it is payable by instalments were included in the references in s 58(3) (repealed) to the agreements there mentioned: Sale of Goods Act 1979 Sch 1 paras 1(1), 5.

22 Ibid s 14(7) (substituted by the Sale of Goods Act 1979 Sch 1 para 5); Sale of Goods Act 1979 (Appointed Day) Order 1983, SI 1983/1572, art 2.

23 *Randall v Newson* (1877) 2 QBD 102, CA; *Frost v Aylesbury Dairy Co* [1905] 1 KB 608, CA; *Godley v Perry* [1960] 1 All ER 36, [1960] 1 WLR 9. The fact that the buyer has an opportunity of examining or actually examines the goods is immaterial if the other's judgment is relied on, which is a question of fact: *Wallis v Russell* [1902] 2 IR 585, Ir CA. Cf *Lowe v Lombank Ltd* [1960] 1 All ER 611, [1960] 1 WLR 196, CA (signed acknowledgment by hirer that examination revealed no defects which it ought to have revealed did not protect other party; such examination would be expected to reveal patent defects only). Where, however, the defect in the goods is one known to the buyer, or, where he has seen the goods, is obvious to the senses, it is conceived that the presumption will be that the buyer bought on his own judgment, so far as the particular defect is concerned, according to the analogy of the rule applicable to express warranties: see PARAS 79, 108 post. See, however, the dictum in *Randall v Newson* supra at 109.

It was formerly thought that there is necessarily an implied condition that provisions sold are fit for food whether the seller is a dealer in them or not: 3 Bl Com (14th Edn) 165. See, however, to the contrary, *Burnby v Bollett* (1847) 16 M & W 644; *Emmerton v Mathews* (1862) 7 H & N 586; *Smith v Baker, Son and Death* (1878) 40 LT 261, DC; *Newbury v Perowne* (1908) referred to in 72 JP Jo 302. The Sale of Goods Act 1979 draws no distinction between provisions and other goods (*Wallis v Russell* supra at 611; *Wren v Holt* [1903] 1 KB 610, CA; *Frost v Aylesbury Dairy Co* supra; *Chapronière v Mason* (1905) 21 TLR 633, CA; *Jackson v Watson & Sons* [1909] 2 KB 193, CA; *Lockett v A and M Charles Ltd* [1938] 4 All ER 170 (whitebait); *Heil v Hedges* [1951] 1 TLR 512), provided that the seller is a dealer (see *Burnby v Bollett* supra (seller not dealer)). As to the statutory restrictions and prohibitions on sale of food and drugs see PARAS 803-804, 807-808 post; FOOD vol 18(2) (Reissue) PARA 282 et seq; and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 248 et seq. A breach of the statutory provisions does not, however, of itself give rise to an action for damages by the purchaser: see *Square v Model Farm Dairies (Bournemouth) Ltd* [1939] 2 KB 365, [1939] 1 All ER 259, CA; and FOOD vol 18(2) (Reissue) PARA 360.

24 *Sharp v Great Western Rly Co* (1841) 9 M & W 7. The provisions of the Sale of Goods Act 1979 s 14(3) (as amended), and of s 14(2) (as substituted) (see PARA 80 post), are not mutually exclusive. Thus, the fact that s 14(2) (as substituted) is satisfied does not show that s 14(3) (as amended) is: see *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 KB 831 at 843, CA, per Kennedy LJ.

25 *Langridge v Levy* (1837) 2 M & W 519 (affd sub nom *Levy v Langridge* (1838) 4 M & W 337, Ex Ch); *Gerhard v Bates* (1853) 2 E & B 476; *Barry v Croskey* (1861) 2 John & H 1; *Thompson v Lucas* (1868) 17 WR 520. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 789 et seq.

26 As to the doctrine of privity of contract generally see CONTRACT vol 9(1) (Reissue) PARA 748 et seq; and as to the duty in the law of negligence in relation to goods supplied see NEGLIGENCE vol 78 (2010) PARA 47 et seq. Cf *Lockett v A and M Charles Ltd* [1938] 4 All ER 170 (restaurant; implied contracts with husband and with wife).

27 See PARAS 103-104, 450 et seq post.

28 Re the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARAS 105, 452 et seq post.

29 See the Sale of Goods Act 1979 s 55 (as amended); and PARAS 100, 105 post.

30 See the cases cited in PARA 105 notes 6-8 post. Cf *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431 at 438, [1958] 1 WLR 1126 at 1131-1132.

UPDATE

77-82 Contracts for the Sale of Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

78 When an implied term about fitness of goods is a condition

NOTE 14--See also *KG Bominflot Bunkergesellschaft für Mineralöle mbh & Co KG v Petroplus Marketing AG; The Mercini Lady* [2009] EWHC 1088 (Comm), [2009] 2 All ER (Comm) 827.

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79. Reliance on seller's skill or judgment.

The buyer's reliance on the seller's skill and judgment is a question of fact¹. In relation to contracts made before 18 May 1973² the onus was on the buyer to show that he relied on the seller's skill and judgment and that a reasonable person in the shoes of the seller would have realised that he was being relied on³. Where the special purpose was disclosed to the seller, such disclosure was normally sufficient to show that the buyer relied on the seller's skill⁴. However, generally no condition or warranty of fitness was implied where the buyer, although stating his purpose, selected the goods he required⁵. It was not necessary that the buyer should rely exclusively on the seller's skill and judgment, so long as he did so to a substantial extent⁶. The fact that no ordinary skill or judgment could detect a defect did not negative the implied condition if the seller's skill and judgment were in fact relied on⁷.

The onus is now on the seller to show that the buyer did not rely on his skill or judgment or that it was unreasonable for him so to rely, but the principles stated, in relation to contracts before 18 May 1973, will still apply, except as regards onus of proof, to contracts after that date.

It would seem to be unreasonable for the buyer to rely on the seller's skill and judgment if in all the circumstances he ought to appreciate that a reasonable person in the seller's shoes would not realise that he was being relied on, or where the purpose is not made known to the seller with sufficient particularity to enable him to identify the characteristics which the goods would have to possess in order to be fit for that purpose, unless the seller ought to have recognised that he would need such further information⁸.

1 *Medway Oil and Storage Co Ltd v Silica Gel Corp* (1928) 33 Com Cas 195 at 196, HL, per Lord Sumner. The fact that the buyer took delivery of a car known at the time of the contract to have a leaking roof in the expectation that this defect would be put right after the contract was signed did not automatically mean that the buyer had ceased to rely on the seller's skill or judgment or that it was unreasonable for him to do so: *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd (Saunders Abbott (1980) Ltd, third party)* [1988] 1 All ER 847 at 851-852, 857, [1988] 1 WLR 321 at 326-327, 333, CA. As to the implied terms about quality and fitness generally see PARAS 77-78 ante; and PARA 81 et seq post.

2 The date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3).

3 *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31 at 81, [1968] 2 All ER 444 at 455, HL, per Lord Reid.

4 *Manchester Liners Ltd v Rea Ltd* [1922] 2 AC 74, HL; *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 99, PC; *Godley v Perry* [1960] 1 All ER 36 at 39, [1960] 1 WLR 9 at 13 (reliance by child readily inferred); *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545, [1968] 2 All ER 886, CA; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, [1971] 1 All ER 847, HL. No inference of reliance would, however, be drawn from a mere disclosure of purpose where two equally knowledgeable merchants were dealing with each other: *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31 at 84, 124-125, [1968] 2 All ER 444 at 457, 491-492, HL. See also *Ashford Shire Council v Dependable Motors Pty Ltd* [1961] AC 336, [1961] 1 All ER 96, PC (reliance by corporation; one agent makes known the purpose; another decides to buy).

5 *Wilson v Dunville* (1879) 4 LR Ir 249; on appeal 6 LR Ir 210. See also *Fitzgerald v Iveson* (1858) 1 F & F 410; *Turner v Mucklow* (1862) 8 Jur NS 870; *Robertson v Amazon Tug and Lighterage Co* (1881) 7 QBD 598, CA;

Daniels and Daniels v R White & Sons Ltd and Tarbard [1938] 4 All ER 258. Likewise, in the case of a contract for the sale of a specified article under its patent or other trade name, there was no implied condition as to its fitness for any particular purpose: see the Sale of Goods Act 1893 s 14(1) proviso (repealed). See now the Sale of Goods Act 1979 s 14(7), Sch 1 para 6, re-enacting the original provisions of the Sale of Goods Act 1893 (repealed) in respect of contracts made before 18 May 1973. For cases on the interpretation of s 14(1) proviso (repealed) see *Chanter v Hopkins* (1838) 4 M & W 399 (patent smoke-consuming furnace); *Ollivant v Bayley* (1843) 5 QB 288 (patent printing machine); *Prideaux v Bunnett* (1857) 1 CBNS 613; *Prideaux v M'Murray* (1860) 2 F & F 225 (smoke-consuming valve); *Chalmers v Harding* (1868) 17 LT 571 (corn reaper); *Paul & Co v Glasgow Corp'n* (1900) 3 F 119 (patent smoke-consuming apparatus). Cf FOOD vol 18(2) (Reissue) PARA 361. The Sale of Goods Act 1893 s 14(1) proviso (repealed) was a branch of the larger rule that a buyer buys on his own judgment where he defines the thing he requires for his stated purpose. It also assumed that the seller had not expressly undertaken that the goods would be fit for the buyer's purpose, in which case the buyer would not be bound to take the goods: *Chanter v Hopkins* supra at 405 per Lord Abinger CB; *Hydraulic Engineering Co Ltd v Spencer & Sons* (1886) 2 TLR 554, CA; *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 KB 831, CA; *Baldry v Marshall* [1925] 1 KB 260, CA.

6 See eg *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] AC 402, HL (reliance although buyer furnished specification); *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, [1971] 1 All ER 847, HL. Cf *Hall v Burke* (1886) 3 TLR 165, CA, per Lord Esher MR; *Lynch v Thorne* [1956] 1 All ER 744, [1956] 1 WLR 303, CA (sale of house; exact specification complied with; implied term overridden); *David's Pty Ltd v George Wills & Co Ltd* [1957] 1 Lloyd's Rep 203, Aust HC; *Dixon Kerly Ltd v Robinson* [1965] 2 Lloyd's Rep 404.

7 *Frost v Aylesbury Dairy Co* [1905] 1 KB 608 at 613, CA. See also PARA 78 note 23 ante.

8 Cf *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31 at 81, [1968] 2 All ER 444 at 455, HL, per Lord Reid.

UPDATE

77-82 Contracts for the Sale of Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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80. When an implied term about satisfactory quality is a condition.

Where the seller¹ sells goods² in the course of a business³, there is an implied term⁴ that the goods supplied⁵ under the contract are of satisfactory quality⁶. The term so implied does not extend to any matter making the quality of goods unsatisfactory:

104 (1) which is specifically drawn to the buyer's⁷ attention before the contract is made⁸;

105 (2) where the buyer examines the goods before the contract is made, which that examination ought to reveal⁹;

106 (3) in the case of a contract for sale by sample¹⁰, which would have been apparent on a reasonable examination of the sample¹¹.

Where, in the case of a contract of sale:

- 107 (a) the buyer would, but for this provision, have the right to reject goods by reason of a breach on the part of the seller of a term so implied as to description; but
- 108 (b) the breach is so slight that it would be unreasonable for him to reject them,

then, if the buyer does not deal as consumer¹², and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty¹³. It is for the seller to show that a breach fell within head (b) above¹⁴.

1 For the meaning of 'seller' see PARA 27 ante.

2 For the meaning of 'goods' see PARA 30 ante. In relation to contracts made before 18 May 1973 (ie the date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3)) the implied condition as to merchantable quality (see note 5 infra) applied only when the goods were bought by description from a seller who dealt in goods of that description: see the Sale of Goods Act 1979 s 14(7), Sch 1 paras 1(1), 6. For the meaning of 'contract' see PARA 5 note 12 ante. See also *Ipswich Gaslight Co v WB King & Co* (1886) 3 TLR 100, CA.

3 As to the meaning of 'business' see PARA 78 note 3 ante. The Sale of Goods Act 1979 s 14(2) (as substituted) is to be construed broadly and at face value as part of the overall code embodied in the Sale of Goods Act 1979 and there is no reason or warrant to introduce an implied qualification, difficult to define, in order to narrow what appears to be the wide scope and apparent purpose of the words, which is to distinguish between a sale made in the course of a seller's business and a purely private sale of goods outside the confines of the business carried on by the seller: *Stevenson v Rogers* [1999] QB 1028, [1999] 1 All ER 613, CA (fishing boat used exclusively for the purposes of a fishing business held to have been sold in the course of a business). As to whether the sale of items as part of the sale of the majority of a business can be described as a sale in the course of a business where such items have been previously sold by the business see *Browning v Brachers (a firm)* [2004] EWHC 16 (QB), [2004] All ER (D) 246 (Feb). See also John de Lacy 'Selling in the Course of a Business under the Sale of Goods Act 1979' (1999) 62 MLR 776.

4 As regards England and Wales, the term so implied is a condition: Sale of Goods Act 1979 s 14(6) (substituted by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 5(1), (5)(b)). An implied term about quality may be annexed by usage: see the Sale of Goods Act 1979 s 14(4) (as amended); and PARAS 19, 77 ante. As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante. Cf *Broome v Pardess Co-operative Society of Orange Growers (Est 1900) Ltd* [1940] 1 All ER 603, CA (broker's contract; no implied condition as to merchantable quality). For conditions implied in hire-purchase agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 24.

5 Prior to the introduction of the term 'satisfactory quality' by the Sale and Supply of Goods Act 1994 s 1(1) the implied condition of 'merchantable quality' extended to all goods supplied in purported compliance with the contract including containers which were not sold but remained the property of the seller: *Chapronière v Mason* (1905) 21 TLR 633, CA (Bath bun with stone in it); *Wilson v Rickett, Cockerell & Co Ltd* [1954] 1 QB 598, [1954] 1 All ER 868, CA (coalite containing explosive); *Gedding v Marsh* [1920] 1 KB 668, DC (returnable bottles); *Niblett Ltd v Confectioners' Materials Co Ltd* [1921] 3 KB 387, CA (wrapping); *Marleau v People's Gas Supply Co Ltd* [1940] 4 DLR 433, Can SC (gas tank lent by seller). As to free gifts see *Esso Petroleum Co Ltd v Customs and Excise Comrs* [1976] 1 All ER 117, [1976] 1 WLR 1, HL.

6 Sale of Goods Act 1979 s 14(2) (substituted by the Sale and Supply of Goods Act 1994 s 1(1)). For a discussion of the relationship between the Sale of Goods Act 1979 s 14(2) (as substituted) and s 14(3) (as amended) see *Jewson Ltd v Kelly* [2003] EWCA Civ 1030 at para [46], [2004] 1 Lloyd's Rep 505 at para [46], [2003] All ER (D) 470 (Jul) at para [46] ('there is a considerable overlap between subsections 14(2) and 14(3) but they perform different functions. The function of s 14(2) is to establish a general standard which goods are required to reach, whereas the function of s 14(3) is to impose a particular (higher) standard which is appropriate where the buyer (to the knowledge of the seller) buys the goods for a particular purpose and relies on the seller's skill and judgment for that purpose'). For the meaning of 'satisfactory quality' see PARA 81 post. For illustrations of decisions made under the Sale of Goods Act 1893 s 14(2) (repealed), in relation to contracts made before 18 May 1973 see *Gardiner v Gray* (1815) 4 Camp 144 (waste silk); *Laing v Fidgeon* (1815) 6 Taunt 108 (saddles); *Jones v Bright* (1829) 5 Bing 533 (copper sheathing); *Mody v Gregson* (1868) LR 4 Exch 49, Ex Ch (shirting); *Jones v Just* (1868) LR 3 QB 197 (Manilla hemp) (reviewing the previous cases); *Beer v Walker* (1877) 46 LJQB 677 (rabbits); *M'Clelland v Stewart* (1883) 12 LR Ir 125 (goods 'as classified'; exclusion of the Sale of Goods Act 1893 s 14(2) (repealed)); *Drummond v Van Ingen* (1887) 12 App Cas 284 at 290, HL; *Jones v Padgett* (1890) 24 QBD 650, DC (cloth); *Wren v Holt* [1903] 1 KB 610, CA (beer contaminated with arsenic); *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 KB 831, CA (motor omnibuses); *Jackson v Rotax Motor*

and *Cycle Co* [1910] 2 KB 937, CA (motor horns); *Grenfell v EB Meyrowitz Ltd* [1936] 2 All ER 1313, CA (goggles fitted with safety-glass lenses); *Lusk v Barclay* 1953 SLT (Sh Ct) 23 (coal); *Wilson v Rickett Cockerell & Co Ltd* [1954] 1 QB 598, [1954] 1 All ER 868, CA (coalite containing explosive); *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] EWCA Civ 548, [2002] 2 All ER (Com) 321 (see PARA 78 note 12 ante). Where goods were not of the description ordered, there was no room for the application of the Sale of Goods Act 1893 s 14(2) (repealed): see *M'Callum v Mason* 1956 SC 50, Ct of Sess (fertiliser). The rule applied to specific as well as to unascertained goods: *Shepherd v Pybus* (1842) 3 Man & G 868; *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd* supra at 838.

7 For the meaning of 'buyer' see PARA 29 ante.

8 Sale of Goods Act 1979 s 14(2C)(a) (added by the Sale and Supply of Goods Act 1994 s 1(1)).

9 Sale of Goods Act 1979 s 14(2C)(b) (added by the Sale and Supply of Goods Act 1994 s 1(1)). See *Bramhill v Edwards* [2004] EWCA Civ 403, [2004] 2 Lloyd's Rep 653, [2004] All ER (D) 42 (Apr). The Sale of Goods Act 1979 s 14(2C)(b) (as added) re-enacts the Sale of Goods Act 1893 s 14(2)(b) (repealed) (substituted by the Supply of Goods (Implied Terms) Act 1973 s 3 (repealed)). The Sale of Goods Act 1893 s 14(2) (as originally enacted and now repealed) provided only that there was no implied condition if the buyer had examined the goods as regards any defect which ought to have been revealed by such examination, and this is still the position as regards contracts made before 18 May 1973: see the Sale of Goods Act 1979 Sch 1 para 6. See further *Drummond v Van Ingen* (1887) 12 App Cas 284 at 290, HL; *Wallis v Russell* [1902] 2 IR 585 at 596, Ir CA; *Thornett and Fehr v Beers & Son* [1919] 1 KB 486; *Horn v Minister of Food* [1948] 2 All ER 1036. The rule prior to the Sale of Goods Act 1893 (repealed) was that a warranty of merchantable quality was implied where goods of a specified description, ie kind, inaccessible to the buyer's examination, were contracted for. In such a case the presumption was that the buyer relied on the judgment, knowledge and information of the seller, and the maxim caveat emptor accordingly did not apply: *Jones v Just* (1868) LR 3 QB 197. Under the Sale of Goods Act 1893 (repealed) the condition is excluded where the buyer has actually examined the goods, only as regards defects discoverable by the examination actually made: *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 KB 831, CA; *Grant v Australian Knitting Mills Ltd* [1936] AC 85, PC; *Canadian Yacht Sales v MacDonald* [1977] 2 Lloyd's Rep 298, Ont SC. The Sale of Goods Act 1893 (repealed) had thus adapted to implied conditions the principle of the rule at common law that an express general warranty does not cover patent defects: see PARA 108 post.

10 As to sales by sample see PARA 94 post.

11 Sale of Goods Act 1979 s 14(2C)(c) (added by the Sale and Supply of Goods Act 1994 s 1(1)).

12 As to the meaning of 'dealing as consumer' see PARA 73 note 8 ante. As to the buyer's rights where the buyer is a consumer and the goods bought are not of satisfactory quality see PARA 307 post.

13 Sale of Goods Act 1979 s 15A(1), (2) (added by the Sale and Supply of Goods Act 1994 s 4(1)).

14 Sale of Goods Act 1979 s 15A(3) (added by the Sale and Supply of Goods Act 1994 s 4(1)).

UPDATE

77-82 Contracts for the Sale of Goods

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81. Meaning of 'satisfactory quality'.

Goods¹ of any kind supplied under a contract made on or after 18 May 1973² are of satisfactory quality for the purposes of the implied term³ that goods supplied are of satisfactory quality⁴ if they meet the standard that a reasonable person⁵ would regard as satisfactory, taking account of any description of the goods, the price, if relevant⁶, and all the other relevant circumstances⁷. For these purposes, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods:

- 109 (1) fitness for all the purposes for which goods of the kind in question are commonly supplied⁸;
- 110 (2) appearance and finish;
- 111 (3) freedom from minor defects;
- 112 (4) safety⁹;
- 113 (5) durability¹⁰; and
- 114 (6) if the buyer deals as consumer¹¹, any public statement on the specific characteristics of the goods made about them by the seller, the producer¹² or his representative, particularly in advertising or on labelling¹³.

1 For the meaning of 'goods' see PARA 30 ante.

2 A statutory definition of 'satisfactory quality' was introduced by the Sale and Supply of Goods Act 1994 s 1(1), which substituted the Sale of Goods Act 1979 s 14(2) (as originally enacted). That definition replaced the statutory definition of 'merchantable quality' introduced by the Supply of Goods (Implied Terms) Act 1973 s 7(2) (repealed) which added the Sale of Goods Act 1893 s 62(1A), itself repealed and re-enacted in the Sale of Goods Act 1979 s 14(6) (as originally enacted). It is submitted, however, that decisions based on the old law of 'merchantable quality' may still be usefully regarded, albeit with some caution, as aids to the interpretation of the new provisions. The statutory definition of 'merchantable quality' contained in s 14(6) (as originally enacted) did not apply to contracts made before 18 May 1973 (ie the date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3)) (see the Sale of Goods Act 1979 s 14(7), Sch 1 paras 1(1), 6); and decisions on the meaning of 'merchantable quality' in relation to such contracts do not represent the law in relation to later contracts, where the new statutory definition applies: *Lee v York Coach and Marine* [1977] RTR 35, CA; *Rogers v Parish (Scarborough) Ltd* [1987] QB 933, [1987] 2 All ER 232, CA; *AT Bright & Sons (a firm) v PHR (Rayne) (a firm)* [2003] All ER (D) 117 (Jan). In relation to contracts made before 18 May 1973, as a general rule, goods were of merchantable quality if in the form in which they were tendered they would be used by a reasonable person for some purpose for which goods of the same quality and same general character and designation would normally be used, so as to be saleable under the description by which they were sold at a price not substantially less than the contract price: *BS Brown & Son Ltd v Craiks Ltd* [1970] 1 All ER 823, [1970] 1 WLR 752, HL. See also *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, [1975] 3 All ER 739, CA. As to the relevance before 18 May 1973 of knowledge acquired after the sale as to the way the goods could safely be used see *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL.

3 As regards England and Wales, the terms implied by the Sale of Goods Act 1979 s 14(2) (as substituted) (see PARA 80 ante) and s 14(3) (as amended) (see PARA 78 ante) are conditions: s 14(6) (substituted by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 5(1), (5)(b)). As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

4 Ie within the meaning of the Sale of Goods Act 1979 s 14(2A) (as added).

5 The test is objective, that of a reasonable person in the position of the buyer, so that the reasonable buyer has to be attributed with knowledge of all relevant background facts: *Bramhill v Edwards* [2004] EWCA Civ 403, [2004] 2 Lloyd's Rep 653, [2004] All ER (D) 42 (Apr).

6 Cf *BS Brown & Son Ltd v Craiks Ltd* [1970] 1 All ER 823 at 825, 828, 830-831, [1970] 1 WLR 752 at 754-755, 757-758, 760, HL (effect of price before 18 May 1973). A number of cases decided prior to the introduction of the term 'satisfactory quality' by the Sale and Supply of Goods Act 1994 s 1(1) in substitution for the term 'merchantable quality' may still provide useful guidance as to the relevance of the price to the question whether the goods are of satisfactory quality. Thus, a reduction in the value of goods because of defects did not necessarily mean that the goods were not of merchantable quality, if they were still fit for the purpose for which they were bought, particularly if there was provision in the contract giving the buyer an allowance for defects: *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, [1975] 3 All ER 739, CA. See also *Millars of Falkirk Ltd v Turpie* 1976 SLT (Notes) 66, Ct of Sess (minor defects in car which are not dangerous and easily remediable under guarantee do not make the car unmerchantable). Cf, however, *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep 645 (electrical defect caused destruction of boat); *Shine v General Guarantee*

Corpn Ltd (Reeds Motor Co (a firm), third party) [1988] 1 All ER 911, CA (purchasers' reasonable expectations must be considered as well as the condition of the goods). As to secondhand cars see *Bartlett v Sidney Marcus Ltd* [1965] 2 All ER 753, [1965] 1 WLR 1013, CA; *Crowther v Shannon Motor Co (a firm)* [1975] 1 All ER 139, [1975] 1 WLR 30, CA; *Towerbrook Ltd v Williams* [1976] CA Transcript 426; *Lee v York Coach and Marine* [1977] RTR 35, CA; *Business Applications Specialists Ltd v Nationwide Credit Corpn Ltd (Marn Garage (Camberley) Ltd, third party)* [1988] RTR 332, CA.

7 Sale of Goods Act 1979 s 14(2A) (added by the Sale and Supply of Goods Act 1994 s 1(1)). As to the deterioration of goods in transit see PARAS 191-192 post. A number of cases decided prior to the introduction of the term 'satisfactory quality' by the Sale and Supply of Goods Act 1994 s 1(1) in substitution for the term 'merchantable quality' may still provide useful guidance as to which other circumstances may be relevant in establishing whether the goods are of satisfactory quality. Under the meaning of 'merchantable quality' prior to 18 May 1973 (see note 2 supra) the condition as to merchantable quality did not refer to the legality of sale in a foreign country in which the goods were to be resold: *Sumner Permain & Co v Webb & Co* [1922] 1 KB 55, CA (tonic water unsaleable in Argentina due to presence of salicylic acid); *Phoenix Distributors Ltd v LB Clarke (London) Ltd* [1966] 2 Lloyd's Rep 285; affd [1967] 1 Lloyd's Rep 518, CA. Cf *Niblett Ltd v Confectioners' Materials Co Ltd* [1921] 3 KB 387, CA. For a consideration of defects rendering a new car unmerchantable see *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220. Where a buyer ordered an article under a trade name, he would normally have been taken to order it as manufactured at the date of the order and its merchantable quality would, therefore, have been determined on that basis: *Harris & Sons v Plymouth Varnish and Colour Co Ltd* (1933) 49 TLR 521. For a recent example of a breach of the term as to satisfactory quality see *Area Solutions v Tasty Wok Ltd* [2004] EWHC 2615 (TCC).

The fact that goods intrinsically work satisfactorily is not the same as their being of 'satisfactory quality' in accordance with the Sale of Goods Act 1979 s 14(2A) (as added): *Jewson Ltd v Kelly* [2002] EWHC 2515 (QB), [2003] EWCA Civ 1030, [2004] 1 Lloyd's Rep 505.

8 Prior to the introduction of the term 'satisfactory quality' by the Sale and Supply of Goods Act 1994 s 1(1) in substitution for the term 'merchantable quality', where goods had only one use in the ordinary course of things and were not fit for that use, they were not merchantable: *Grant v Australian Knitting Mills Ltd* [1936] AC 85, PC. Where, however, goods could reasonably be expected to be used for more than one purpose, they did not need to be fit for all such purposes for them to be merchantable: *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 All ER 135, [1987] 1 WLR 1, CA. Likewise, where the sale of a picture appearing to have been painted by a named artist was effected either for the purpose of a resale or for the purpose of resale and aesthetic appreciation, the picture was merchantable so long as it served either purpose, even if its resale value was much less than the price paid: *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 QB 564, [1990] 1 All ER 737, CA.

9 See *Clegg v Andersson* [2003] EWCA Civ 320, [2003] 1 All ER (Comm) 721 (overweight keel made yacht unsafe). The fact that the thing sold is secondhand does not deprive the condition as to satisfactory quality of its effect: *SW Tubes Ltd v Owen Stuart Ltd (t/a OSL Technical Services)* [2002] EWCA Civ 854, [2002] All ER (D) 243 (May).

10 Sale of Goods Act 1979 s 14(2B) (added by the Sale and Supply of Goods Act 1994 s 1(1)).

11 As to the meaning of 'dealing as consumer' see PARA 73 note 8 ante.

12 'Producer' means the manufacturer of goods, the importer of goods into the European Economic Area or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods: Sale of Goods Act 1979 s 61(1) (definition added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 6(1)).

13 Sale of Goods Act 1979 s 14(2D) (s 14(2D)-(2F) added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 3). A public statement is not by virtue of the Sale of Goods Act 1979 s 14(2D) (as added) a relevant circumstance for the purposes of s 14(2A) (as added) (see the text to notes 1-7 supra) in the case of a contract of sale, if the seller shows that: (1) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement; (2) before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything which was incorrect or misleading, it had been corrected in public; or (3) the decision to buy the goods could not have been influenced by the statement: s 14(2E) (as so added). Section 14(2D), (2E) (as added) does not prevent any public statement from being a relevant circumstance for the purposes of s 14(2A) (as added) (whether or not the buyer deals as consumer) if the statement would otherwise have been such a circumstance: s 14(2F) (as so added). As to penalties under the Trade Descriptions Act 1968 s 13 see PARA 484 post.

UPDATE

77-82 Contracts for the Sale of Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

81 Meaning of 'satisfactory quality'

NOTE 4--See *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, [2008] 1 All ER 1156 (car of satisfactory quality at time of buyer's rejection).

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82. Seller in course of business acting as agent.

The implied terms about fitness for purpose and satisfactory quality¹ apply to a sale² by a person who in the course of a business³ is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer⁴ knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract⁵ is made⁶.

1 The rules contained in the Sale of Goods Act 1979 s 14(1)-(4) (as amended): see PARAS 77-80 ante. As regards England and Wales, the terms implied by s 14(2) (as substituted) (see PARA 80 ante) and s 14(3) (as amended) (see PARA 78 ante) are conditions: s 14(6) (substituted by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 5(1), (5)(b)). As to the distinction between warranties, conditions and innominate or intermediate terms see PARA 64 ante.

2 For the meaning of 'sale' see PARA 27 ante.

3 As to the meaning of 'business' see PARA 78 note 3 ante. Cf *Stevenson v Rogers* [1999] QB 1028, [1999] 1 All ER 613, CA (cited in PARA 80 note 3 ante).

4 For the meaning of 'buyer' see PARA 29 ante.

5 For the meaning of 'contract of sale' see PARA 29 ante.

6 Sale of Goods Act 1979 s 14(5). Where an agent acts for an undisclosed principal, an action for breach of the terms implied by s 14(2) (as substituted) and s 14(3) (as amended) may be brought under s 14(5) against the principal himself as well as against the agent: *Boyer v Thomson* [1995] 2 AC 628, [1995] 3 All ER 135, HL.

UPDATE

77-82 Contracts for the Sale of Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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Quality or Fitness in Contracts for the Sale and Supply of Goods/B. CONTRACTS FOR THE TRANSFER OF GOODS/83. General rule.

B. CONTRACTS FOR THE TRANSFER OF GOODS

83. General rule.

Except as otherwise provided by the Supply of Goods and Services Act 1982¹ and subject to the provisions of any other enactment², there is no implied condition or warranty about the quality or fitness for any particular purpose of goods³ supplied under a contract for the transfer of goods⁴. An implied condition or warranty about quality or fitness for a particular purpose may be annexed by usage to a contract for the transfer of goods⁵.

1 le by the Supply of Goods and Services Act 1982 s 4 (as amended) (see infra; and PARAS 84-85 post) and s 5 (as amended) (see PARA 95 post).

2 For these purposes, 'enactment' means any legislation, including subordinate legislation, of the United Kingdom: *ibid* s 18(1). See eg the Consumer Protection Act 1987 s 41(1); and PARA 543 post.

3 For the meaning of 'goods' see PARA 34 ante.

4 Supply of Goods and Services Act 1982 s 4(1). For the meaning of 'contract for the transfer of goods' see PARA 32 ante.

5 *Ibid* s 4(7).

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84. Fitness for purpose in contracts for the transfer of goods.

Where, under a contract for the transfer of goods¹, the transferor² transfers the property³ in goods in the course of a business⁴ and the transferee⁵, expressly or by implication, makes known:

115 (1) to the transferor; or

116 (2) where the consideration or part of the consideration for the transfer is a sum payable by instalments and the goods were previously sold by a credit broker⁶ to the transferor, to that credit broker,

any particular purpose for which the goods are being acquired, there is an implied condition⁷ that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied⁸. There is, however, no such implied condition where the circumstances show that the transferee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the transferor or credit broker⁹.

Where, in the case of a contract for the transfer of goods:

117 (a) the transferee would, but for this provision, have the right to treat the contract as repudiated by reason of a breach on the part of the transferor of a term so implied as to fitness for a particular purpose; but

118 (b) the breach is so slight that it would be unreasonable for him to do so,

then, if the transferee does not deal as consumer¹⁰, and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty¹¹. It is for the transferor to show that a breach fell within head (b) above¹².

For the meaning of 'contract for the transfer of goods' see PARA 32 ante; and for the meaning of 'goods' see PARA 34 ante.

2 For the meaning of 'transferor' see PARA 70 note 2 ante.

3 For the meaning of 'property', in relation to goods see PARA 32 note 1 ante.

4 For these purposes, 'business' includes a profession and the activities of any government department or local or public authority: Supply of Goods and Services Act 1982 s 18(1). Cf *Stevenson v Rogers* [1999] QB 1028, [1999] 1 All ER 613, CA (cited in PARA 80 note 3 ante).

5 For the meaning of 'transferee' see PARA 70 note 8 ante.

6 For these purposes, 'credit broker' means a person acting in the course of a business of credit brokerage carried on by him: Supply of Goods and Services Act 1982 s 18(1). 'Credit brokerage' means the effecting introductions: (1) of individuals desiring to obtain credit to persons carrying on any business, so far as it relates to the provision of credit; (2) of individuals desiring to obtain goods on hire to persons carrying on a business which comprises or relates to the bailment of goods under a contract for the hire of goods; or (3) of individuals desiring to obtain credit, or to obtain goods on hire, to other credit brokers: s 18(1) (amended by the Sale and Supply of Goods Act 1994 s 6, Sch 1 para 2(a)).

7 As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante. As to the relationship between this condition and the condition as to satisfactory quality see PARA 85 note 6 post.

8 Supply of Goods and Services Act 1982 s 4(4), (5). An implied term about fitness for purpose may be annexed by usage: see PARA 83 ante. As against a person dealing as consumer, liability in respect of the fitness of goods for any particular purpose cannot be excluded or restricted by reference to any contract term (see the Unfair Contract Terms Act 1977 s 7(1), (2); and PARA 450 post); and as against a person dealing otherwise than as consumer, such liability can be excluded or restricted only in so far as the contract term referred to satisfies the requirement of reasonableness (see s 7(1), (3); and PARA 450 et seq post). As to the meaning of 'dealing as consumer' in the Unfair Contract Terms Act 1977 see PARA 450 note 10 post. As to the transferee's rights where the transferee is a consumer and the goods transferred are not fit for their purpose see PARA 307 post.

9 Supply of Goods and Services Act 1982 s 4(6).

10 As to the meaning of 'dealing as consumer' see PARA 75 note 10 ante.

11 Supply of Goods and Services Act 1982 s 5A(1), (2) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (5)).

12 Supply of Goods and Services Act 1982 s 5A(3) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (5)).

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85. Satisfactory quality in contracts for the transfer of goods.

Where, under a contract for the transfer of goods¹, the transferor² transfers the property³ in goods in the course of a business⁴, there is an implied condition⁵ that the goods supplied under

the contract are of satisfactory quality⁶. The condition so implied does not extend to any matter making the quality of goods unsatisfactory:

- 119 (1) which is specifically drawn to the transferee's⁷ attention before the contract is made;
- 120 (2) where the transferee examines the goods before the contract is made, which that examination ought to reveal; or
- 121 (3) where the property in the goods is transferred by reference to a sample⁸, which would have been apparent on a reasonable examination of the sample⁹.

Where, in the case of a contract for the transfer of goods:

- 122 (a) the transferee would, but for this provision, have the right to treat the contract as repudiated by reason of a breach on the part of the transferor of a term so implied as to quality; but
- 123 (b) the breach is so slight that it would be unreasonable for him to do so,

then, if the transferee does not deal as consumer¹⁰, and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty¹¹. It is for the transferor to show that a breach fell within head (b) above¹².

1 For the meaning of 'contract for the transfer of goods' see PARA 32 ante; and for the meaning of 'goods' see PARA 34 ante.

2 For the meaning of 'transferor' see PARA 70 note 2 ante.

3 For the meaning of 'property', in relation to goods see PARA 32 note 1 ante.

4 As to the meaning of 'business' see PARA 84 note 4 ante.

5 As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

6 Supply of Goods and Services Act 1982 s 4(2) (substituted by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (3)). For the meaning of 'satisfactory quality' see PARA 86 post. For a discussion of the relationship between the Supply of Goods and Services Act 1982 s 4(2) (as substituted) (fitness for purpose) and s 4(3) (as substituted) (satisfactory quality) see *Lumbermens Mutual Casualty Co v Bovis Lend Lease Ltd* [2004] EWHC 2197 (Comm), [2005] 1 Lloyd's Rep 494. See also, in the context of the Sale of Goods Act 1979, PARA 81 note 6 ante. An implied term about satisfactory quality may be annexed by usage: see PARA 83 ante. As to the exclusion of implied terms generally see PARA 102 post. As against a person dealing as consumer, liability in respect of the quality of goods cannot be excluded or restricted by reference to any contract term (see the Unfair Contract Terms Act 1977 s 7(1), (2); and PARA 450 post); and as against a person dealing otherwise than as consumer, such liability can be excluded or restricted only in so far as the contract term referred to satisfies the requirement of reasonableness (see s 7(1), (3); and PARA 450 et seq post). As to the meaning of 'dealing as consumer' in the Unfair Contract Terms Act 1977 see PARA 450 note 10 post. As to the transferee's rights where the transferee is a consumer and the goods transferred are not of satisfactory quality see PARA 307 post.

7 For the meaning of 'transferee' see PARA 70 note 8 ante.

8 As to the transfer of goods by sample see PARA 95 post.

9 Supply of Goods and Services Act 1982 s 4(3) (substituted by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (3)).

10 As to the meaning of 'dealing as consumer' see PARA 75 note 10 ante.

11 Supply of Goods and Services Act 1982 s 5A(1), (2) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (5)).

12 Supply of Goods and Services Act 1982 s 5A(3) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (5)).

UPDATE

85 Satisfactory quality in contracts for the transfer of goods

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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86. Meaning of 'satisfactory quality'.

Goods¹ are of satisfactory quality for the purposes of the implied condition that goods transferred under a contract for the transfer of goods are of satisfactory quality² if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price, if relevant, and all the other relevant circumstances³. For these purposes, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods:

- 124 (1) fitness for all purposes for which goods of the kind in question are commonly supplied;
- 125 (2) appearance and finish;
- 126 (3) freedom from minor defects;
- 127 (4) safety;
- 128 (5) durability⁴; and
- 129 (6) if the transferee deals as consumer⁵, any public statements on the specific characteristics of the goods made about them by the transferor, the producer⁶ or his representative, particularly in advertising or on labelling⁷.

1 For the meaning of 'goods' see PARA 34 ante.

2 Ie for the purposes of the Supply of Goods and Services Act 1982 s 4(2) (as substituted): see PARA 85 ante.

3 Ibid s 4(2A) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (3)).

4 Supply of Goods and Services Act 1982 s 18(3) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (10)).

5 As to the meaning of 'dealing as consumer' see PARA 75 note 10 ante.

6 For the meaning of 'producer' see PARA 81 note 12 ante.

7 Supply of Goods and Services Act 1982 s 4(2B) (s 4(2B)-(2D) added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 7). A public statement is not by virtue of the Supply of Goods and Services Act 1982 s 4(2B) (as added) a relevant circumstance for the purposes of s 4(2A) (as added) (see the text to notes 1-3 supra) in the case of a contract for the transfer of goods, if the transferor shows that: (1) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement; (2) before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything which was incorrect or misleading, it had been corrected in public; or (3) the decision to acquire the goods could not have been influenced by the statement: s 4(2C) (as so added). Section 4(2B), (2C) (as added)

does not prevent any public statement from being a relevant circumstance for the purposes of s 4(2A) (as added) (whether or not the transferee deals as consumer) if the statement would have been such a circumstance apart from those provisions: s 4(2D) (as so added).

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87. Transferor in course of business acting as agent.

The implied conditions as to fitness for purpose and satisfactory quality¹ apply to a transfer by a person who in the course of a business² is acting as agent for another as it applies to a transfer by a principal in the course of a business, except where that other is not transferring in the course of a business and either the transferee³ knows that fact or reasonable steps are taken to bring it to the transferee's notice before the contract concerned is made⁴.

1. The Supply of Goods and Services Act 1982 s 4 (as amended); see PARAS 84-85 ante.

2. As to the meaning of 'business' see PARA 84 note 4 ante.

3. For the meaning of 'transferee' see PARA 70 note 8 ante.

4. Supply of Goods and Services Act 1982 s 4(8).

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C. CONTRACTS FOR THE HIRE OF GOODS

88. General rule.

Except as otherwise provided by the Supply of Goods and Services Act 1982¹ and subject to the provisions of any other enactment², there is no implied condition or warranty about the quality or fitness for any particular purpose of goods³ bailed under a contract for the hire of goods⁴. An implied condition or warranty about quality or fitness for a particular purpose may be annexed by usage to a contract for the hire of goods⁵.

1. The Supply of Goods and Services Act 1982 s 9 (as amended) (see *infra*; and PARAS 89-90 post) and s 10 (as amended) (see PARA 96 post).

2. For the meaning of 'enactment' see PARA 83 note 2 ante.

3. For the meaning of 'goods' see PARA 34 ante.

4. Supply of Goods and Services Act 1982 s 9(1). For the meaning of 'contract for the hire of goods' see PARA 33 ante.

5. *Ibid* s 9(7).

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89. Fitness for purpose in contracts for the hire of goods.

Where, under a contract for the hire of goods¹, the bailor² bails goods in the course of a business³ and the bailee⁴, expressly or by implication, makes known:

- 130 (1) to the bailor in the course of negotiations conducted by him in relation to the making of the contract; or
- 131 (2) to a credit broker⁵ in the course of negotiations conducted by that broker in relation to goods sold by him to the bailor before forming the subject matter of the contract,

any particular purpose for which the goods are being bailed, there is an implied condition⁶ that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied⁷. There is, however, no such implied condition where the circumstances show that the bailee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the bailor or credit broker⁸.

Where, in the case of a contract for the hire of goods:

- 132 (a) the bailee would, but for this provision, have the right to treat the contract as repudiated by reason of a breach on the part of the bailor of a term so implied as to fitness for purpose; but
- 133 (b) the breach is so slight that it would be unreasonable for him to do so,

then, if the bailee does not deal as consumer⁹, and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty¹⁰. It is for the bailor to show that a breach fell within head (b) above¹¹.

1 For the meaning of 'contract for the hire of goods' see PARA 33 ante; and for the meaning of 'goods' see PARA 34 ante. 'Goods' includes a computer disk but not a computer program; but, where a disk onto which a program designed and intended to instruct or enable a computer to achieve particular functions has been encoded is sold or hired but the program is defective, so that it will not instruct or enable the computer to achieve the intended purpose, the seller or hirer of the disk will be in breach of the terms about quality or fitness implied by the Supply of Goods and Services Act 1982 s 9 (as amended): *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481 at 493, CA, per Sir Iain Glidewell.

2 For the meaning of 'bailor' see PARA 71 note 3 ante.

3 As to the meaning of 'business' see PARA 84 note 4 ante.

4 For the meaning of 'bailee' see PARA 71 note 6 ante.

5 For the meaning of 'credit broker' see PARA 84 note 6 ante.

6 As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

7 Supply of Goods and Services Act 1982 s 9(4), (5). For an example of a breach of this condition see *Blackpool Ladder Centre Ltd v BWB Partnership* [2000] All ER (D) 1802. An implied term about fitness for purpose may be annexed by usage: see PARA 88 ante. As to the exclusion of implied terms generally see PARA

102 post. As against a person dealing as consumer, liability in respect of the fitness of goods for any particular purpose cannot be excluded or restricted by reference to any contract term (see the Unfair Contract Terms Act 1977 s 7(1), (2); and PARA 450 post); and as against a person dealing otherwise than as consumer, such liability can be excluded or restricted only in so far as the contract term referred to satisfies the requirement of reasonableness (see s 7(1), (3); and PARA 450 et seq post). As to the meaning of 'dealing as consumer' in the Unfair Contract Terms Act 1977 see PARA 450 note 10 post. As to the bailee's rights where the bailee is a consumer and the goods hired are not fit for their purpose see PARA 307 post.

8 Supply of Goods and Services Act 1982 s 9(6).

9 As to the meaning of 'dealing as consumer' see PARA 75 note 10 ante.

10 Supply of Goods and Services Act 1982 s 10A(1), (2) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (9)).

11 Supply of Goods and Services Act 1982 s 10A(3) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (9)).

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90. Satisfactory quality in contracts for the hire of goods.

Where, under a contract for the hire of goods¹, the bailor² bails goods in the course of a business³, there is an implied condition⁴ that the goods supplied under the contract are of satisfactory quality⁵. The condition so implied does not extend to any matter making the quality of goods unsatisfactory:

134 (1) which is specifically drawn to the bailee's⁶ attention before the contract is made;

135 (2) where the bailee examines the goods before the contract is made, which that examination ought to reveal; or

136 (3) where the goods are bailed by reference to a sample, which would have been apparent on a reasonable examination of the sample⁷.

Where, in the case of a contract for the hire of goods:

137 (a) the bailee would, but for this provision, have the right to treat the contract as repudiated by reason of a breach on the part of the bailor of a term so implied as to quality; but

138 (b) the breach is so slight that it would be unreasonable for him to do so,

then, if the bailee does not deal as consumer⁸, and in so far as a contrary intention does not appear, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty⁹. It is for the bailor to show that a breach fell within head (b) above¹⁰.

1 For the meaning of 'contract for the hire of goods' see PARA 33 ante; and for the meaning of 'goods' see PARA 34 ante. As to the meaning of 'goods' in this context see PARA 89 note 1 ante.

2 For the meaning of 'bailor' see PARA 71 note 3 ante.

3 As to the meaning of 'business' see PARA 84 note 4 ante.

4 As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

5 Supply of Goods and Services Act 1982 s 9(2) (substituted by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (7)). An implied term about satisfactory quality may be annexed by usage: see PARA 88 ante. As to the exclusion of implied terms generally see PARA 102 post. As against a person dealing as consumer, liability in respect of the quality of goods cannot be excluded or restricted by reference to any contract term (see the Unfair Contract Terms Act 1977 s 7(1), (2); and PARA 450 post); and as against a person dealing otherwise than as consumer, such liability can be excluded or restricted only in so far as the contract term referred to satisfies the requirement of reasonableness (see s 7(1), (3); and PARA 450 et seq post). As to the meaning of 'dealing as consumer' in the Unfair Contract Terms Act 1977 see PARA 450 note 10 post. As to the bailee's rights where the bailee is a consumer and the goods hired are not of satisfactory quality see PARA 307 post.

6 For the meaning of 'bailee' see PARA 71 note 6 ante.

7 Supply of Goods and Services Act 1982 s 9(3) (substituted by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (7)).

8 As to the meaning of 'dealing as consumer' see PARA 75 note 10 ante.

9 Supply of Goods and Services Act 1982 s 10A(1), (2) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (9)).

10 Supply of Goods and Services Act 1982 s 10A(3) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (9)).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(v) Implied Terms about Quality or Fitness in Contracts for the Sale and Supply of Goods/C. CONTRACTS FOR THE HIRE OF GOODS/91. Meaning of 'satisfactory quality'.

91. Meaning of 'satisfactory quality'.

Goods¹ are of satisfactory quality for the purposes of the implied condition that goods supplied under a contract for the hire of goods are of satisfactory quality² if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price, if relevant, and all the other relevant circumstances³. For these purposes, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods:

- 139 (1) fitness for all purposes for which goods of the kind in question are commonly supplied;
- 140 (2) appearance and finish;
- 141 (3) freedom from minor defects;
- 142 (4) safety;
- 143 (5) durability⁴; and
- 144 (6) if the bailee deals as consumer⁵, any public statements on the specific characteristics of the goods made about them by the bailor, the producer⁶ or his representative, particularly in advertising or on labelling⁷.

1 For the meaning of 'goods' see PARA 34 ante.

2 For the purposes of the Supply of Goods and Services Act 1982 s 9(2) (as substituted): see PARA 90 ante. See also PARA 85 ante.

3 Ibid s 9(2A) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (7)).

4 Supply of Goods and Services Act 1982 s 18(3) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (10)).

5 As to the meaning of 'dealing as consumer' see PARA 75 note 10 ante.

6 For the meaning of 'producer' see PARA 81 note 12 ante.

7 Supply of Goods and Services Act 1982 s 9(2B) (s 9(2B)-(2D) added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 10). A public statement is not by virtue of the Supply of Goods and Services Act 1982 s 9(2B) (as added) a relevant circumstance for the purposes of s 9(2A) (as added) (see the text to notes 1-3 supra) in the case of a contract for the hire of goods, if the bailor shows that: (1) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement; (2) before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything which was incorrect or misleading, it had been corrected in public; or (3) the decision to acquire the goods could not have been influenced by the statement: s 9(2C) (as so added). Section 9(2B), (2C) (as added) does not prevent any public statement from being a relevant circumstance for the purposes of s 9(2A) (as added) (whether or not the bailee deals as consumer) if the statement would have been such a circumstance apart from those provisions: s 9(2D) (as so added).

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92. Bailor in course of business acting as agent.

The implied conditions as to fitness for purpose and satisfactory quality¹ apply to a bailment by a person who in the course of a business² is acting as agent for another as they apply to a bailment by a principal in the course of a business, except where that other is not bailing in the course of a business and either the bailee³ knows that fact or reasonable steps are taken to bring it to the bailee's notice before the contract concerned is made⁴.

1 In the Supply of Goods and Services Act 1982 s 9 (as amended): see PARAS 88-90 ante.

2 As to the meaning of 'business' see PARA 84 note 4 ante.

3 For the meaning of 'bailee' see PARA 71 note 6 ante.

4 Supply of Goods and Services Act 1982 s 9(8).

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(vi) Sale and Supply of Goods by Sample

A. CONTRACTS FOR THE SALE OF GOODS

93. Sale of goods by sample.

A contract of sale¹ is a contract for sale by sample where there is an express or implied term to that effect in the contract². The mere exhibition of a sample³ during the negotiation of the contract does not by itself constitute the contract one for sale by sample⁴.

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 Sale of Goods Act 1979 s 15(1). Evidence may be given annexing such a term by usage to a written contract: see *Syers v Jonas* (1848) 2 Exch 111 (sale of tobacco). For examples of express sales by sample see eg *Clark v Schwartz* (1853) 2 WR 16 (bulk to be equal to sample and analysis); *Russell v Nicolopulo* (1860) 8 CBNS 362 (bulk to be equal to agent's report and to samples); *Heyworth v Hutchinson* (1867) LR 2 QB 447 ('wool guaranteed about similar to samples'); *Azémar v Casella* (1867) LR 2 CP 677, Ex Ch ('cotton guaranteed equal to sample'; otherwise an allowance); *Towerson v Aspatria Agricultural Co-operative Society Ltd* (1872) 27 LT 276, Ex Ch; *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152 ('about as per sample'; custom of London Corn Exchange).

3 The office of a sample, like inspection of bulk, is to present to the eye the intention of the parties, which it may be difficult or impossible to express in words: see *Champanhac & Co Ltd v Waller & Co Ltd* [1948] 2 All ER 724. A sample cannot be treated as conveying any greater information than would be given by express words: *Drummond v Van Ingen* (1887) 12 App Cas 284 at 297, HL (latent defect in goods and sample). *Parkinson v Lee* (1802) 2 East 314, to the contrary, is no longer law: *Randall v Newson* (1877) 2 QBD 102, CA.

4 *Tye v Fynmore* (1813) 3 Camp 462; *Meyer v Everth* (1814) 4 Camp 22; *Gardiner v Gray* (1815) 4 Camp 144; *Ginner v King* (1890) 7 TLR 140, CA (all cases of written contracts).

UPDATE

93-94 Sale of goods by sample, Implied terms in sales by sample

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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94. Implied terms in sales by sample.

In the case of a contract for sale¹ by sample² there is an implied term³:

- 145 (1) that the bulk will correspond with the sample in quality⁴;
- 146 (2) that the goods⁵ will be free from any defect, making their quality unsatisfactory⁶, which would not be apparent on reasonable examination⁷ of the sample⁸.

Where, in the case of a contract of sale:

- 147 (a) the buyer⁹ would, but for this provision, have the right to reject goods by reason of a breach on the part of the seller of a term so implied as to description; but
- 148 (b) the breach is so slight that it would be unreasonable for him to reject them,

then, if the buyer does not deal as consumer¹⁰, and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty¹¹. It is for the seller to show that a breach fell within head (b) above¹².

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 As to mistake in exhibiting the wrong sample, and as to the effect see *Scott v Littledale* (1858) 8 E & B 815; *Megaw v Molloy* (1878) 2 LR Ir 530, Ir CA. Where part of the bulk is inferior to sample, the buyer may reject the whole or accept the whole and claim damages in respect of the inferior part, but he cannot, unless the contract is severable, accept part and reject part: *Aitken, Campbell & Co Ltd v Boullen and Gatenby* 1908 SC 490, Ct of Sess. The implied condition applies to specific goods; accordingly *Heyworth v Hutchinson* (1867) LR 2 QB 447 (cited in PARA 93 note 2 ante) is open to reconsideration.

3 Sale of Goods Act 1979 s 15(2) (amended by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 5(1), (6)(a)). As regards England and Wales, the term so implied is a condition: Sale of Goods Act 1979 s 15(3) (substituted by the Sale and Supply of Goods Act 1994 Sch 2 para 5(1), (6)(b)). As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante. The Sale of Goods Act 1979 s 15(3) (as so substituted) does not apply in relation to contracts made before 18 May 1973 (ie the date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3)): Sale of Goods Act 1979 s 15(4), Sch 1 paras 1(1), 7. Where goods do not correspond with their description s 13 (as amended) (see PARAS 72-74 ante) also applies: see s 13(2); and PARA 95 ante.

As against a person dealing as consumer, liability for breach of the obligation arising from the Sale of Goods Act 1979 s 15 (as amended) cannot be excluded or restricted by reference to any contract term (see the Unfair Contract Terms Act 1977 s 6(2)(a) (as amended); and PARA 450 post); and as against a person dealing otherwise than as consumer, such liability can be excluded or restricted by reference to a contract term only in so far as the term satisfies the requirement of reasonableness (see s 6(3); and PARA 450 et seq post). As to the meaning of 'dealing as consumer' in the Unfair Contract Terms Act 1977 see PARA 450 note 10 post.

4 Sale of Goods Act 1979 s 15(2)(a). For the meaning of 'quality' in relation to goods see PARA 81 ante. In this context, 'quality' is confined to such qualities as are apparent on an ordinary examination of the sample as usually carried out in the trade: *FE Hookway & Co Ltd v Alfred Isaacs & Sons* [1954] 1 Lloyd's Rep 491; *Steels and Busks Ltd v Bleecker Bik & Co Ltd* [1956] 1 Lloyd's Rep 228; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 at 470-471, 514, [1971] 1 All ER 847 at 856, 892, HL. For illustration of the principles of the Sale of Goods Act 1979 s 15 (as amended) see *Hibbert v Shee* (1807) 1 Camp 113 (usage inconsistent with written contract); *Parker v Palmer* (1821) 4 B & Ald 387 at 391 (Indian rice); *Wells v Hopkins* (1839) 5 M & W 7 (failure of consideration for bill given for hops); *Cooke v Riddellien* (1844) 1 Car & Kir 561 (usage to make rebate on price); *Carter v Crick* (1859) 4 H & N 412 (unknown seed called seed barley); *Lucy v Moufflet* (1860) 5 H & N 229 (cider); *Borrowman v Rossell* (1864) 16 CBNS 58 (refined petroleum; sold note omitting provision as to sample; buyer's equitable plea); *Smith v Hughes* (1871) LR 6 QB 597, DC (oats sold simply as oats, and not as old oats); *Heilbutt v Hickson* (1872) LR 7 CP 438 (boots); *Mellor v Japing* (1889) 5 TLR 574 (cloth not according to sample in colour); *Johnson v Gaskain* (1891) 8 TLR 70, DC (hops falsely packed contrary to statute); *Re Walkers, Winsor and Hamm and Shaw, Son & Co* [1904] 2 KB 152 ('about as per sample'; usage qualifying implied condition); *Champanhac & Co Ltd v Waller & Co Ltd* [1948] 2 All ER 724 (goods sold by sample 'with all faults and imperfections' not corresponding with sample; seller liable). Exact compliance with sample is necessary: *E and S Ruben Ltd v Faire Bros & Co Ltd* [1949] 1 KB 254, [1949] 1 All ER 215 (simple process necessary to make goods comply with sample; seller liable). For the meaning of 'average sample' see *Leonard v Fowler* (1871) 44 New York Reports 289.

5 For the meaning of 'goods' see PARA 30 ante.

6 For the meaning of 'satisfactory quality' see PARA 81 ante.

7 'Reasonable examination' means such an examination as, in the case of a sale to a trader, is ordinarily carried out in that trade: *FE Hookway & Co Ltd v Alfred Isaacs & Sons* [1954] 1 Lloyd's Rep 491; *Steels and Busks Ltd v Bleecker Bik & Co Ltd* [1956] 1 Lloyd's Rep 228; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 at 470-471, 514, [1971] 1 All ER 847 at 856, 892, HL. 'Reasonable' does not mean practicable: *Godley v Perry* [1960] 1 All ER 36, [1960] 1 WLR 9.

8 Sale of Goods Act 1979 s 15(2)(c) (amended by the Sale and Supply of Goods Act 1994 s 1(2)). See *Macfarlane v Taylor* (1868) LR 1 Sc & Div 245, HL; *Mody v Gregson* (1868) LR 4 Exch 49, Ex Ch; *Heilbutt v Hickson* (1872) LR 7 CP 438; *Drummond v Van Ingen* (1887) 12 App Cas 284, HL; *Haines, Batchelor & Co v Firminger* (1885) 2 TLR 107; *Joseph Travers & Sons Ltd v Longel Ltd* (1947) 64 TLR 150; *Champanhac & Co Ltd v Waller & Co Ltd* [1948] 2 All ER 724; *Godley v Perry* [1960] 1 All ER 36, [1960] 1 WLR 9. The Sale of Goods Act 1979 s 15(2)(c) (as amended) presupposes that both the sample and the bulk contain a latent defect. If the latent defect is in the sample only, there is no breach of the provision, and the question would seem to be whether, under s 15(2)(a) (see head (1) in the text), the bulk corresponds with the apparent quality of the sample. If the defect in the sample is patent, the seller fulfils his contract by delivering the bulk in accordance with the defective sample, for any implied intention that the bulk shall be of higher quality is negated: *Mody v Gregson* supra. This implied term will, it appears, be excluded on a sale 'with all faults and imperfections': *Champanhac & Co Ltd v Waller & Co Ltd* supra at 726 per Slade J.

9 For the meaning of 'buyer' see PARA 29 ante.

10 As to the meaning of 'dealing as consumer' see PARA 73 note 8 ante. As to the buyer's rights where the buyer is a consumer and the goods bought are not as per sample see PARA 307 post.

11 Sale of Goods Act 1979 s 15A(1), (2) (added by the Sale and Supply of Goods Act 1994 s 4(1)).

12 Sale of Goods Act 1979 s 15A(3) (added by the Sale and Supply of Goods Act 1994 s 4(1)).

UPDATE

93-94 Sale of goods by sample, Implied terms in sales by sample

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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B. CONTRACTS FOR THE TRANSFER OF GOODS

95. Contracts for the transfer of goods by sample.

Where, under a contract for the transfer of goods¹, the transferor² transfers or agrees to transfer the property³ in the goods by reference to a sample⁴, there is an implied condition⁵:

- 149 (1) that the bulk will correspond with the sample in quality⁶; and
- 150 (2) that the transferee⁷ will have a reasonable opportunity of comparing the bulk with the sample; and
- 151 (3) that the goods will be free from any defect, making their quality unsatisfactory⁸, which would not be apparent on reasonable examination of the sample⁹.

Where, in the case of a contract for the transfer of goods:

- 152 (a) the transferee would, but for this provision, have the right to treat the contract as repudiated by reason of a breach on the part of the transferor of a term implied by head (1) or head (3) above; but
- 153 (b) the breach is so slight that it would be unreasonable for him to do so,

then, if the transferee does not deal as consumer¹⁰, and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty¹¹. It is for the transferor to show that a breach fell within head (b) above¹².

1 For the meaning of 'contract for the transfer of goods' see PARA 32 ante; and for the meaning of 'goods' see PARA 34 ante.

2 For the meaning of 'transferor' see PARA 70 note 2 ante.

3 For the meaning of 'property', in relation to goods see PARA 32 note 1 ante.

4 For these purposes, a transferor transfers or agrees to transfer the property in goods by reference to a sample where there is an express or implied term to that effect in the contract concerned: Supply of Goods and Services Act 1982 s 5(4).

5 As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

6 For the meaning of 'quality', in relation to goods see PARA 86 ante.

7 For the meaning of 'transferee' see PARA 70 note 8 ante.

8 For these purposes, 'satisfactory quality' has the same meaning as in the Supply of Goods and Services Act 1982 s 4(2A) (as added) (see PARA 86 ante): s 4(2A) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (3)).

9 Supply of Goods and Services Act 1982 s 5(1), (2) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (4)(a)). Where goods do not correspond with their description, the Supply of Goods and Services Act 1982 s 3 (see PARA 75 ante) also applies: see s 3(2); and PARA 75 ante. As to the exclusion of implied terms see PARA 102 post. As against a person dealing as consumer, liability in respect of the goods' correspondence with sample cannot be excluded or restricted by reference to any contract term (see the Unfair Contract Terms Act 1977 s 7(1), (2); and PARA 450 post); and as against a person dealing otherwise than as consumer, such liability can be excluded or restricted only in so far as the contract term referred to satisfies the requirement of reasonableness (see s 7(1), (3); and PARA 450 et seq post). As to the meaning of 'dealing as consumer' in the Unfair Contract Terms Act 1977 see PARA 450 note 10 post. As to the transferee's rights where the transferee is a consumer and the goods transferred are not as per sample see PARA 307 post.

10 As to the meaning of 'dealing as consumer' see PARA 75 note 10 ante.

11 Supply of Goods and Services Act 1982 s 5A(1), (2) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (5)).

12 Supply of Goods and Services Act 1982 s 5A(3) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (5)).

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C. CONTRACTS FOR THE HIRE OF GOODS

96. Contracts for the hire of goods by sample.

Where, under a contract for the hire of goods¹, the bailor² bails or agrees to bail the goods by reference to a sample³, there is an implied condition⁴:

154 (1) that the bulk will correspond with the sample in quality⁵; and

155 (2) that the bailee⁶ will have a reasonable opportunity of comparing the bulk with the sample; and

156 (3) that the goods will be free from any defect, making their quality unsatisfactory⁷, which would not be apparent on reasonable examination of the sample⁸.

Where, in the case of a contract for the hire of goods:

- 157 (a) the bailee would, but for this provision, have the right to treat the contract as repudiated by reason of a breach on the part of the bailor of a term implied by head (1) or head (3) above; but
 158 (b) the breach is so slight that it would be unreasonable for him to do so,

then, if the bailee does not deal as consumer⁹, and in so far as a contrary intention does not appear in, or is to be implied from, the contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty¹⁰. It is for the bailor to show that a breach fell within head (b) above¹¹.

1 For the meaning of 'contract for the hire of goods' see PARA 33 ante; and for the meaning of 'goods' see PARA 34 ante.

2 For the meaning of 'bailor' see PARA 71 note 3 ante.

3 For these purposes, a bailor bails or agrees to bail goods by reference to a sample where there is an express or implied term to that effect in the contract concerned: Supply of Goods and Services Act 1982 s 10(4).

4 As to the distinction between conditions, warranties and innominate or intermediate terms see PARA 64 ante.

5 For the meaning of 'quality', in relation to goods see PARA 91 ante.

6 For the meaning of 'bailee' see PARA 71 note 6 ante.

7 For these purposes, 'satisfactory quality' has the same meaning as in the Supply of Goods and Services Act 1982 s 9(2A) (as added) (see PARA 91 ante): s 9(2A) (added by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 6(1), (7)).

8 Supply of Goods and Services Act 1982 s 10(1), (2) (amended by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (8)(a)). Where goods do not correspond with their description, the Supply of Goods and Services Act 1982 s 8 (see PARA 76 ante) also applies: see s 8(3); and PARA 76 ante. As to the exclusion of implied terms see PARA 102 post. As against a person dealing as consumer, liability in respect of the goods' correspondence with sample cannot be excluded or restricted by reference to any contract term (see the Unfair Contract Terms Act 1977 s 7(1), (2); and PARA 450 post); and as against a person dealing otherwise than as consumer, such liability can be excluded or restricted only in so far as the contract term referred to satisfies the requirement of reasonableness (see s 7(1), (3); and PARA 450 et seq post). As to the meaning of 'dealing as consumer' in the Unfair Contract Terms Act 1977 see PARA 450 note 10 post. As to the bailee's rights where the bailee is a consumer and the goods transferred are not as per sample see PARA 307 post.

9 As to the meaning of 'dealing as consumer' see PARA 75 note 10 ante.

10 Supply of Goods and Services Act 1982 s 10A(1), (2) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (9)).

11 Supply of Goods and Services Act 1982 s 10A(3) (added by the Sale and Supply of Goods Act 1994 Sch 2 para 6(1), (9)).

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(vii) Implied Terms in Contracts for the Supply of a Service

97. Implied term about care and skill.

In a contract for the supply of a service¹ where the supplier² is acting in the course of a business³, there is an implied term⁴ that the supplier will carry out the service⁵ with reasonable care and skill⁶.

The Secretary of State may by order provide that the term so implied is not to apply to services of a description specified in the order; and such order may make different provision for different circumstances⁷.

1 For the meaning of 'contract for the supply of a service' see PARA 35 ante.

2 For the meaning of 'supplier' see PARA 35 ante.

3 As to the meaning of 'business' see PARA 84 note 4 ante. Cf *Society of Lloyd's v Clementson* [1994] CLC 71 at 77 (the Society of Lloyd's not a supplier of a service).

4 Nothing in the Supply of Goods and Services Act 1982 Pt II (ss 12-16) (as amended) prejudices any rule of law which imposes on the supplier a duty stricter than that imposed by s 13 or, subject thereto, any rule of law whereby any term not inconsistent with Pt II (as amended) is to be implied in a contract for the supply of a service: s 16(3). As to the relationship between the terms implied by the Supply of Goods and Services Act 1982 and terms implied by the common law see *Law of Contract: Implied Terms in Contracts for the Supply of Services* (Law Com no 156) PARAS 2.1-2.33.

5 A supplier can be in breach of the implied term about care and skill not only by carrying out the service without reasonable care and skill but also by selecting a sub-contractor without taking steps to ensure that the sub-contractor would exercise reasonable care: *Metaalhandel JA Magnus BV v Ardfields Transport Ltd and Eastfell Ltd (t/a Jones Transport)* [1988] 1 Lloyd's Rep 197. See also *Payless Travel Ltd v Baba Krupa Holidays Ltd* [2004] EWCA Civ 472, [2004] All ER (D) 503 (Mar); *Jones v Sunworld Ltd* [2003] EWHC 591 (QB), [2003] All ER (D) 349 (Mar).

6 Supply of Goods and Services Act 1982 s 13. As to the exclusion of implied terms see PARA 102 post. Section 13 has effect subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description: s 16(4). For the meaning of 'enactment' see PARA 83 note 2 ante.

The duty of care owed by a tour operator to its customers in accordance with s 13 is a duty to exercise reasonable care to exclude from the accommodation offered any hotel the characteristics of which are such that guests cannot spend a holiday there in reasonable safety. The duty to ensure reasonable safety is discharged if the tour operator has checked that local safety regulations have been complied with and the duty does not extend to excluding a hotel whose characteristics, so far as safety is concerned, fail to satisfy the current standards applying in England, provided that the absence of the relevant safety feature is not such that a reasonable holiday-maker may decline to take a holiday at the hotel in question, eg if a hotel included in a brochure has no fire precautions at all: *Wilson v Best Travel Ltd* [1993] 1 All ER 353 (the defendants had inspected the accommodation offered in their brochure as part of their services, the accommodation complying with Greek safety regulations; accordingly, the defendants were held to have discharged their duty of care owed to the plaintiff); applied in *Codd v Thomson Tour Operations Ltd* (2000) Times, 20 October, CA.

7 See the Supply of Goods and Services Act 1982 s 12(4); and PARA 35 ante. As to the Secretary of State see PARA 15 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(vii) Implied Terms in Contracts for the Supply of a Service/98. Implied term about time for performance.

98. Implied term about time for performance.

Where, under a contract for the supply of a service¹ by a supplier² acting in the course of a business³, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term⁴ that the supplier will carry out the service within a reasonable time⁵. What is a reasonable time is a question of fact⁶.

The Secretary of State may by order provide that the term so implied is not to apply to services of a description specified in the order; and such order may make different provision for different circumstances⁷.

1 For the meaning of 'contract for the supply of a service' see PARA 35 ante.

2 For the meaning of 'supplier' see PARA 35 ante.

3 As to the meaning of 'business' see PARA 84 note 4 ante. Cf *Society of Lloyd's v Clementson* [1994] CLC 71 at 77 (the Society of Lloyd's not a supplier of a service).

4 Nothing in the Supply of Goods and Services Act 1982 Pt II (ss 12-16) (as amended) prejudices any rule of law which imposes on the supplier a duty stricter than that imposed by s 14 or, subject thereto, any rule of law whereby any term not inconsistent with Pt II (as amended) is to be implied in a contract for the supply of a service: s 16(3). As to the relationship between the terms implied by the 1982 Act and terms implied by the common law see *Law of Contract: Implied Terms in Contracts for the Supply of Services* (Law Com no 156) PARAS 2.1-2.33.

5 Supply of Goods and Services Act 1982 s 14(1). As to the exclusion of implied terms see PARA 102 post. Section 14 has effect subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description: s 16(4). For the meaning of 'enactment' see PARA 83 note 2 ante.

6 Ibid s 14(2).

7 See ibid s 12(4); and PARA 35 ante. As to the Secretary of State see PARA 15 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(vii) Implied Terms in Contracts for the Supply of a Service/99. Implied term about consideration.

99. Implied term about consideration.

Where, under a contract for the supply of a service¹, the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier² will pay a reasonable charge³. What is a reasonable charge is a question of fact⁴.

The Secretary of State may by order provide that the term so implied is not to apply to services of a description specified in the order; and such order may make different provision for different circumstances⁵.

1 For the meaning of 'contract for the supply of a service' see PARA 35 ante.

2 For the meaning of 'supplier' see PARA 35 ante.

3 Supply of Goods and Services Act 1982 s 15(1). See *Allan v UCB Group Ltd* [2002] All ER (D) 327 (Mar); *Alstom Signalling Ltd (t/a Alstom Transport Information Solutions) v Jarvis Facilities Ltd* [2004] EWHC 1232 (TCC), [2004] All ER (D) 02 (Jun). As to the exclusion of implied terms see PARA 102 post. The Supply of Goods and Services Act 1982 s 15 has effect subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description: s 16(4). For the meaning of 'enactment' see PARA 83 note 2 ante.

4 Ibid s 15(2).

5 See ibid s 12(4); and PARA 35 ante. As to the Secretary of State see PARA 15 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(viii) Exclusion of Liability for Breach of Implied Terms/100. Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods.

(viii) Exclusion of Liability for Breach of Implied Terms

100. Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods.

Subject to the rule excluding, in general, extrinsic evidence in cases where the parties have reduced their intention to writing¹ and subject to the Unfair Contract Terms Act 1977² and the Unfair Terms in Consumer Contracts Regulations 1999³, a right, duty or liability which would arise under a contract of sale⁴ of goods⁵ by implication of law may be negated or varied by express agreement or by the course of dealing between the parties⁶ or by such usage⁷ as binds both parties to the contract⁸.

An express term does not negative a term implied by the Sale of Goods Act 1979, unless inconsistent with it⁹.

1 As to this rule see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 185 et seq.

2 See PARAS 103-104, 450 et seq post.

3 I.e. the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARAS 105, 452 et seq post.

4 For the meaning of 'contract of sale' see PARA 29 ante.

5 For the meaning of 'goods' see PARA 30 ante.

6 See eg *Prosser v Hooper* (1817) 1 Moore CP 106 (saffron expressly bought as being inferior); *Dickson v Zizinia* (1851) 10 CB 602 (express warranty of quality on shipment only); *Covas v Bingham* (1853) 2 E & B 836 (cargo 'as it stands'); *Pinder v Button* (1862) 11 WR 25 (seed 'of good growing stock'; warranty of productiveness excluded); *Josling v Kingsford* (1863) 13 CBNS 447 (sale of oxalic acid, 'quality approved'); *Ward v Hobbs* (1878) 4 App Cas 13, HL (pigs sold 'with all faults'); *McClelland v Stewart* (1883) 12 LR Ir 125 (goods 'as classified'); *Hydraulic Engineering Co Ltd v Spencer & Sons* (1886) 2 TLR 554, CA (goods to be made sound according to buyer's plan); *De Witt v Berry* 134 US 306 (1890) (express standard of quality); *Polenghi Bros v Dried Milk Co Ltd* (1904) 10 Com Cas 42; *Gage v Beauchamp* (1920) 36 TLR 253 (sale by trustees of Lloyd's Register of report of survey by their surveyor to intending purchaser of yacht; no express or implied warranty of accuracy of report); *Horn v Minister of Food* [1948] 2 All ER 1036 (deterioration of potatoes in express contemplation of parties). See also *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394, HL (where an unsuccessful attempt was made to negative the implied condition of description); and the cases cited in PARA 105 notes 6-8 post.

7 As to usage see *Yates v Pym* (1816) 6 Taunt 446 (failure of description; usage to exclude buyer's right of rejection invalid); *Johnson v Raylton Dixon & Co* (1881) 7 QBD 438, CA (usage to supply goods of other manufacturers); *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152 at 158 (usage to turn condition into warranty found by arbitrator to exist and by court to be reasonable). See also CUSTOM AND USAGE vol 12(1) (Reissue) PARA 650 et seq.

8 Sale of Goods Act 1979 s 55(1).

9 Ibid s 55(2) (amended by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 5(1), (8)). In relation to a contract made before 18 May 1973 (ie the date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3)), where a right, duty or liability arose under a contract of sale by implication of law, it could be negated or varied by express agreement or by a course of dealing between the parties or by such usage as binds both parties to the contract: Sale of Goods Act 1979 s 55(3), Sch 1 paras 1(1), 12. For the meaning of 'contract' see PARA 5 note 12 ante. See further *Bigge v Parkinson* (1862) 7 H & N 955, Ex Ch; *Mody v Gregson* (1868) LR 4 Exch 49, Ex Ch; *Johnson v Raylton Dixon & Co* (1881) 7 QBD 438, CA (ship plates to pass Lloyd's survey); *Drummond v Van Ingen* (1887) 12 App Cas 284, HL. Cf *Dickson v Zizinia* (1851) 10 CB 602

(inconsistent express warranty); *M'Clelland v Stewart* (1883) 12 LR Ir 125; *Champanhac & Co Ltd v Waller & Co Ltd* [1948] 2 All ER 724.

UPDATE

100-108 Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods ... Effect of general warranty on patent defects

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(viii) Exclusion of Liability for Breach of Implied Terms/101. Excluding the condition of description.

101. Excluding the condition of description.

The general principle of the implied condition that goods sold by description must correspond with the description is clear and founded on the consensual basis of the law of contract. Subject to the provisions of the Unfair Contract Terms Act 1977¹ and the Unfair Terms in Consumer Contracts Regulations 1999², it is possible in theory to exclude this implied condition by express agreement³, but the courts are reluctant to construe the contract so as to permit this to be done, and clauses purporting expressly to exclude the implied condition that the goods must correspond with the description are narrowly construed⁴.

1 See PARAS 103, 450 et seq post.

2 I.e the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARAS 105, 452 et seq post.

3 See the Sale of Goods Act 1979 s 55 (as amended); and PARAS 12, 100 ante.

4 See the cases cited in PARA 105 notes 6-8 post.

UPDATE

100-108 Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods ... Effect of general warranty on patent defects

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(viii) Exclusion of Liability for Breach of Implied Terms/102. Circumstances in which implied terms may be excluded or varied in contracts for the supply of goods and services.

102. Circumstances in which implied terms may be excluded or varied in contracts for the supply of goods and services.

Subject to the rule excluding, in general, extrinsic evidence in cases where the parties have reduced their intention to writing¹ and subject to the Unfair Contract Terms Act 1977² and the Unfair Terms in Consumer Contracts Regulations 1999³, a right, duty or liability which would arise under a contract for the transfer of goods⁴, under a contract for the hire of goods⁵, or under a contract for the supply of a service⁶, by implication of law may be negated or varied by express agreement or by the course of dealing between the parties⁷ or by such usage⁸ as binds both parties to the contract⁹.

An express condition or warranty does not negative a condition or warranty implied in contracts for the transfer of property in, or for the hire of, goods¹⁰; and an express term does not negative a term implied in contracts for the supply of a service¹¹, unless inconsistent with it¹².

1 As to this rule see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 185 et seq.

2 See PARAS 103-104, 450 et seq post.

3 I.e. the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARAS 105, 452 et seq post.

4 For the meaning of 'contract for the transfer of goods' see PARA 32 ante; and for the meaning of 'goods' see PARA 34 ante.

5 For the meaning of 'contract for the hire of goods' see PARA 33 ante.

6 For the meaning of 'contract for the supply of a service' see PARA 35 ante.

7 See the cases cited in PARA 100 note 6 ante.

8 See PARA 100 note 7 ante.

9 Supply of Goods and Services Act 1982 ss 11(1), 16(1).

10 I.e. an express condition or warranty implied by *ibid* ss 1-10A (as amended): see PARAS 32-33, 70 et seq ante.

11 I.e. an express term implied by *ibid* Pt II (ss 12-16) (as amended): see PARAS 97-99 ante.

12 *Ibid* ss 11(2), 16(2). See also the cases cited in PARA 100 note 9 ante.

UPDATE

100-108 Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods ... Effect of general warranty on patent defects

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(viii) Exclusion of Liability for Breach of Implied Terms/103. Restrictions under the Unfair Contract Terms Act 1977 on agreements excluding or restricting obligations.

103. Restrictions under the Unfair Contract Terms Act 1977 on agreements excluding or restricting obligations.

With certain exceptions¹, the following restrictions apply:

- 159 (1) liability for breach of the obligations arising from the seller's implied undertakings as to title, freedom from incumbrances and quiet possession² cannot be excluded or restricted by reference to any contract term³;
 - 160 (2) liability for breach of the obligations arising from the seller's implied undertakings as to conformity of goods⁴ with description or sample or as to their quality or fitness for a particular purpose⁵ cannot be excluded or restricted by reference to any contract term as against a person dealing as consumer⁶; as against a person dealing otherwise than as consumer such liability can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness⁷;
 - 161 (3) where one of the contracting parties deals as consumer or on the other's written standard terms of business, then, as against that party, the other cannot by reference to any contract term:
- 5
 - 7. (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
 - 8. (b) claim to be entitled to render a contractual performance substantially different from that which was reasonably expected of him or in respect of the whole or any part of his contractual obligation, to render no performance at all,
 - 6
 - 162 except in so far as, in any of the cases mentioned in heads (3)(a) and (3)(b) above, the contract term satisfies the requirement of reasonableness⁸;
 - 163 (4) liability for breach of the obligations arising from the transferor's undertaking, in the case of a transfer of property in goods, that he has a right to transfer such property and, in the case of an agreement to transfer such property, that he will have such a right when the property is to be transferred⁹, cannot be excluded or restricted by reference to a contract term¹⁰.

These restrictions have effect notwithstanding any contract term which applies, or purports to apply, the law of some country outside the United Kingdom where: (i) the term appears to the court or arbitrator to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the Unfair Contract Terms Act 1977; and/or (ii) in the making of the contract one of the parties dealt as consumer and he was then habitually resident in the United Kingdom and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf¹¹.

1 See the Unfair Contract Terms Act 1977 ss 26, 27 (as amended); and PARA 450 post.

2 ie the obligations arising under the Sale of Goods Act 1979 s 12 (as amended): see PARA 69 ante.

3 See the Unfair Contract Terms Act 1977 s 6(1)(a) (as amended); and PARA 450 post.

4 As to the meaning of 'goods' for these purposes see PARA 450 note 8 post.

5 ie the obligations arising under the Sale of Goods Act 1979 s 13 (as amended) (see PARAS 72-74 ante), s 14 (as amended) (see PARA 77 et seq ante) or s 15 (as amended) (see PARAS 93-94 ante).

6 See the Unfair Contract Terms Act 1977 s 6(2)(a) (as amended); and PARA 450 post.

7 See *ibid* s 6(3); and PARA 450 post.

- 8 See *ibid* s 3; and PARA 450 post.
- 9 The liability arising under the Supply of Goods and Services Act 1982 s 2: see PARA 70 ante.
- 10 See the Unfair Contract Terms Act 1977 s 7(3A) (as added); and PARA 450 post.
- 11 See *ibid* s 27(2); and PARA 450 post.

UPDATE

100-108 Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods ... Effect of general warranty on patent defects

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(viii) Exclusion of Liability for Breach of Implied Terms/104. The test of reasonableness.

104. The test of reasonableness.

In relation to a contract term, the requirement of reasonableness¹ is that the term must have been a fair and reasonable one to be included, having regard to the circumstances which were, or ought reasonably to have been, known to, or in the contemplation of, the parties when the contract was made². In determining³ whether a contract term satisfies the requirement of reasonableness, regard is to be had, in particular, to the following matters:

- 164 (1) the strength of the bargaining positions of the parties relative to each other, taking into account, among other things, alternative means by which the customer's requirements could have been met;
- 165 (2) whether the customer received an inducement to agree to the term or, in accepting it, had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
- 166 (3) whether the customer knew or ought reasonably to have known of the existence and extent of the term, having regard, among other things, to any custom of the trade and any previous course of dealing between the parties;
- 167 (4) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
- 168 (5) whether the goods⁴ were manufactured, processed or adapted to the special order of the customer⁵.

Where, by reference to a contract term or notice⁶, a person seeks to restrict liability to a specified sum of money, and the question arises whether the term or notice satisfies the requirement of reasonableness, regard is to be had, in particular, to:

- 169 (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
- 170 (b) how far it was open to him to cover himself by insurance⁷.

In relation to a notice, not being a notice having contractual effect, the requirement of reasonableness is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or, but for the notice, would have arisen⁸.

It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does⁹.

1 le for the purposes of the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended) (see PARAS 103 ante, 450 et seq post; and CONTRACT vol 9(1) (Reissue) PARA 820 et seq) and the Misrepresentation Act 1967 s 3 (as substituted) (see PARA 465 post; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 803, 828).

2 See the Unfair Contract Terms Act 1977 s 11(1); and PARA 451 post.

3 le for the purposes of the Unfair Contract Terms Act 1977 s 6 (as amended) (see PARAS 103 ante, 450 post) or s 7 (as amended) (miscellaneous contracts under which goods pass: see PARAS 103 ante, 450 post; and CONTRACT vol 9(1) (Reissue) PARA 827).

4 As to the meaning of 'goods' for these purposes see PARA 450 note 8 post.

5 See the Unfair Contract Terms Act 1977 s 11(2), Sch 2; and PARA 451 post.

6 As to the meaning of 'notice' see PARA 450 note 5 post.

7 See the Unfair Contract Terms Act 1977 s 11(4); and PARA 451 post.

8 See *ibid* s 11(3); and PARA 451 post.

9 See *ibid* s 11(5); and PARA 451 post.

UPDATE

100-108 Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods ... Effect of general warranty on patent defects

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(viii) Exclusion of Liability for Breach of Implied Terms/105. Other restrictions on agreements excluding or varying implied terms.

105. Other restrictions on agreements excluding or varying implied terms.

Apart from the restrictions imposed by the Unfair Contract Terms Act 1977¹ on contractual terms excluding or restricting undertakings implied into contracts covered by the Sale of Goods Act 1979² or, as the case may be, the Supply of Goods and Services Act 1982³, such terms are also restricted through narrow construction by the courts and through the application of the Unfair Terms in Consumer Contracts Regulations 1999⁴.

Although the undertakings so implied by the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 may in theory be excluded by express agreement⁵, the courts have been reluctant to construe a contract so as to permit this to be done⁶. Clauses purporting expressly

to exclude the implied conditions have been narrowly construed⁷ so as to avoid, as far as possible, defeating the fundamental right of a buyer to receive the article bargained for⁸.

In so far as the Unfair Terms in Consumer Contracts Regulations 1999 apply to contracts covered by the Sale of Goods Act 1979 or, as the case may be, the Supply of Goods and Services Act 1982, it is to be assumed that the parties' freedom to contract out of the terms implied by the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 is subject to the provisions of the Unfair Terms in Consumer Contracts Regulations 1999.

1 See PARAS 103-104 ante, 450 et seq post.

2 See PARAS 73, 77-82, 94 ante.

3 See PARAS 75-76, 83 et seq ante.

4 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARA 452 et seq post.

5 See the Sale of Goods Act 1979 s 55 (as amended) and PARAS 39, 78, 100 ante; the Supply of Goods and Services Act 1982 ss 11, 16 and PARAS 97-99, 102 ante; and the cases cited in PARA 100 notes 6-7 ante.

6 *Howcroft v Laycock* (1898) 14 TLR 460, DC; *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394, HL; *Walls v Centaur Co Ltd* (1921) 126 LT 242; *Szymonowski & Co v Beck & Co* [1923] 1 KB 457, CA (affd sub nom *Beck v Szymonowski & Co* [1924] AC 43, HL); *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 KB 690; *Baldry v Marshall* [1925] 1 KB 260, CA ('car suitable for touring'); *J Gordon Alison & Co Ltd v Wallsend Slipway and Engineering Co Ltd* (1927) 43 TLR 323, CA; *Sproule v Triumph Cycle Co Ltd* [1927] NI 83, NI CA; *Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd* [1934] 1 KB 17, CA ('new S car' held an express and not an implied condition); *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, [1971] 1 All ER 847, HL. Cf *WN Lindsay & Co Ltd v European Grain and Shipping Agency Ltd* [1963] 1 Lloyd's Rep 437, CA. See also *Lowe v Lombank Ltd* [1960] 1 All ER 611, [1960] 1 WLR 196, CA (hire purchase of car; hirer not estopped from relying on statutory condition of fitness either by representation in delivery receipt or by clause in agreement by which she purported to acknowledge that she had not made known to owners purpose for which goods required).

7 Goods sold 'with all faults' must still correspond with description: see eg *Shepherd v Kain* (1821) 5 B & Ald 240; *Peters & Co v Planner* (1895) 11 TLR 169; *Robert A Munro & Co Ltd v Meyer* [1930] 2 KB 312. If a person wishes to exempt himself from a liability which the common law imposes on him, he can do so only by an express stipulation brought home to the party affected and assented to by him as part of the contract: see *Harling v Eddy* [1951] 2 KB 739 at 748, [1951] 2 All ER 212 at 218, CA, per Denning LJ. See also *Couchman v Hill* [1947] KB 554, [1947] 1 All ER 103, CA (clause excluding misdescriptions in auction catalogue overridden by oral stipulation); *Nicholson and Venn v Smith Marriott* (1947) 177 LT 189 (terms of auction catalogue insufficient to exclude liability for misdescription); *Webster v Higgin* [1948] 2 All ER 127, CA (hire-purchase agreement; excluding clause insufficiently clear); *Minister of Materials v Steel Bros & Co Ltd* [1952] 1 All ER 522, CA (defective quality, but not damage, excluded). Cf *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co* [1953] 2 All ER 1471, [1953] 1 WLR 1468.

8 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL. It has been suggested that since the Unfair Contract Terms Act 1977 courts will be less willing to place a strained construction on an exemption clause at least in commercial cases where the parties are of equal bargaining power: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 843, 851, 853, [1980] 1 All ER 556 at 561, 568, 570, HL. See also *RW Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep 602. Cf *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1981] 1 Lloyd's Rep 476; on appeal [1983] QB 284, [1983] 1 All ER 108, CA; affd in part [1983] 2 AC 803, [1983] 2 All ER 737, HL. See further CONTRACT vol 9(1) (Reissue) PARAS 801-802.

UPDATE

100-108 Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods ... Effect of general warranty on patent defects

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(ix) Construction of certain Express Terms regarding Goods Sold/106. Warranty limited in time.

(ix) Construction of certain Express Terms regarding Goods Sold

106. Warranty limited in time.

Prima facie a limitation of time added to an express stipulation as to the quality, fitness or other incident of the goods means that the goods must conform to the term during the whole of the time¹. It may, however, be intended, by the construction of the contract, the nature of the goods sold or usage of trade, to mean that the seller is liable for such breach only of the term as will be enforced by action, or notified² to the seller, within the time³.

1 *Chapman v Gwyther* (1866) LR 1 QB 463. Such would be the case of a warranty of watches, pianos or provisions. As to provisions see *J Barre Johnston & Co v Oldham* (1895) 11 TLR 401, PC.

2 A notification is, however, not ordinarily a condition precedent to a right of action: see PARA 317 post.

3 *Chapman v Gwyther* (1886) LR 1 QB 463. In *Bywater v Richardson* (1834) 1 Ad & El 508, and *Smart v Hyde* (1841) 8 M & W 723, the seller's responsibility was in terms limited to a certain time. See also *Speak v Taylor* (1894) 10 TLR 224 (damages held to cover past and future defects). Cf *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co* [1953] 2 All ER 1471, [1953] 1 WLR 1468 (dispute to be referred to arbitration within 14 days); *RW Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep 602 (breach not discoverable within time limit).

UPDATE

100-108 Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods ... Effect of general warranty on patent defects

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(ix) Construction of certain Express Terms regarding Goods Sold/107. Certification by third person.

107. Certification by third person.

Where goods are to be supplied to the buyer to the satisfaction of a third person¹, as, for example, by certification, the standard required to satisfy the certifier may be laid down in the contract², or be that of the certifier³, or both⁴. In such a case, where the goods are also subject to an express warranty or condition, the approval of the third person is not, unless it is otherwise agreed⁵, deemed to show conclusively that the warranty or condition has been duly

performed⁶. Conversely, the fact that the goods conform to the warranty or condition does not show that they are supplied to the satisfaction of the third person⁷. A contractual provision that the approval of a third person is to be conclusive of certain matters, so as to exclude other evidence, will be strictly construed against the seller⁸. A mistake by a certifier, even if it is afterwards admitted by him, does not, however, invalidate a certificate as between buyer and seller⁹.

Where a certificate is to be by a named person, that person may not delegate the power to give the certificate; and a certificate given by a delegate will be invalid¹⁰.

1 As to contracts subject to the approval of the buyer or a third person generally see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 125 et seq; CONTRACT vol 9(1) (Reissue) PARA 964. See also *Batterbury v Vyse* (1863) 2 H & C 42 (buyer's collusion with third person); *Shipway v Broadwood* [1899] 1 QB 369, CA (seller's collusion with third person); and the cases cited in notes 2-7 infra.

2 *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] AC 402, HL. See *Soules CAF v Louis Dreyfus Negoce SA* [2000] 2 All ER (Comm) 154 at 161, [2000] 2 Lloyd's Rep 307 at 311 (as a matter of commercial common sense, in the field of international commodity sale contracts where a chain of sales is commonplace, it is desirable that the contractual machinery for resolving mistakes should not be vulnerable to challenge in the courts).

3 *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136, [1954] 1 WLR 963.

4 *Newton Abbot Development Co Ltd v Stockman Bros* (1931) 47 TLR 616; *Petrofina SA of Brussels v Compagnia Italiana Trasporto Olii Minerali di Genoa* (1937) 53 TLR 650, CA. In such cases there is an implied undertaking that the certifier will not be influenced. See also *Hickman & Co v Roberts* [1913] AC 229, HL; *Panamenia Europea Navigation (Compania Lda) v Frederick Leyland & Co Ltd (J Russell & Co)* [1947] AC 428, HL. Where the certifier has completed his function before the contract is entered into, it can perhaps be implied that he has not been influenced: see *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136 at 145-146 per Devlin J. See also *Mideastra Ltd v Cargo Superintendents (London) Ltd* [1959] 2 Lloyd's Rep 324.

5 Eg as in *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136, [1954] 1 WLR 963. See also *H Glynn (Covent Garden) Ltd v Wittleder* [1959] 2 Lloyd's Rep 409 (certificate of German Phytological Health Service held conclusive against buyers as to quality of potatoes).

6 *Bird v Smith* (1848) 12 QB 786; *Ripley v Lordan* (1860) 2 LT 154; *Bombay Burmah Trading Corp Ltd v Aga Mahomed Khaleel Shirazee* (1911) LR 38 Ind App 169, PC (goods sold to be 'passed' by seller's agent).

7 *Grafton v Eastern Counties Rly Co* (1853) 8 Exch 699.

8 *WN Lindsay & Co Ltd v European Grain and Shipping Agency Ltd* [1963] 1 Lloyd's Rep 437; *Kollerich & Cie SA v State Trading Corp of India* [1979] 2 Lloyd's Rep 442 (on appeal [1980] 2 Lloyd's Rep 32, CA). If a certificate is to be conclusive, it must be in the precise terms of the contractual provision, which renders it conclusive: *Rolimpex Centrala Handlu Zagranicznego v Haji E Dossa & Sons Ltd* [1971] 1 Lloyd's Rep 380 at 383. It is a question of the construction of the relevant contract what matters are covered by a certificate as to quality: cf *Oleificio Zucchi SpA v Northern Sales Ltd* [1965] 2 Lloyd's Rep 496 (quality held to include condition of goods); *Toepfer v Continental Grain Co* [1974] 1 Lloyd's Rep 11, CA (certificate as to quality conclusive, although quality in question also formed part of description); *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341 (quality held not to include condition of goods); *Bunge NV v Compagnie Noga d'Importation et d'Exportation SA, The Bow Cedar* [1980] 2 Lloyd's Rep 601 (where it was held on an fob contract that a certificate was final as to quality but not as to a matter of description affecting the nature of the goods); *Gill & Duffus SA v Berger & Co Inc* [1983] 1 Lloyd's Rep 622, CA (where it was held that the certificate was final as to quality and description, in so far as these overlapped) (revsd on other grounds sub nom *Berger & Co Inc v Gill and Duffus SA* [1984] AC 382, [1984] 1 All ER 438, HL); *Ch Daudruy Van Cauwenberghe & Fils SA v Tropical Products Sales SA, Tropical Products Sales SA v Saudi Sabah Palm Oil Corp Ltd* [1986] 1 Lloyd's Rep 535 (certificate of weight and quality held not to refer to the nature of goods, so that, where the goods were wrong in their nature, a claim was not prevented); *Charles E Ford Ltd v AFEC Inc* [1986] 2 Lloyd's Rep 307 (sampling and analysis clause contained in contract; evidence based on analysis not carried out under contract admitted).

9 *Toepfer v Continental Grain Co* [1974] 1 Lloyd's Rep 11, CA. The certifier may be liable in negligence to the party injured by his mistake: see NEGLIGENCE vol 78 (2010) PARA 14. An exception is made, however, in circumstances where a manifest, or plain and obvious, error has occurred: *Galaxy Energy International Ltd v Eurobunker SpA* [2001] 2 All ER (Comm) 912; applied in *Invensys plc v Automotive Sealing Systems Ltd* [2002] 1 All ER (Comm) 222. For the inspection to be final in circumstances where the sale contract presumes a particular method of inspection, that method and no other has to be used: *Veba Oil Supply and Trading GmbH v*

Petrotrade Inc [2001] EWCA Civ 1832, [2002] 1 All ER 703. For an error to be manifest, it was not necessary to imply a term within the contract requiring the seller to have a sample retested by the inspector: *Exxonmobil Sales and Supply Corp v Texaco Ltd, The Helene Knutsen* [2003] EWHC 1964 (Comm), [2004] 1 All ER (Comm) 435. It is difficult for an error to be considered to be manifest if the buyer makes no objection to the certificate when it is produced and when he accepts part of the cargo: *Galaxy Energy International Ltd v Eurobunker SpA* supra.

10 *Kollerich & Cie SA v State Trading Corp of India* [1980] 2 Lloyd's Rep 32, CA.

UPDATE

100-108 Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods ... Effect of general warranty on patent defects

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/2. THE CONTRACT/(10) CONDITIONS AND WARRANTIES/(ix) Construction of certain Express Terms regarding Goods Sold/108. Effect of general warranty on patent defects.

108. Effect of general warranty on patent defects.

Although the buyer is entitled to rely on a warranty and is not bound to examine the goods to which it relates¹, yet even an express² warranty of goods, although in general terms, is not, unless it is otherwise agreed³, deemed to protect the buyer against defects in the goods of which he was at the time of the contract aware or which, the buyer having at that time seen the goods, were apparent without the exercise of skill or knowledge⁴. The fact that a defect in goods is pointed out to a buyer by the seller contemporaneously with the giving of a written warranty of the goods that extends to the defect does not of itself exclude the defect from this warranty⁵.

Where the seller, in order to prevent or render ineffectual an examination of the goods by the buyer, gives an express warranty or uses some other artifice, an express general warranty is deemed to cover defects which would otherwise have been apparent⁶.

1 *Tye v Fynmore* (1813) 3 Camp 462 (latent defect in samples); *Mowbray v Merryweather* [1895] 2 QB 640, CA; *Scott v Foley, Aikman & Co* (1899) 16 TLR 55 (ship under charterparty). The buyer cannot, however, wilfully blind his eyes: *Vandewalker v Osmer* 65 Barb 556 (NY 1873).

2 In *Burges v Wickham* (1863) 3 B & S 669 at 684, Cockburn CJ considered that the principle a fortiori applied to warranties or conditions implied by law, and it has been expressly adopted by the Sale of Goods Act 1979 s 14(2) (as substituted) (see PARA 80 ante). It is also impliedly enacted in s 13 (as amended) (see PARAS 72-74 ante), s 14(3) (as amended) (see PARA 78 ante) and s 15 (as amended) (see PARAS 93-94 ante).

3 The seller may eg warrant the future soundness of goods having a patent defect: *Liddard v Kain (Cain)* (1824) 2 Bing 183.

4 'If one sell me a horse apparent blind, and warrant him sound of all his members, and I see him, I shall have no deceit, for that I might see it. Otherwise it is of a disease within the body; there upon the warrant I shall have deceit. But if one sell a blind horse, and warrant him to one that does not see him, deceit lyes': Kitchen on Courts (4th Edn) 347. See also *Baily v Merrell* (1615) 3 Bulst 94 (horse with one eye); *Butterfield v Burroughs* (1706) 1 Salk 211 (same; defect not obvious); *Liddard v Kain (Cain)* (1824) 2 Bing 183; *Margetson v Wright* (1831) 7 Bing 603 (subsequent proceedings on order for new trial (1832) 8 Bing 454); *Holliday (Halliday) v Morgan* (1858) 1 E & E 1; *Smith v O'Bryan (Bryant)* (1864) 13 WR 79 (defect not patent); *Cowdy v Thomas*

(1876) 36 LT 22 (inspection for collateral purpose of buyer's agent). See generally ANIMALS vol 2 (2008) PARA 725 et seq.

The rule is as old as the civil law (Dig 18, 1, 43, 1) and is also the same in equity (*Dyer v Hargrave*, *Hargrave v Dyer* (1805) 10 Ves 505; *Jennings v Broughton* (1854) 5 De GM & G 126 at 131) and illustrates the wider principle that a thing may be sold subject to defects (*Ducondu v Dupuy* (1883) 9 App Cas 150, PC (title)).

5 *Smith v O'Bryan (Bryant)* (1864) 13 WR 79. As to the admission of extrinsic evidence to add to or vary written documents generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 185 et seq. Cf *Schuyler v Russ* 2 Cai R 202 (NY 1804). As to misrepresentation and fraud generally see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 701 et seq.

6 *Dorrington v Edwards* (1621) 2 Roll Rep 188; *Kenner v Harding* 28 Am R 615 (1877). The law is well stated in *Chadsey v Greene* 24 Conn 562 (1856).

UPDATE

100-108 Circumstances in which implied terms may be excluded or varied in contracts for the sale of goods ... Effect of general warranty on patent defects

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(i) In general/109. Intention governs.

3. EFFECTS OF THE CONTRACT

(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER

(i) In general

109. Intention governs.

The intention of the parties, as shown by the terms of the contract, the conduct of the parties and the circumstances of the case, determine the time when the property in the goods is to be transferred¹.

Like all contracts, a contract of sale must be construed as a whole. Accordingly, the property in the goods passes where the terms of the contract show a clear intention that it will pass², notwithstanding that there may be an express provision in the contract to the contrary³.

1 This is enacted in express terms with regard to specific goods by the Sale of Goods Act 1979 s 17, and with regard to both specific and unascertained goods by the covering words in s 18 (as amended): see PARAS 112 et seq, 125, 127 post. See *Broadcrest CD Ltd v Ruddock* [2000] All ER (D) 619. As to unascertained goods see *Ginzberg v Barrow Haematite Steel Co Ltd and McKellar* [1966] 1 Lloyd's Rep 343. See also the Sale of Goods Act 1979 s 62(2) (saving the common law rules); and PARA 9 ante.

2 *Shaw v Jeffery* (1860) 13 Moo PCC 432; *McEntire v Crossley Bros Ltd* [1895] AC 457 at 463, 468-470, HL; *Warburton v Stamp* (1919) 88 LJB 1170, DC; *Watson v Coupland* [1945] 1 All ER 217, DC; *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240; *Davy Offshore Ltd v Emerald Field Contracting Ltd* [1992] 2 Lloyd's Rep 142, CA.

3 *McEntire v Crossley Bros Ltd* [1895] AC 457, HL; *Re Yorkshire Joinery Co Ltd (in liquidation)* (1967) 111 Sol Jo 701 (where property in building materials passed when incorporated in the building, although there was an express term to the contrary). As to retention of title clauses see further PARA 110 post.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(i) In general/110. Retention of title clauses.

110. Retention of title clauses.

The parties may provide by their contract that, although the buyer is entitled to possession of the goods, the property in the goods is not to pass until the price is paid or some other condition is performed¹. In such a case, it is a question of construction of the contract as to how the buyer may deal with the goods, for example by using them or reselling them².

A reservation of the legal title will normally prevent the goods from forming part of the general assets of the buyer in the event of his insolvency. If the finished product remains in the form in which it was sold and incorporates no other material, there is no reason why the vendor's title should not remain³. If the goods are incorporated with others in such a manner that it is possible to separate them out again, the vendor's title to any such goods still in the hands of the buyer remains⁴.

A reservation of the equitable interest in the goods takes effect as a charge which must be protected by registration in the case of a company⁵ and must comply with the requirements of the Bills of Sale Acts 1878 and 1882⁶ in the case of an individual buyer⁷. The same formalities must also be complied with if the seller wishes to obtain an interest over other goods of the buyer, including goods manufactured by the buyer and incorporating the goods sold by the seller⁸.

Where goods are sold for resale and the contract gives the seller the right to the proceeds of resale as security for payment of the price, the right to those proceeds normally takes effect as a charge over book debts⁹.

1 Reservation of title clauses, sometimes called 'Romalpa clauses' after *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, [1976] 1 WLR 676, have achieved widespread use (in various forms) and significance as a possible means of protecting the seller, particularly against the risks of a buying company going into receivership or liquidation. The seller may expressly or by implication reserve the right to recover the goods in the event of non-payment. His right to do so in the case of a regulated agreement under the Consumer Credit Act 1974 is, however, limited: see CONSUMER CREDIT vol 9(1) (Reissue) PARA 262 et seq.

Where goods are sold subject to a reservation of title clause and the purchaser then sells the goods on to a sub-purchaser, also subject to a retention of title clause, and delivers the goods to the sub-purchaser, then, unless and until the sub-purchaser pays the purchaser the price of the goods, the original seller may still claim title to the goods in the hands of the sub-purchaser: *Re Highway Foods International Ltd (in administrative receivership)*, *Mills v C Harris (Wholesale Meat) Ltd* [1995] 1 BCLC 209.

2 *Re Anchor Line (Henderson Bros) Ltd* [1937] Ch 1, [1936] 2 All ER 941, CA. See also *Re Andrabell Ltd (in liquidation)*, *Airborne Accessories Ltd v Goodman* [1984] 3 All ER 407, [1984] BCLC 522 (passing of property in

goods postponed only until full payment made for particular consignment rather than total indebtedness; no provision for separate storage of goods and no obligation on buyer to keep proceeds from sale of goods separate; therefore, seller's action against liquidator for recovery of purchase price failed); *Four Point Garage Ltd v Carter* [1985] 3 All ER 12 (Romalpa clause was insufficient to preclude implication of term authorising sale); *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339, [1990] 3 All ER 481, HL (property in goods transferred remained property of vendor), applied in *Pongakawa Sawmill Ltd v New Zealand Forest Products Ltd* [1992] 3 NZLR 304, NZ CA. If the buyer acts wrongfully under the contract clause reserving title to the seller, the buyer may nonetheless give a good title to a third person in good faith: see PARA 158 et seq post.

3 *McEntire v Crossley Bros Ltd* [1895] AC 457, HL; *Clough Mill Ltd v Martin* [1984] 3 All ER 982 at 994, [1985] 1 WLR 111 at 125, CA, per Sir John Donaldson MR. Once goods are used in the manufacturing process with the consent of the seller, the seller can acquire rights over the finished product only by express contractual stipulation complying in the case of an individual buyer with any applicable requirements of the Bills of Sale Acts (see note 6 infra), and, in the case of a corporate buyer, with the requirements of the Companies Act 1985 as to the registration of charges: *Re Bond Worth Ltd* [1980] Ch 228, [1979] 3 All ER 919; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 2 All ER 152, [1984] 1 WLR 485; *Clough Mill Ltd v Martin* [1984] 3 All ER 982, [1985] 1 WLR 111, CA; *Re Peachdart Ltd* [1984] Ch 131, [1983] 3 All ER 204; *Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris)* [1993] BCLC 602, [1991] BCC 484; *Modelboard Ltd v Outer Box Ltd (in liquidation)* [1993] BCLC 623, [1992] BCC 945. As to security bills of sale see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1674 et seq; and as to the registration of company charges see COMPANIES vol 15 (2009) PARA 1295 et seq. See also PARA 131 post. Similarly, once goods have been attached to land so as to become part of it and lose their separate identity, a retention of title clause will be ineffective: *Re Yorkshire Joinery Co Ltd (in liquidation)* (1967) 111 Sol Jo 701.

4 *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 2 All ER 152, [1984] 1 WLR 485; *Len Vidgen Ski & Leisure Ltd v Timaru Marine Supplies (1982) Ltd* [1986] 1 NZLR 349, NZ HC.

5 *Re Bond Worth Ltd* [1980] Ch 228, [1979] 3 All ER 919. See COMPANIES vol 15 (2009) PARA 1269 et seq. Where the legal title is retained by the seller, the charge does not require registration: see *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552 at 557, [1976] 1 WLR 676 at 682-683 per Mocatta J; *Re Bond Worth Ltd* supra at 271 and 957 per Slade J; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 at 45, [1979] 3 All ER 961 at 973, CA; *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150, [1987] BCLC 522.

6 See the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882.

7 As to the form and content of a security bill see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1711 et seq.

8 *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA; *Modelboard Ltd v Outer Box Ltd (in liquidation)* [1993] BCLC 623, [1992] BCC 945. See generally note 3 supra.

9 *Re Interview Ltd* [1975] IR 382; but see *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, [1976] 1 WLR 676, CA (where under the terms of the initial contract of sale the buyer held the goods as bailee and agent for the seller and, as between buyer and seller, resold as agent for the seller, who was entitled to trace the proceeds of such resale as against a receiver of the buyer's assets). See also *Specialist Plant Services Ltd v Braithwaite Ltd* [1987] BCLC 1, 3 BCC 119, CA; *Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris)* [1993] BCLC 602, [1991] BCC 484 (where the presence of a retention of title clause operated as a registrable charge over the proceeds of sub-sales); *Modelboard Ltd v Outer Box Ltd (in liquidation)* [1993] BCLC 623, [1992] BCC 945; *Ian Chisholm Textiles Ltd v Griffiths* [1994] 2 BCLC 291; and COMPANIES vol 15 (2009) PARAS 1270, 1279, 1295. As to the position in Scotland see *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SLT 308, Ct of Sess; *Emerald Stainless Steel Ltd v South Side Distribution Ltd* 1983 SLT 162, Ct of Sess.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(i) In general/111. Rules for ascertaining intention.

111. Rules for ascertaining intention.

The rules which follow¹, other than the rule as to unascertained goods², are rules for ascertaining the intention of the parties as to the time at which the property is to pass to the buyer where the express contract is silent on the point³. They have no application where the question is expressly dealt with in unequivocal terms in the contract but, like all rules in the Sale of Goods Act 1979, they will be given weight in construing an express contract which is ambiguous⁴. However, the rule relating to unascertained goods is, subject to the provisions relating to undivided shares in goods forming part of a bulk⁵, fundamental to the contract of sale, inasmuch as a contract to sell unascertained goods is not a complete sale but a promise to sell⁶.

1 See *infra*; and PARA 112 et seq post.

2 Ie other than the rule contained in the Sale of Goods Act 1979 s 16 (as amended): see PARA 124 post.

3 See *ibid* ss 17, 18 (as amended) (covering words); and PARAS 112 et seq, 125, 127 post.

4 See *ibid* s 55(1); and PARAS 12, 100 ante.

5 Ie subject to *ibid* s 20A (as added): see PARA 134 post.

6 *Badische Anilin und Soda Fabrik v Hickson* [1906] AC 419 at 421, HL, per Lord Loreburn LC.

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109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/A. IN GENERAL/112. A question of intention.

(ii) Specific Goods

A. IN GENERAL

112. A question of intention.

Where there is a contract for the sale¹ of specific² or ascertained³ goods, the property⁴ in them is transferred to the buyer⁵ at such time as the parties to the contract intend it to be transferred⁶.

For the purpose of ascertaining the intention of the parties, regard is to be had to the terms of the contract, the conduct of the parties and the circumstances of the case⁷.

- 1 For the meaning of 'contract of sale' see PARA 29 ante.
- 2 For the meaning of 'specific goods' see PARA 54 ante; and for the meaning of 'goods' see PARA 30 ante.
- 3 The term 'ascertained goods', as contrasted with 'specific goods', may be intended to cover the case of goods which have become ascertained after the formation of the contract: see *Re Stapylton Fletcher Ltd (in administrative receivership)*, *Re Ellis Son & Vidler Ltd (in administrative receivership)* [1995] 1 All ER 192, [1994] 1 WLR 1181 (goods to pass from generic to customer stock and to be sufficiently segregated in order to be ascertained). The same collocation of words is found in the Sale of Goods Act 1979 s 52(1): see PARA 305 post. As to the transfer of the property in unascertained goods in an identified bulk see PARA 134 post.
- 4 For the meaning of 'property', in relation to goods see PARA 27 ante.
- 5 For the meaning of 'buyer' see PARA 29 ante.
- 6 Sale of Goods Act 1979 s 17(1). For illustrations see PARA 113 et seq post (where various rules of presumption enacted by s 18 (as amended) are discussed).
- 7 Ibid s 17(2). See *Gale v New* [1937] 4 All ER 645, CA; *Re Capon, Trustee in Bankruptcy v RC Knight & Sons (No 4 of 1938)* [1940] Ch 442, [1940] 2 All ER 135, CA; *Jarvis v Williams* [1955] 1 All ER 108, [1955] 1 WLR 71, CA.

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109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/B. SPECIFIC GOODS IN A DELIVERABLE STATE/113. Property prima facie passes immediately.

B. SPECIFIC GOODS IN A DELIVERABLE STATE

113. Property prima facie passes immediately.

Unless a different intention appears¹, where there is an unconditional² contract for the sale³ of specific goods⁴, in a deliverable state⁵, the property⁶ in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery⁷, or both, is postponed⁸.

1 See the Sale of Goods Act 1979 s 18 (as amended) (covering words); and PARA 109 ante. See also *Langton v Waring* (1865) 18 CBNS 315 (advance of price against goods as security); *Saks v Tilley* (1915) 32 TLR 148, CA (where there was an oral contract for the sale of diamonds, the invoice being marked 'settled by acceptance' and it was held that there was an intention that property should not pass until the bill of exchange was accepted); *Lambert v G and C Finance Corp Ltd* (1963) 107 Sol Jo 666 (retention of car log book); *Cheetham & Co Ltd v Thornham Spinning Co Ltd* [1964] 2 Lloyd's Rep 17 (retention of shipping documents pending payment); *President of India v Metcalfe Shipping Co Ltd* [1969] 2 QB 123, [1969] 1 All ER 861; on appeal [1970] 1 QB 289, [1969] 3 All ER 1549, CA (where there was a term as to the passing of risk). Very little is now needed to give rise to the inference that property is to pass only on delivery or payment: *RV Ward Ltd v Bignall* [1967] 1 QB 534 at 545, [1967] 2 All ER 449 at 453, CA, per Diplock LJ. In cash and carry shops and in supermarkets the intention of the parties is normally that property will only pass on payment: *Lacis v Cashmarts* [1969] 2 QB 400, [1969] 2 WLR 329, DC; *Dip Kaur v Chief Constable for Hampshire* [1981] 2 All ER 430, [1981] 1 WLR 578, DC.

2 The word 'conditional' is unnecessary having regard to the covering words of the Sale of Goods Act 1979 s 18 (as amended). As to the meaning of 'conditional' see PARA 29 note 14 ante.

3 For the meaning of 'specific goods' see PARA 54 ante; and for the meaning of 'goods' see PARA 30 ante.

4 For the meaning of 'contract of sale' see PARA 29 ante.

5 Goods are in a deliverable state within the meaning of the Sale of Goods Act 1979 when they are in such a state that the buyer would under the contract be bound to take delivery of them: s 61(5). For the meaning of 'buyer' see PARA 29 ante. See *Philip Head & Sons Ltd v Showfronts Ltd* [1970] 1 Lloyd's Rep 140 (where there was a contract to supply and lay carpet and the bales of carpet were held not to be in a deliverable state). See also *Broadcrest CD Ltd v Ruddock* [2000] All ER (D) 619 (a machine fixed to the freehold and which buyers could not be bound to accept before dismantling was held not to be in a deliverable state).

6 For the meaning of 'property', in relation to goods see PARA 27 ante.

7 For the meaning of 'delivery' see PARAS 27 note 6 ante, 163 post.

8 Sale of Goods Act 1979 s 18 r 1. This is the first presumptive rule to ascertain the intention of the parties under s 17: see PARAS 111-112 ante. See *Philimore v Barry* (1808) 1 Camp 513 (storage free for 30 days); *Tarling v Baxter* (1827) 6 B & C 360; *Gurr v Cuthbert* (1843) 12 LJ Ex 309 (rick of hay not to be cut until paid for); *Sweeting v Turner* (1871) LR 7 QB 310 (sale at auction); *Lord Eldon v Hedley Bros* [1935] 2 KB 1, CA (sale of stack of hay); *Re Anchor Line (Henderson Bros) Ltd* [1937] Ch 1, [1936] 2 All ER 941, CA (crane on deferred payments); *Watts v Seymour* [1967] 2 QB 647, [1967] 1 All ER 1044, DC. In cases under this rule the appropriation by the parties is a purely mental one: *Dixon v Yates* (1833) 5 B & Ad 313 at 340 per Parke B; *Badische Anilin und Soda Fabrik v Hickson* [1906] AC 419 at 424, HL, per Lord Atkinson.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/B. SPECIFIC GOODS IN A DELIVERABLE STATE/114. Contract for specific goods and interest in land.

114. Contract for specific goods and interest in land.

A non-severable contract for the sale of specific goods and of an interest in land is, with regard to the goods, prima facie only an agreement to sell; and the transfer of the property in the goods is prima facie conditional on the conveyance of the interest in land¹, even though separate prices may have been fixed for the goods and for the interest in land².

1 *Lanyon v Toogood* (1844) 13 M & W 27 (house and furniture); *Sleddon v Cruikshank* (1846) 16 M & W 71 (assignment of lease and sale of greenhouse). See also *Corder v Drakeford* (1811) 3 Taunt 382; *Vaughan v Hancock* (1846) 3 CB 766 (lease of house and sale of furniture and fixtures). The buyer must, however, pay for the goods if, without a conveyance of the interest in land, he has appropriated them: *Sleddon v Cruikshank* supra.

2 *Neal v Viney* (1808) 1 Camp 471 (purchase of lease and crops); *Salmon v Watson* (1819) 4 Moore CP 73 (account stated). It is important to note that the cases are concerned with entire agreements for an interest in land together with chattels in some way connected with it.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/C. SPECIFIC GOODS TO BE PUT IN A DELIVERABLE STATE/115. When transfer of property is suspended.

C. SPECIFIC GOODS TO BE PUT IN A DELIVERABLE STATE

115. When transfer of property is suspended.

Unless a different intention appears¹, where there is a contract for the sale² of specific goods³, and the seller⁴ is bound⁵ to do something⁶ to the goods for the purpose⁷ of putting them into a deliverable state⁸, the property⁹ does not pass until the thing is done and the buyer has notice¹⁰ that it has been done¹¹.

The principle of this rule applies also where a specific chattel which is partially manufactured at the time of the contract is by the contract to be completed by the seller¹², and also where, after a contract for the manufacture and sale of a chattel, the parties agree that the specific partially manufactured chattel, and no other, is to be the subject matter of the contract¹³.

1 See the Sale of Goods Act 1979 s 18 (as amended) (covering words); and PARA 109 ante.

2 For the meaning of 'contract of sale' see PARA 29 ante.

3 For the meaning of 'specific goods' see PARA 54 ante; and for the meaning of 'goods' see PARA 30 ante.

4 For the meaning of 'seller' see PARA 27 ante.

5 It is otherwise where it is merely for the satisfaction of the buyer (*Swanwick v Sothorn* (1839) 9 Ad & El 895 (weighing specific goods in a deliverable state)), or where the buyer is to do the act (*Rugg v Minett* (1809) 11 East 210 (gauging casks); *Turley v Bates* (1863) 2 H & C 200 (weighing clay by buyer after delivery)). If, however, the seller is bound to do the act, it cannot be done by the buyer without the seller's consent: *Acraman v Morrice* (1849) 8 CB 449.

6 'Something' would seem to contemplate some act done directly to the goods (see eg *Broadcrest CD Ltd v Ruddock* [2000] All ER (D) 619) and not merely an act done 'with reference to them' as under the Sale of Goods Act 1979 s 18 r 3: see PARA 116 post.

7 Thus, the fact that the seller is to pay warehouse or wharfage rent for the goods does not suspend the passing of the property (*Hammond v Anderson* (1803) 1 Bos & PNR 69; *Greaves v Hepke* (1818) 2 B & Ald 131), nor the fact that he is to pay customs duties (*Hinde v Whitehouse* (1806) 7 East 558), or retains the warrants for that purpose (*North British and Mercantile Insurance Co v Moffatt* (1871) LR 7 CP 25). In *Anderson v Morice* (1875) LR 10 CP 609 at 618-619, Ex Ch, Blackburn J and Lush J were of opinion that, in a contract for the sale of a cargo, the completing of the loading was an act to put the goods in a deliverable state, but see *Anderson v Morice* (1876) 1 App Cas 713 at 749, HL, per Lord Selborne.

8 As to when goods are in a deliverable state see PARA 113 note 5 ante.

9 For the meaning of 'property', in relation to goods see PARA 27 ante.

10 The provision as to notice is an addition to the common law.

11 Sale of Goods Act 1979 s 18 r 2. See eg (subject to the statutory provision as to notice) *Rugg v Minett* (1809) 11 East 210 (filling up casks); *Smith v Surman* (1829) 9 B & C 561 (timber to be felled by seller); *Laidler v Burlinson* (1837) 2 M & W 602 (completing ship); *Acraman v Morrice* (1849) 8 CB 449 (severing sold parts of timber); *Brown Bros v Carron Co* (1898) 6 SLT 231 (steam crane to be altered by seller). Cf *Young v Matthews* (1866) LR 2 CP 127; *Underwood Ltd v Burgh Castle Brick and Cement Syndicate* [1922] 1 KB 343, CA. Cf the position under cif contracts (see PARAS 324, 345 post) and fob contracts (see PARAS 351, 354 post).

12 *Laidler v Burlinson* (1837) 2 M & W 602. Such cases fall more naturally under the Sale of Goods Act 1979 s 18 r 2 than under s 18 r 5(1): see PARA 125 post. Cf the cases where goods are to be manufactured: see PARA 129 post.

13 *Wait v Baker* (1848) 2 Exch 1 at 8-9 per Parke B.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/D. MEASURING OR TESTING TO ASCERTAIN PRICE/116. When transfer of property is suspended.

D. MEASURING OR TESTING TO ASCERTAIN PRICE

116. When transfer of property is suspended.

Unless a different intention appears¹, where there is a contract for the sale² of specific goods³, in a deliverable state⁴, but the seller⁵ is bound⁶ to weigh, measure, test or do some other act or thing⁷ with reference to the goods for the purpose of ascertaining the price⁸, the property⁹ does not pass until that act or thing is done and the buyer has notice that it has been done¹⁰.

The fact that the parties have agreed on a provisional estimate of the price of the goods, the actual amount of which is to be calculated exactly later, is relevant to prove a common intention that the transfer of the property is not to depend on the final adjustment of the price¹¹.

1 See the Sale of Goods Act 1979 s 18 (as amended) (covering words); and PARA 109 ante.

2 For the meaning of 'contract of sale' see PARA 29 ante.

3 For the meaning of 'specific goods' see PARA 54 ante; and for the meaning of 'goods' see PARA 30 ante.

4 As to when goods are in a deliverable state see PARA 113 note 5 ante.

5 For the meaning of 'seller' see PARA 27 ante.

6 As to the seller being bound or otherwise see PARA 115 text and note 5 ante.

7 A merely mental act, such as counting the items of a specific lot of goods, would seem not to be 'an act or thing': see the case of the flock of sheep put forward by Lord Alverstone CJ and Channell J in *R v Tideswell* [1905] 2 KB 273 at 277, 279, CCR. Nor is the adding up of separate sums previously ascertained 'an act or thing': *Tansley v Turner* (1835) 2 Bing NC 151.

8 Where the quantity is known, weighing is not necessary to ascertain the price (*Swanwick v Sothern* (1839) 9 Ad & El 895), nor where goods are sold for a lump sum (*Hanson v Meyer* (1805) 6 East 614 at 627 per Lord Ellenborough CJ, citing *Hammond v Anderson* (1803) 1 Bos & PNR 69). Sometimes, however, weighing is necessary to ascertain the identity of the goods; the case then falls under the Sale of Goods Act 1979 s 16 (as amended) (see PARA 124 post) and s 18 r 5(1) (see PARA 125 post).

9 For the meaning of 'property', in relation to goods see PARA 27 ante.

10 Sale of Goods Act 1979 s 18 r 3. See eg (subject to the statutory provision as to notice) *Hanson v Meyer* (1805) 6 East 614 (weighing starch sold at price per cwt); *Zagury v Furnell* (1809) 2 Camp 240 (counting of skins sold price per dozen); *Withers v Lyss* (1815) 4 Camp 237 ('30 tons (more or less) of rosin at 13s 9d a cwt'); *Simmons v Swift* (1826) 5 B & C 857 (stack sold at price per ton); *Logan v Le Mesurier* (1847) 6 Moo PCC 116 (raft of timber at price 'per foot measured off'); *National Coal Board v Gamble* [1959] 1 QB 11, [1958] 3 All ER 203, DC (load of coal to be weighed; held that property passed after weighing). Cf *Gilmour v Supple* (1858) 11 Moo PCC 551 (raft of 'about 71,000 feet', but quantity already measured); *Turley v Bates* (1863) 2 H & C 200 (goods to be weighed by buyer; held that the intention was to pass property immediately); *Kershaw v Ogden* (1865) 3 H & C 717 (stacks of cotton waste at price per pound; held that the intention was to pass property immediately); *Castle v Playford* (1872) LR 7 Exch 98, Ex Ch (transfer of property not suspended until weighing); *The Napoli* (1898) 15 TLR 56 (cargo of ice sold at price per ton); *Lord Eldon v Hedley Bros* [1935] 2 KB 1, CA (stacks of hay at price per ton; held that the intention was to pass property immediately).

11 *Martineau v Kitching* (1872) LR 7 QB 436 at 449 per Cockburn CJ; *Anderson v Morice* (1874) LR 10 CP 58 at 73. Cf *Logan v Le Mesurier* (1847) 6 Moo PCC 116 (where the payment of a provisional price was controlled by other parts of the contract).

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/D. MEASURING OR TESTING TO ASCERTAIN PRICE/117. Thing attached to land severable by buyer.

117. Thing attached to land severable by buyer.

Under a contract for the sale of a specific thing which is attached to, or forms part of, land at the time of the contract, and which is to be severed by the buyer, the property in the thing passes to the buyer on his severance of the thing from the land¹.

¹ The case falls under the Sale of Goods Act 1979 s 17 (see PARA 112 ante), and s 18 rr 1, 2 (see PARAS 113, 115 respectively ante) do not apply. See generally *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440 at 442 per Parker J. See also *Phillips v Morrison* (1844) 12 M & W 740 (coal); *Stearns v Washburn* 73 Mass 187 (1856) (growing grass); *Fletcher v Livingston* 153 Mass 388 (1891) (growing timber); *Kursell v Timber Operators and Contractors* [1927] 1 KB 298, CA (growing timber to be measured before cutting). The position of the buyer seems to be that he has a chattel interest in the thing before severance: *James Jones & Sons Ltd v Earl of Tankerville* supra at 443-444 per Parker J. This interest is assignable: *Muskett v Hill* (1839) 5 Bing NC 694. It is not an interest in land: *Marshall v Green* (1875) 1 CPD 35; but cf *Morgan v Russell & Sons* [1909] 1 KB 357, DC (slack etc forming actual part of land). As to the seller's licence to the buyer to sever see PARA 166 post; as to interests in land see PARA 30 note 4 ante; and as to contracts for the sale of land see SALE OF LAND vol 42 (Reissue) PARA 1 et seq.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/D. MEASURING OR TESTING TO ASCERTAIN PRICE/118. Buyer's anticipation of payments passing property.

118. Buyer's anticipation of payments passing property.

Where the price is payable by instalments, and the passing of the property in specific goods is made dependent on full payment, the buyer may, unless it is otherwise agreed, at any time anticipate the payment of any unpaid balance of the price¹.

¹ *Lancashire Waggon Co Ltd v Nuttall* (1879) 42 LT 465, CA. If the buyer tenders the price on account of the goods, the seller cannot appropriate it to the price of other goods, as the maxim solvitur in modum solventis (ie money is to be applied according to the wish of the person paying it) applies: see *Lancashire Waggon Co Ltd v Nuttall* (1879) 40 LT 291 at 294. See also *Croft v Lumley* (1858) 6 HL Cas 672.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/D. MEASURING OR TESTING TO ASCERTAIN PRICE/119. Option to turn agreement into sale.

119. Option to turn agreement into sale.

Either party may, by the terms of an agreement to sell specific goods, have, in a specified event, an option to treat the agreement to sell as a sale¹. For example, where, on the buyer's default in paying the price or part of it, the seller has the option either to rescind the agreement or to sue the buyer for the price of the goods, and elects to sue for the price, his election, unless it is otherwise expressly agreed, passes the property in the goods to the buyer². In the same way, if a contract of sale is voidable for fraud, and the seller, although entitled to avoid, elects to prove in bankruptcy for the price, the property passes on the election³.

1 See *McEntire v Crossley Bros Ltd* [1895] AC 457 at 464, HL. See also *Bianchi v Nash* (1836) 1 M & W 545; *Bevington and Morris v Dale & Co Ltd* (1902) 7 Com Cas 112.

2 See *Walker v Clyde and Wren* (1861) 10 CBNS 381 (where the seller elected to take back the goods); *McEntire v Crossley Bros Ltd* [1895] AC 457, HL (where the goods had been delivered). It is considered, however, that the principles stated in the text apply equally where the goods have not been delivered.

3 *Kin Tye Loong v Seth* (1920) 89 LJPC 113.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/E. SPECIFIC GOODS DELIVERED ON APPROVAL OR ON SALE OR RETURN/120. When property passes.

E. SPECIFIC GOODS DELIVERED ON APPROVAL OR ON SALE OR RETURN

120. When property passes.

Unless a different intention appears¹, when goods² are delivered³ to the buyer⁴ on approval, or on sale or return⁵, or other⁶ similar terms, the property⁷ in the goods passes⁸ to the buyer when he signifies his approval or acceptance to the seller⁹ or does any other act adopting the transaction¹⁰; and, if he does not signify his approval or acceptance to the seller but retains¹¹ the goods without giving notice¹² of rejection¹³, then, if a time has been fixed for the return of the goods, on the expiration of that time¹⁴ and, if no time has been fixed, on the expiration of a reasonable time¹⁵. What is a reasonable time is a question of fact¹⁶.

1 See the Sale of Goods Act 1979 s 18 (as amended) (covering words); and PARA 109 ante. See also *Weiner v Gill* [1906] 2 KB 574, CA (term that property should remain with the seller until payment); *R v Eaton* (1966) 50 Cr App Rep 189, CCA (same).

2 For the meaning of 'goods' see PARA 30 ante.

3 Delivery to a carrier is not in this case delivery to the buyer, as it is under the Sale of Goods Act 1979 s 32 (see PARA 188 post), so far at least as the computation of the time for rejection is concerned: *Jacobs v Harbach* (1886) 2 TLR 419.

4 The person called a 'buyer' in this context is really only a bailee, as he has not bought or agreed to buy, but has merely an option to buy: *Helby v Matthews* [1895] AC 471, HL (decided under the Factors Act 1889 s 9 (as amended): see PARA 158 et seq post); *Percy Edwards Ltd v Vaughan* (1910) 26 TLR 545, CA. The position of the seller is that he has made an irrevocable offer to sell (*Kirkham v Attenborough*, *Kirkham v Gill* [1897] 1 QB 201 at 203, CA, per Lord Esher MR), and so cannot require a return of the goods, unless eg a course of dealing allows him to do so: see the Sale of Goods Act 1979 s 55(1); and PARAS 12, 100 ante.

5 Whether a delivery is made under a contract for sale or return depends on the effect of the transaction as a whole. The fact that it is called 'sale or return' is not conclusive, as it may be an agency to sell for the bailor: *Weiner v Harris* [1910] 1 KB 285, CA. Similarly, the fact that the transaction is called an agency does not show that it may not be really one for sale or return: *Re Nevill, ex p White* (1871) 6 Ch App 397; affd sub nom *John Towle & Co v White* (1873) 29 LT 78, HL. See also *Re Smith, ex p Bright* (1879) 10 ChD 566, CA (where a del

credere agency is distinguished from a sale); *Michelin Tyre Co Ltd v Macfarlane (Glasgow) Ltd* (1916) 54 SLR 1. The fact that the agent is remunerated by the profit on a resale does not make him the buyer: *Re Smith, ex p Bright* supra. Cf *Alexander v Glenbroome Ltd* [1957] 1 Lloyd's Rep 157 (where goods were consigned in the hope of the consignees buying them and this was held not to be a contract for sale or return). As to del credere agents see AGENCY vol 1 (2008) PARA 13, and generally paras 1, 12, 104, 211.

6 Eg on trial or on approbation. See *Beecham Foods Ltd v North Supplies (Edmonton) Ltd* [1959] 2 All ER 336, [1959] 1 WLR 643 (where it was held that, on the sale of a soft drink with a sum of money refundable on the return of the bottle, it amounted to a hiring and not a sale of the bottle). As to similar terms see PARA 121 post.

7 For the meaning of 'property', in relation to goods see PARA 27 ante.

8 Consequently, until that time the seller is the person to sue the carrier if the goods are lost in transit: *Swain v Shepherd* (1832) 1 Mood & R 223.

9 *Swain v Shepherd* (1832) 1 Mood & R 223.

10 Sale of Goods Act 1979 s 18 r 4(a). See also *Kirkham v Attenborough*, *Kirkham v Gill* [1897] 1 QB 201, CA. For the meaning of 'act adopting the transaction' see PARA 122 post. It may also be expressly provided what act is to be considered to be one adopting the transaction, as eg a sale of goods by the bailee: *Re Nevill, ex p White* (1871) 6 Ch App 397; affd sub nom *John Towle & Co v White* (1873) 29 LT 78, HL.

11 The buyer does not retain the goods after seizure under an execution: *Re Ferrier, ex p Trustee v Donald* [1944] Ch 295.

12 A refusal to agree to the price is a rejection, and the bailee's option of purchase is then determined: *Bradley and Cohn Ltd v Ramsay & Co* (1911) 28 TLR 13; affd (1912) 28 TLR 388, CA. An actual return of the goods may be necessary by an express agreement: see *Ornstein v Alexandra Furnishing Co* (1895) 12 TLR 128.

13 The notice of rejection needs clearly to indicate that the buyer is rejecting the seller's offer and that he is exercising his right to return identifiable goods; the notice does not need to set out in detail the precise goods to be returned, provided that the generic description in the notice enables them to be identified with certainty: *Atari Corp'n (UK) Ltd v Electronics Boutique Stores (UK) Ltd* [1998] QB 539, [1998] 1 All ER 1010, CA.

14 *Ellis v Mortimer* (1805) 1 Bos & PNR 257; *Johnson v Kirkaldy* (1840) 4 Jur 988 (return in three months or payment of first price); *Elphick v Barnes* (1880) 5 CPD 321 (trial for eight days); *Blankensee v Blaiberg* (1885) 2 TLR 36, CA ('on approbation or return' within ten days); *Marsh v Hughes-Hallett* (1900) 16 TLR 376. See also *Rees v Manners* (1805) 3 Smith KB 119; *Humphries v Carvalho* (1812) 16 East 45 ('quality to be approved on Monday'). Cf *Re Ferrier, ex p Trustee v Donald* [1944] Ch 295 (where execution was levied on goods before the date fixed for the return).

15 Sale of Goods Act 1979 s 18 r 4(b). See *Bailey v Gouldsmith* (1791) Peake 78 [56]; *Gibson v Bray* (1817) 8 Taunt 76; *Beverley v Lincoln Gas Light and Coke Co* (1837) 6 Ad & El 829; *Moss v Sweet* (1851) 16 QB 493; *Ray v Barker* (1879) 4 Ex D 279, CA; *Re Florence, ex p Wingfield* (1879) 10 ChD 591 at 593, CA, per Jessel MR; *Poole v Smith's Car Sales (Balham) Ltd* [1962] 2 All ER 482, [1962] 1 WLR 744, CA.

16 Sale of Goods Act 1979 s 59. This is so of all references in the Sale of Goods Act 1979 to a reasonable time (see s 59), as in s 29(3) (see PARA 168 post), s 35 (as amended) (see PARA 199 post), s 37 (see PARA 205 post) and s 48(3) (see PARA 282 post).

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

BUYER/(ii) Specific Goods/E. SPECIFIC GOODS DELIVERED ON APPROVAL OR ON SALE OR RETURN/121. Similar terms.

121. Similar terms.

A delivery of goods is not made on terms similar to a delivery on approval or on sale or return unless the effect of the transaction is that the bailee has the option of becoming the owner of the goods and on terms substantially the same as those already mentioned¹. Accordingly, the following cases are not within the rule:

- 171 (1) delivery of goods to a bailee on the terms that, if they are not returned within a fixed or a reasonable time, the bailor is to have the option of treating them as sold, in which case the option, if the goods are not returned, rests with the bailor only, and the property passes when he exercises it²;
- 172 (2) a delivery of goods to a bailee on the terms that the bailee is to have the option of becoming the owner of the goods on, for example, payment in cash, or his being charged for the goods on account, or the goods being invoiced to him³, or on payment in full of instalments of rent for the hire of the goods⁴; and
- 173 (3) a sale of goods on the terms that the buyer is to have the power of rejecting the goods, and revesting the property in them in the seller, if the goods are not approved⁵.

¹ See the Sale of Goods Act 1979 s 18 r 4: see PARA 120 ante. See *Weiner v Gill*, *Weiner v Smith* [1905] 2 KB 172 (affd [1906] 2 KB 574, CA); *Percy Edwards Ltd v Vaughan* (1910) 26 TLR 545, CA; *Beecham Foods Ltd v North Supplies (Edmonton) Ltd* [1959] 2 All ER 336, [1959] 1 WLR 643.

² *Manders v Williams* (1849) 4 Exch 339.

³ *Weiner v Gill*, *Weiner v Smith* [1905] 2 KB 172 (affd [1906] 2 KB 574, CA); *Percy Edwards Ltd v Vaughan* (1910) 26 TLR 545, CA; *W Truman Ltd v Attenborough* (1910) 26 TLR 601; *Kempler v Bravingtons Ltd* (1925) 133 LT 680, CA; *R v Eaton* (1966) 50 Cr App Rep 189, CCA. Cf *R v Justelius* [1937] 1 NSWLR 471, NSW CCA (where the goods had to be returned or paid for within seven days, the recipient being treated as a debtor if the goods were not returned, and it was held that the property in the goods passed when they were not returned within the seven-day period).

⁴ See *Helby v Matthews* [1895] AC 471, HL; *Belsize Motor Supply Co v Cox* [1914] 1 KB 244. If the bailee binds himself to pay all the instalments of rent, there is an agreement to buy and the case falls under the Sale of Goods Act 1979 s 17 (see PARA 112 ante): *Lee v Butler* [1893] 2 QB 318, CA. See further CONSUMER CREDIT vol 9(1) (Reissue) PARA 23.

⁵ *Neate v Ball* (1801) 2 East 117; *Head v Tattersall* (1871) LR 7 Exch 7; *Cranston v Mallow and Lien* 1912 SC 112, Ct of Sess; *Tiffin v Pitcher* [1969] CLY 3234.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/E. SPECIFIC GOODS DELIVERED ON APPROVAL OR ON SALE OR RETURN/122. Meaning of 'act adopting the transaction'.

122. Meaning of 'act adopting the transaction'.

'Act adopting the transaction' means an act indicating an election on the part of the bailee to become the buyer of the goods, or otherwise inconsistent with his being other than the buyer of them¹, as, for example, a sale or pledge of them, or any other unauthorised act in relation to them which, or the result of which, is inconsistent with a free power to return them according to the express or implied terms of the bailment².

A delivery of the goods to a third person for a special purpose consistent with the terms of the original bailment is, therefore, not an act adopting the transaction, even though the bailee is thereby unable to return the goods; nor does the bailee in such circumstances retain them³.

1 *Weiner v Gill, Weiner v Smith* [1905] 2 KB 172 at 179 per Bray J. See also *Kirkham v Attenborough, Kirkham v Gill* [1897] 1 QB 201 at 203, CA, per Lord Esher MR.

2 *Kirkham v Attenborough, Kirkham v Gill* [1897] 1 QB 201, CA (pledge). See also *Re Florence, ex p Wingfield* (1879) 10 ChD 591 at 593, CA, per Jessel MR (sale); *Genn v Winkel* (1912) 107 LT 434, CA (delivery over on sale or return); *London Jewellers Ltd v Attenborough* [1934] 2 KB 206, CA. An act may, therefore, be either one showing an intention to become the buyer or one from which such an intention is a necessary inference: *Genn v Winkel* supra.

3 *Weiner v Gill, Weiner v Smith* [1906] 2 KB 574 at 578, CA, per Lord Alverstone CJ; *Genn v Winkel* (1912) 107 LT 434, CA.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(ii) Specific Goods/E. SPECIFIC GOODS DELIVERED ON APPROVAL OR ON SALE OR RETURN/123. Loss etc of goods delivered.

123. Loss etc of goods delivered.

A bailment of goods on approval, sale or return, or similar terms, does not, unless it is otherwise agreed¹, become a sale of the goods by reason that, while in the possession of the bailee, they have perished or been damaged, if the loss or damage was not caused by the bailee's act or default².

1 Eg where there is a usage of trade that the goods will in that event be treated as sold: *Bevington and Morris v Dale & Co Ltd* (1902) 7 Com Cas 112. Where the bailee in such cases would by contract or custom be liable to pay the price in the event of loss or damage, before the property would otherwise have passed to him, he is relieved of such liability if the loss or damage was caused by war, except where it is expressly related to war by the terms of a contract and the price exceeds £25: Liability for War Damage (Miscellaneous Provisions) Act 1939 ss 2, 8(2). Cf BAILMENT vol 3(1) (2005 Reissue) PARA 92.

2 *Head v Tattersall* (1871) LR 7 Exch 7 (injury to horse); *Elphick v Barnes* (1880) 5 CPD 321; *Chapman v Withers* (1888) 20 QBD 824. Strictly speaking, *Head v Tattersall* supra and *Chapman v Withers* supra were

cases of rescission: see the general principles of the proposition in the text, stated by Bramwell B in *Head v Tattersall* supra at 12. See also *Genn v Winkel* (1912) 107 LT 434, CA; *Poole v Smith's Car Sales (Balham) Ltd* [1962] 2 All ER 482 at 489, [1962] 1 WLR 744 at 753, CA.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iii) Unascertained Goods/124. Ascertainment of goods necessary.

(iii) Unascertained Goods

124. Ascertainment of goods necessary.

Subject to the statutory provisions relating to the transfer of property from the seller to the buyer in undivided shares in goods forming part of a bulk¹, where there is a contract for the sale² of unascertained goods³, no property⁴ in the goods is transferred to the buyer⁵ unless and until the goods are ascertained⁶. In particular, where the individuality of the goods depends on their being separated, weighed, measured, tested or counted, or on some other act or thing being done in relation to them for their ascertainment, the goods are not ascertained until such act or thing is done⁷.

The ascertainment of the goods does not of itself necessarily pass the property. It does so only if the parties have agreed that the property in the goods should pass when ascertained⁸.

1 le subject to the Sale of Goods Act 1979 s 20A (as added): see PARA 134 post.

2 For the meaning of 'contract of sale' see PARA 29 ante.

3 For the meaning of 'goods' see PARA 30 ante.

4 For the meaning of 'property', in relation to goods see PARA 27 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 Sale of Goods Act 1979 s 16 (amended by the Sale of Goods (Amendment) Act 1995 s 1(1)). See *Austen v Craven* (1812) 4 Taunt 644 (hogsheads of sugar out of bulk); *Heilbutt v Hickson* (1872) LR 7 CP 438 at 449 per Bovill CJ and Byles; *Wait and James v Midland Bank Ltd* (1926) 31 Com Cas 172 (where wheat in bulk in a warehouse was held to be ascertained when all the remainder of the bulk was sold); *HM Customs and Excise v Everwine* [2003] EWCA (Civ) 593, [2003] All ER (D) 97 (Jul), distinguishing *Re Stapylton Fletcher Ltd (in administrative receivership)*, *Re Ellis Son & Vidler Ltd (in administrative receivership)* [1995] 1 All ER 192, [1994] 1 WLR 1181 (goods to pass from generic to customer stock and to be sufficiently segregated in order to be ascertained); *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, [1994] 2 All ER 806, PC.

7 *Gillett v Hill* (1834) 2 Cr & M 530 at 535 per Bayley B. See also *Wallace v Breeds* (1811) 13 East 522; *White v Wilks* (1813) 5 Taunt 176; *Shepley v Davis* (1814) 5 Taunt 617; *Swanwick v Sothorn* (1839) 9 Ad & El 895 at 900; *Jenkyns v Osborne* (1844) 7 Man & G 678; *Boswell v Kilborn* (1862) 15 Moo PCC 309; *Sharp v Christmas* (1892) 8 TLR 687, CA; *R v Tideswell* [1905] 2 KB 273, CCR; *National Coal Board v Gamble* [1959] 1 QB 11, [1958] 3 All ER 203, DC; *Re Stapylton Fletcher Ltd (in administrative receivership)*, *Re Ellis Son & Vidler Ltd (in administrative receivership)* [1995] 1 All ER 192, [1994] 1 WLR 1181 (cited in note 6 supra).

8 *Wait v Baker* (1848) 2 Exch 1 at 9; *Campbell v Mersey Docks and Harbour Board* (1863) 14 CBNS 412 at 415 per Erle CJ; *Ginzberg v Barrow Haematite Steel Co Ltd and McKellar* [1966] 1 Lloyd's Rep 343.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iii) Unascertained Goods/125. Subsequent appropriation.

125. Subsequent appropriation.

Unless a different intention appears¹, where there is a contract for the sale² of unascertained³ or future⁴ goods by description⁵, and goods of that description⁶ and in a deliverable state⁷ are unconditionally⁸ appropriated⁹ to the contract, either by the seller with the assent of the buyer¹⁰ or by the buyer with the assent of the seller, the property¹¹ in the goods then passes to the buyer¹²; and the assent may be express or implied and may be given either before or after the appropriation is made¹³. When, however, the appropriation made by one party is not made by the previous authority of the other, a subsequent assent to it by that other party is necessary¹⁴.

1 See the Sale of Goods Act 1979 s 18 (as amended) (covering words); and PARA 109 ante. See also *Karlshamns Oljefabriker v Eastport Navigation Corp'n, The Elafi* [1982] 1 All ER 208, [1981] 2 Lloyd's Rep 679 (where a different intention was inferred). Very little is now needed to give rise to the inference that the property in specific goods is to pass only on delivery or payment: *RV Ward Ltd v Bignall* [1967] 1 QB 534 at 545, [1967] 2 All ER 449 at 453, CA, per Diplock LJ.

2 For the meaning of 'contract of sale' see PARA 29 ante.

3 As to unascertained goods see PARA 124 ante.

4 For the meaning of 'future goods' see PARA 47 ante; for the meaning of 'goods' see PARA 30 ante; and for the meaning of 'seller' see PARA 27 ante.

5 A sale by description implies a condition that the goods will correspond with the description: see the Sale of Goods Act 1979 s 13 (as amended); and PARA 73 ante.

6 *Vigers Bros v Sanderson Bros* [1901] 1 KB 608. See also *Bowes v Shand* (1877) 2 App Cas 455, HL. If the goods do not conform to their description, the property does not pass, even though there is an express term that the property will pass on shipment, because the goods are not goods within the meaning of the contract: *Vigers Bros v Sanderson Bros* supra at 612; *Thornley v Tuckwell (Butchers) Ltd* [1964] Crim LR 127, DC.

7 As to when goods are in a deliverable state see PARA 113 note 5 ante.

8 The seller may reserve the right of disposal under the Sale of Goods Act 1979 s 19 (see PARA 137 et seq post); or there may be other conditions precedent to the passing of the property (see PARA 110 ante). The rule is not limited to a case where there is express notice that the appropriation is unconditional or, conversely, to a case where the notice of appropriation is in terms conditional: *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 at 66, HL, per Lord Wright. If eg the goods, after being identified, have to be weighed to ascertain the price, it is conceived that the analogy of the Sale of Goods Act 1979 s 18 r 3 would apply: see PARA 116 ante.

9 In *Wait v Baker* (1848) 2 Exch 1 at 8 Parke B points out that the word 'appropriation' is used in the cases in two senses. It may mean: (1) a selection with common consent of the goods as the goods to be delivered, in

which case the property may not pass; or (2) a final appropriation of the goods to the contract so as to pass the property in them to the buyer. See also *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240; *Flynn v Mackin and Mahon* [1974] IR 101 (where a car being taken to the buyer was held not to be unconditionally appropriated). In the text, and in the Sale of Goods Act 1979 s 18 r 5(2) (see PARA 127 post), and s 19 (see PARA 137 post), 'appropriation' is used in the second sense.

10 For the meaning of 'buyer' see PARA 29 ante.

11 For the meaning of 'property', in relation to goods see PARA 27 ante.

12 *R (on the application of Valpak Ltd) v Environment Agency* [2002] EWHC 1510 (Admin), [2002] All ER (D) 357 (May).

13 Sale of Goods Act 1979 s 18 r 5(1). See *White v Wilks* (1813) 5 Taunt 176 (unascertained goods remaining at a rent); *Bishop v Crawshay* (1824) 3 B & C 415 (general payment no assent to appropriation); *Rohde v Thwaites* (1827) 6 B & C 388 (filling up casks afterwards assented to); *Atkinson v Bell* (1828) 8 B & C 277; *Elliott v Pybus* (1834) 10 Bing 512; *Alexander v Gardner* (1835) 1 Bing NC 671 (buyer's assent to shipment); *Sparkes v Marshall* (1836) 2 Bing NC 761 (notice of shipment, then insurance by buyer); *Wilkins v Bromhead* (1844) 6 Man & G 963 (request for payment, and payment); *Godts v Rose* (1855) 17 CB 229; *Boswell v Kilborn* (1862) 15 Moo PCC 309 (no separation and appropriation); *Jenner v Smith* (1869) LR 4 CP 270; *Gabarron v Kreeft*, *Kreeft v Thompson* (1875) LR 10 Exch 274; *Ridgway v Ward* (1884) 14 QBD 110, DC; *Noblett v Hopkinson* [1905] 2 KB 214, DC. Cf *Daniel v Whitfield* (1885) 15 QBD 408, DC (mutual appropriation of goods at shop); *Ginner v King* (1890) 7 TLR 140, CA (seller's authority to appropriate revoked); *Pletts v Beattie* [1896] 1 QB 519, DC (setting aside goods with buyer's express previous assent); *Hayman & Son v M'Lintock* 1907 SC 936, Ct of Sess; *Pignataro v Gilroy* [1919] 1 KB 459, DC (implied consent of buyer after notice); *Laurie and Morewood v John Dudin & Sons* [1926] 1 KB 223, CA; *Mischeff v Springett* [1942] 2 KB 331, [1942] 2 All ER 349, DC (relation of rule to emergency legislation); *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240 (preparations for appropriation only); *Edwards v Ddin* [1976] 3 All ER 705, [1976] 1 WLR 942, DC (where the filling of a petrol tank of a car with petrol was held to be unconditional appropriation). As to the effect of the giving of earnest, ie a coin or something valuable, given by the buyer to the seller to signify the conclusion of the bargain see *Hinde v Whitehouse* (1806) 7 East 558. Cf *Sumner and Leivesley v John Brown & Co* (1909) 25 TLR 745.

14 *Jenner v Smith* (1869) LR 4 CP 270.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iii) Unascertained Goods/126. Place of appropriation and authority to appropriate.

126. Place of appropriation and authority to appropriate.

An appropriation takes place where the goods are situated at the time of the appropriation, not where the contract of sale is made, or where one party assents to an appropriation by the other¹.

An authority given by one party to the other to appropriate the goods is an implied assent by the party giving the authority to a subsequent appropriation by the other², provided that the appropriation is made in accordance with the contract³. Such an authority confers an election on the party authorised⁴. An authority to appropriate is presumed where, by the terms of the contract, one party is to do with reference to the goods some act or thing which cannot be done until the goods are appropriated. When the party authorised has determined his election

by doing such act or thing, the appropriation is finally made⁵. Until that time any act or thing done with reference to the goods towards appropriation by the party authorised is revocable⁶, unless, before its revocation, it has been assented to by the other party⁷.

The question whether any act or thing done with reference to the goods is a final determination of an election to appropriate, or merely indicates a revocable intention to appropriate, is one of law⁸.

1 *Badische Anilin und Soda Fabrik v Hickson* [1906] AC 419 at 421, HL, per Lord Loreburn LC. Consequently, an appropriation of goods abroad is no infringement of an English patent: *Badische Anilin und Soda Fabrik v Hickson* supra.

2 *Aldridge v Johnson* (1857) 7 E & B 885 at 901 per Erle; *Jenner v Smith* (1869) LR 4 CP 270 at 276-277.

3 See the Sale of Goods Act 1979 s 18 r 5(1); para 125 ante; *Borrowman, Phillips & Co v Free and Hollis* (1878) 4 QBD 500 at 504-505, CA, per Brett LJ and Cotton LJ; *Denny v Skelton* (1916) 86 LJB 280 (where there was a sale of two portions of cargo to D and S, who employed the same lighterman, and D's portion was intended to be delivered to D but by mistake it was received by the lighterman on account of S, and the property was held to have passed to D). For a special clause overriding the common form appropriation clause see *Luis de Ridder Ltd v André & Cie SA (Lausanne)* [1941] 1 All ER 380. As to the notice of appropriation under London Corn Trade contracts see *Compagnie Continentale d'Importation v Handelsvertretung der Union der USSR in Deutschland* (1927) 44 TLR 10 (affd (1928) 138 LT 663, CA); *Dalgety & Co Ltd v TG Bradford & Co Ltd* (1930) 46 TLR 274.

4 Blackburn's Contract of Sale (3rd Edn) 138, citing *Heyward's Case* (1595) 2 Co Rep 35a at 37a, approved by Erle J in *Aldridge v Johnson* (1857) 7 E & B 885. 'An election once determined is determined for ever, and such a determination is made by any act which shows it to be made': *Rankin v Potter* (1873) LR 6 HL 83 at 119 per Blackburn J. See also *Grain Union Co SA Antwerp v Hans Larsen A/S Aalborg* (1933) 49 TLR 540 (where the notice was valid, even though the seller's clerk had made a mistake in naming the ship). Cf *Luis de Ridder Ltd v André & Cie SA (Lausanne)* [1941] 1 All ER 380. See further *Scarf v Jardine* (1882) 7 App Cas 345, HL; and ESTOPPEL vol 16(2) (Reissue) PARA 962.

5 Blackburn's Contract of Sale (3rd Edn) 138; *Fragano v Long* (1825) 4 B & C 219 (dispatch of goods by buyer's authority); *Aldridge v Johnson* (1857) 7 E & B 885 (filling buyer's sacks by his authority); *Langton v Higgins* (1859) 4 H & N 402 (filling buyer's bottles); *Pletts v Beattie* [1896] 1 QB 519, DC.

6 *Anderson v Morice* (1876) 1 App Cas 713, HL (delivery to seller's own employee or agent); *Borrowman, Phillips & Co v Free and Hollis* (1878) 4 QBD 500, CA.

7 This point was not decided in *Borrowman, Phillips & Co v Free and Hollis* (1878) 4 QBD 500, CA, but is in accordance with principle, an irregular appropriation being an offer of a new contract: *Cunliffe v Harrison* (1851) 6 Exch 903 at 906 per Parke B.

8 See Blackburn's Contract of Sale (3rd Edn) 137.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iii) Unascertained Goods/127. Delivery to buyer or carrier.

127. Delivery to buyer or carrier.

Unless a different intention appears¹, where, in pursuance of the contract², the seller³ delivers⁴ the goods⁵ to the buyer⁶, or to a carrier⁷ or other bailee, whether named by the buyer or not⁸, for the purpose of transmission to the buyer, and does not reserve the right of disposal⁹, he is deemed to have unconditionally appropriated the goods to the contract¹⁰. If, however, the seller retains control over the goods after delivery to the carrier, as by taking a bill of lading to his own order or by retaining the documents of title, that fact may show that he has reserved a right of disposal and that the appropriation is not unconditional. In such a case the property does not pass on delivery to the carrier but only on performance of the condition¹¹.

1 See the Sale of Goods Act 1979 s 18 (as amended) (covering words); and PARA 109 ante.

2 I.e. the contract for the sale of unascertained or future goods. For the meaning of 'contract of sale' see PARA 29 ante; for the meaning of 'future goods' see PARA 47 ante; and for the meaning of 'goods' see PARA 30 ante. As to unascertained goods see PARA 124 ante.

3 For the meaning of 'seller' see PARA 27 ante.

4 For the meaning of 'delivery' see PARAS 27 note 6 ante, 163 post.

5 I.e. being goods of the description contracted for, and in a deliverable state, and the delivery being otherwise good: see *Hoare v Great Western Rly Co* (1877) 37 LT 186, DC (consignment by seller to wrong consignee); *Wardar's (Import and Export) Co Ltd v W Norwood & Sons Ltd* [1968] 2 QB 663, [1968] 2 All ER 602, CA.

6 *Ogle v Atkinson* (1814) 5 Taunt 759 (buyer's ship); *Greaves v Hepke* (1818) 2 B & Ald 131 (buyer obtains delivery order on warehouseman); *Studdy v Sanders* (1826) 5 B & C 628 (delivery of cider juice to buyer's agent); *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128, PC (delivery on buyer's chartered ship). For the meaning of 'buyer' see PARA 29 ante.

7 *Vale v Bayle* (1775) 1 Cowp 294 (carrier indicated); *Dutton v Solomonson* (1803) 3 Bos & P 582 (delivery to carrier's wagon); *Fragano v Long* (1825) 4 B & C 219; *Bryans v Nix* (1839) 4 M & W 775; *Evans v Nichol* (1841) 3 Man & G 614; *Tregelles v Sewell* (1862) 7 H & N 574 (affd (1863) 7 H & N 584, Ex Ch) (shipment and payment against shipping documents); *Badische Anilin und Soda Fabrik v Basle Chemical Works, Bindschedler* [1898] AC 200, HL. The carrier is prima facie the buyer's agent. If the terms of the contract or appropriation show that the carrier is the seller's agent, the appropriation is revocable, and the property does not pass until delivery: *Badische Anilin und Soda Fabrik v Basle Chemical Works, Bindschedler* supra. As to who may sue for loss of or injury to goods see CARRIAGE AND CARRIERS vol 7 (2008) PARA 752.

8 The words 'whether named by the buyer or not' should be read subject to the preceding words 'in pursuance of the contract'. Thus, if the buyer names the carrier, the seller does not duly pursue his authority to appropriate if he delivers to another carrier: *Ullock v Reddelein* (1828) Dan & Ll 6.

9 I.e. under the Sale of Goods Act 1979 s 19(1): see PARA 137 post. The effect of the reservation is to suspend the passing of the property: see s 19(1). An effective reservation is not always possible: see eg *Edwards v Ddin* [1976] 3 All ER 705, [1976] 1 WLR 942, DC.

10 Sale of Goods Act 1979 s 18 r 5(2).

11 As to the reservation of the right of disposal, the passing of property and the effect of documents on the passing of property see PARAS 137, 139, 345 post.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iii) Unascertained Goods/128. Present sale of future goods and goods in potential existence.

128. Present sale of future goods and goods in potential existence.

Where there is a contract purporting to be a present sale of future goods¹, and, when the goods come into existence or are acquired, the seller delivers them to the buyer² or otherwise appropriates them to him³, or the buyer takes possession of them by the authority of the seller, given by the terms of the contract or subsequently to it, the property in the goods is thereupon transferred to the buyer⁴.

Where, however, the future goods are such as have, at the date of the contract, a potential existence, the property in them is prima facie transferred to the buyer when they come into existence, so as to be capable of identification, without any further act of appropriation⁵. Goods are in potential existence when they are the natural product, or expected increase, of something owned or possessed by the seller at the time of the contract, such as the hay or wheat to be grown in his field, the wool to be clipped from his existing sheep, the milk to be given by his existing cows, the young to be produced by his existing animals and similar products⁶.

Where, however, the subject matter of the contract is a product to be made or manufactured out of potentially existing future goods, a subsequent act of appropriation when the goods come into actual existence is prima facie necessary⁷.

1 le an agreement to sell: see the Sale of Goods Act 1979 s 5(3); and PARA 48 ante.

2 See *ibid* s 18 r 5(2); and PARA 127 ante.

3 See *ibid* s 18 r 5(1); and PARA 125 ante.

4 Bacon's Maxims of the Law, Regula 14; *Basset v Maynard* (1601) Cro Eliz 819, sub nom *Palmer's Case* 5 Co Rep 24b; *Lunn v Thornton* (1845) 1 CB 379 (no new act of appropriation by grantor); *Congreve v Evetts* (1854) 10 Exch 298; *Hope v Hayley* (1856) 5 E & B 830 (possession taken by grantee); *Carr v Acraman* (1856) 11 Exch 566 (assignor's intervening act of bankruptcy); *Carr v Allatt (Executors of Tweedale)*, *Allatt (Executors of Tweedale) v Carr* (1858) 27 LJ Ex 385; *Chidell v Galsworthy* (1859) 6 CBNS 471 (possession taken by grantee); *Holroyd v Marshall* (1862) 10 HL Cas 191 at 216; *Reeve v Whitmore*, *Martin v Whitmore* (1863) 4 De GJ & Sm 1 (no agreement to give present interest). Cf *Joseph v Lyons* (1884) 15 QBD 280, CA; *Hallas v Robinson* (1885) 15 QBD 288, CA (no seizure). The interest of the buyer under the contract prior to seizure is assignable: *Basset v Maynard* supra; *Muskett v Hill* (1839) 5 Bing NC 694. As between the seller and the buyer, an equitable interest may pass to the buyer by virtue of the contract as soon as the goods come into existence, or are acquired, and can be identified: *Holroyd v Marshall* supra; *Collyer v Isaacs* (1881) 19 ChD 342 at 354, CA; *Clements v Matthews* (1883) 11 QBD 808, CA; *Tailby v Official Receiver* (1888) 13 App Cas 523, HL. As to the assignment of property to be acquired in the future see further PERSONAL PROPERTY vol 35 (Reissue) PARAS 1265-1267.

5 *Grantham v Hawley* (1615) Hob 132, followed in *Petch v Tutin* (1846) 15 M & W 110 (crops). See also YB 21 Hen 6 at 43 (future tithable grain); *Wood and Foster's Case* (1586) 1 Leon 42; *Robinson v Macdonnell* (1816) 5 M & S 228 (future whale oil); *Lunn v Thornton* (1845) 1 CB 379 (future furniture); *Tucker v Farm and General Investment Trust Ltd* [1966] 2 QB 421, [1966] 2 All ER 508, CA, following *Wood and Foster's Case* supra (where the hirer was held to have good title to lambs born to ewes acquired by him on hire purchase). See also *Low v Pew* 108 Mass 347 (1871) (halibut yet to be caught). If the existence of the future thing is possible only, it has no potential existence: *Robinson v Macdonnell* (1816) 5 M & S 228 at 236 per Lord Ellenborough CJ. The property passes when the goods are 'extant': *Grantham v Hawley* (1615) Hob 132. See also *Reeves v Barlow* (1884) 12 QBD 436 at 442, CA, per Bowen LJ.

6 See the cases cited in note 5 supra.

7 *Langton v Higgins* (1859) 4 H & N 402. See also *Anon* (1583) Moore KB 174 (butter produced from cows' milk).

UPDATE**109-160 Effects of the Contract**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iii) Unascertained Goods/129. Goods to be manufactured.

129. Goods to be manufactured.

Under a contract for the manufacture and sale of goods the property in the goods and their materials¹ does not, unless otherwise agreed², pass to the buyer until the goods have been finished and appropriated to the contract with the assent of both parties³. Whether the goods have been finished depends on the construction of the contract and the surrounding circumstances⁴.

1 *Atkinson v Bell* (1828) 8 B & C 277 at 282 per Bayley J. As there is no contract of sale of the materials, apart from the goods themselves, the Sale of Goods Act 1979 s 18 r 5(1) (see PARA 125 ante) cannot be called in aid: *Reid v Macbeth and Gray* [1904] AC 223, HL. See, however, *Pritchett & Gold and Electrical Power Storage Co Ltd v Currie* [1916] 2 Ch 515, CA (where there was a sale of components of a dry battery which was to be subsequently erected by the seller and it was held that the property had passed on the appropriation of the components by delivery to the carrier). Cf *Philip Head & Sons Ltd v Showfronts Ltd* [1970] 1 Lloyd's Rep 140 (where there was a contract to supply and lay carpet and the bales were held not to be in a deliverable state so that property did not pass before laying).

2 See the covering words of the Sale of Goods Act 1979 s 18 (as amended) ('unless a different intention appears'); and PARA 109 ante.

3 Such cases fall under *ibid* s 18 r 5(1) (see PARA 125 ante), the goods being future. See eg *Mucklow v Mangles* (1808) 1 Taunt 318 (barge); *Bishop v Crawshay* (1824) 3 B & C 415 (no assent by buyer); *Atkinson v Bell* (1828) 8 B & C 277 (machine); *Carruthers v Payne* (1828) 5 Bing 270 (carriage treated by parties as complete); *Werner v Humphreys* (1841) 2 Man & G 853 (unfinished coat); *Wilkins v Bromhead* (1844) 6 Man & G 963 (greenhouse); *Armitage v John Haigh & Sons Ltd* (1893) 9 TLR 287, CA; *Sir James Laing & Sons Ltd v Barclay, Curle & Co Ltd* [1908] AC 35, HL (ship); *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240 (preparations for appropriation, but no actual appropriation). See also *Oldfield v Lowe* (1829) 9 B & C 73 (chattel started by A and finished by B).

4 See note 3 *supra*.

UPDATE**109-160 Effects of the Contract**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iii) Unascertained Goods/130. When completion of manufacture is not necessary.

130. When completion of manufacture is not necessary.

An intention that the property in an article to be manufactured and sold will pass to the buyer at any stage before the completion of the manufacture may be inferred from the terms of the contract¹. Subject to this, such an intention may be presumed where the price is made payable by instalments regulated according to particular stages of the work, and from the due payment of such price, and from the fact that the work during its progress has been inspected by or on behalf of the buyer².

1 *Seath v Moore* (1886) 11 App Cas 350 at 370, HL, per Lord Blackburn. See also *Wood v Bell* (1856) 5 E & B 772 (on appeal 6 E & B 355, Ex Ch); *Re Blyth Shipbuilding and Dry Docks Co Ltd* [1926] Ch 494, CA. Cf *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431, [1958] 1 WLR 1126. The question at what stage the property is to pass is one depending on the construction of the contract; whether that stage has been reached is a question of fact: *Seath v Moore* supra at 370 per Lord Blackburn; *Philip Head & Sons Ltd v Showfronts Ltd* [1970] 1 Lloyd's Rep 140. As to the passing of the property in materials in building contracts see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 84 et seq.

2 *Seath v Moore* (1886) 11 App Cas 350 at 380-381, HL, per Lord Watson. These facts are not, however, conclusive: *Sir James Laing & Sons Ltd v Barclay, Curle & Co Ltd* [1908] AC 35 at 43, HL, per Lord Loreburn LC. See *Woods v Russell* (1822) 5 B & Ald 942 (signing by builder of ship of certificate of registry in favour of buyer); *Clarke v Spence* (1836) 4 Ad & El 448 (payment by instalments at particular stages and supervision by buyer); *Laidler v Burlinson* (1837) 2 M & W 602 (instalments not appropriated to particular stages); *Reid v Fairbanks* (1853) 13 CB 692 (bill of sale of ship with intention to give security); *Wood v Bell* (1856) 5 E & B 772 (on appeal 6 E & B 355, Ex Ch) (punching buyer's name on ship, and builder's admission of buyer's ownership); *Sir James Laing & Sons Ltd v Barclay, Curle & Co Ltd* supra (delivery not to be complete until trial of ship when finished); *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431, [1958] 1 WLR 1126.

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109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iii) Unascertained Goods/131. Materials subsequently added.

131. Materials subsequently added.

When an article in an incomplete state of manufacture has become the property of the buyer, materials subsequently added to it become by accession the property of the buyer when, but not before, they have been affixed to, or become in a reasonable way part of, the article¹.

1 *Seath v Moore* (1886) 11 App Cas 350 at 381, HL, per Lord Watson; *Reid v Macbeth and Gray* [1904] AC 223, HL. See also *Wood v Bell* (1856) 5 E & B 772 (on appeal 6 E & B 355, Ex Ch); *Baker v Gray* (1856) 17 CB 462 (property to pass on user by the buyer). Cf *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431, [1958] 1 WLR 1126. The decision in *Woods v Russell* (1822) 5 B & Ald 942 (rudder and cordage of ship) and *Goss v Quinton* (1842) 3 Man & G 825 (rudder) were on this point overruled by *Wood v Bell* supra. It is not

sufficient that the materials have been finished, marked or numbered by the seller with reference to their future position as part of the article, or intended by him to form part of it: *Reid v Macbeth and Gray* supra; *Re Blyth Shipbuilding and Dry Docks Co Ltd* [1926] Ch 494, CA. However see also PARA 110 note 3 ante.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iii) Unascertained Goods/132. Contract for a quantity of goods.

132. Contract for a quantity of goods.

Under a contract for the sale of a quantity of goods, the question whether the property in any part of the goods passes before the full quantity is made up depends on whether successive appropriations of separate portions of the goods were contemplated, or whether the goods were contracted for only as an indivisible whole, to be appropriated as such¹. In particular, a contract for the sale of a cargo or boatload is prima facie² a contract for the entire and indivisible loading as such of the vessel or boat on the particular voyage³.

The fact that the contract contemplates symbolic delivery of the goods as a whole by the transfer to the buyer of a bill of lading, or other document representing the whole quantity, is relevant to show that the goods were contracted for as an indivisible whole⁴.

The fact that successive instalments of goods are deliverable to the buyer during a period of time, especially when the earlier instalments would be consumed or otherwise dealt with before the completion of the full quantity, is relevant to show that the instalments were intended to be separately appropriated⁵.

1 *Anderson v Morice* (1876) 1 App Cas 713, HL (cargo an indivisible whole); *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128, PC (cargo a divisible quantity). See also *Aldridge v Johnson* (1857) 7 E & B 885 (sackloads); *Langton v Higgins* (1859) 4 H & N 402 (bottles). A quantity of goods contracted for as an indivisible whole is like a chattel to be manufactured: see *Anderson v Morice* supra at 733 per Lord Hatherley. Where the goods are so contracted for as an indivisible whole, the instalments are not 'the goods' appropriated under the Sale of Goods Act 1979 s 18 r 5(1) (see PARA 125 ante), for there is no contract for the sale of them as separate entities; nor are they 'the goods' delivered to a carrier under s 18 r 2 (see PARA 127 ante): *Reid v Macbeth and Gray* [1904] AC 223 at 232, HL, per Lord Davey. *Bryans v Nix* (1839) 4 M & W 775 is probably another illustration, in spite of the dictum of Parke B at 793.

2 The facts may, however, show that 'cargo' means merely a quantity, to be separately appropriated, equal to the capacity of the vessel: *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128, PC.

3 *Borrowman v Drayton* (1876) 2 Ex D 15, CA. See also the cases cited in PARA 174 note 2 post.

4 See *Anderson v Morice* (1875) LR 10 CP 609 at 617, Ex Ch, per Blackburn J and at 619 per Lush J. As to bills of lading generally see PARA 366 et seq post.

5 *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128, PC.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iii) Unascertained Goods/133. Goods to be delivered at a particular place.

133. Goods to be delivered at a particular place.

Where, by the terms of the contract for unascertained goods, the seller agrees to deliver the goods at a particular place, and no intention appears in the contract that the property will pass prior to such delivery, the property does not pass unless and until delivery is made accordingly¹.

¹ *Calcutta and Burmah Steam Navigation Co v De Mattos* (1863) 32 LJQB 322 at 335 per Cockburn CJ and at 328 per Blackburn J; affd (1864) 33 LJQB 214, Ex Ch. See also *Dunlop v Lambert* (1839) 6 Cl & Fin 600 at 621-622, HL, per Lord Cottenham LC; *Wheeler v Pearson* (1857) 5 WR 227; *Henckell Du Buisson & Co v Swan & Co* (1889) 17 R 252 (ship deliverable abroad after completion); *Badische Anilin und Soda Fabrik v Basle Chemical Works, Bindschedler* [1898] AC 200 at 207, HL, per Lord Herschell. Common instances are where a tradesman agrees to deliver goods at the customer's house (*Ridgway v Ward* (1884) 14 QBD 110 at 119, DC, per Hawkins J (bread); cf *Daniel v Whitfield* (1885) 15 QBD 408, DC (where the property passed before delivery)), or to the customer over the counter (*Addy v Blake* (1887) 19 QBD 478, DC (liquor)). The reason for the rule is that, until delivery, the appropriation is not complete, as until then the seller may change his mind: *Flynn v Mackin and Mahon* [1974] IR 101. See also *Colley v Overseas Exporters* [1921] 3 KB 302. As to cif contracts generally see PARA 324 et seq post; and as to fob contracts generally see PARA 351 et seq post.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iv) Undivided Shares in Goods forming Part of a Bulk/134. Transfer of property in an undivided share of goods forming part of a bulk.

(iv) Undivided Shares in Goods forming Part of a Bulk

134. Transfer of property in an undivided share of goods forming part of a bulk.

Where there is a contract for the sale¹ of a specified quantity of unascertained goods², then, if the following conditions are met:

- 174 (1) the goods or some of them form part of a bulk³ which is identified either in the contract or by subsequent agreement between the parties; and
 175 (2) the buyer⁴ has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk,

unless the parties agree otherwise, as soon as the conditions specified in heads (1) and (2) above are met or at such later time as the parties may agree, property in an undivided share in the bulk is transferred to the buyer and the buyer becomes an owner in common of the bulk⁵.

For these purposes, the undivided share of a buyer in a bulk at any time is such share as the quantity of goods paid for and due to the buyer out of the bulk bears to the quantity of goods in the bulk at that time⁶. Where, however, the aggregate of the undivided shares of buyers in a bulk so determined would at any time exceed the whole of the bulk at that time, the undivided share in the bulk of each buyer is to be reduced proportionately so that the aggregate of the undivided share is equal to the whole bulk⁷.

Where a buyer has paid the price for only some of the goods due to him out of a bulk, any delivery⁸ to the buyer out of the bulk is to be ascribed in the first place to the goods in respect of which payment has been made⁹. Payment of part of the price for any goods is to be treated as payment for a corresponding part of the goods¹⁰.

Nothing in the above provisions:

- 176 (a) imposes an obligation on a buyer of goods out of a bulk to compensate any other buyer of goods out of that bulk for any shortfall in the goods received by that other buyer;
 177 (b) affects any contractual arrangement between buyers of goods out of a bulk for adjustments between themselves; or
 178 (c) affects the rights of any buyer under his contract¹¹.

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 As to unascertained goods see PARA 124 ante.

3 For these purposes, 'bulk' means a mass or collection of goods of the same kind which: (1) is contained in a defined space or area; and (2) is such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity: Sale of Goods Act 1979 s 61(1) (amended by the Sale of Goods (Amendment) Act 1995 s 2(a)).

4 For the meaning of 'buyer' see PARA 29 ante.

5 Sale of Goods Act 1979 s 20A(1), (2) (s 20A added by the Sale of Goods (Amendment) Act 1995 s 1(3)). As to deemed consent by co-owners to dealings in bulk goods see PARA 135 post; and as to appropriation by exhaustion in unascertained goods forming part of an identified bulk see PARA 136 post. See also *Sale of Goods forming Part of a Bulk* (Law Com no 215), which recommended (inter alia) that there should be a new rule on sales of goods out of bulk which would enable property in an undivided share in the bulk to pass before ascertainment of goods relating to specific sale contracts (see PARA 6.1).

Where the conditions in the Sale of Goods Act 1979 s 20A(1) (as added) (see heads (1), (2) in the text) do not apply, goods which are unascertained remain so notwithstanding that they are to be taken from a specific larger bulk, if the identity of the portion so to be taken is unascertained: *Blackburn's Contract of Sale* (3rd Edn) 133; *Rohde v Thwaites* (1827) 6 B & C 388; *Shepley v Davis* (1814) 5 Taunt 617; *Busk v Davis* (1814) 2 M & S 397; *Snell v Heighton* (1883) Cab & El 95; *Pletts v Campbell* [1895] 2 QB 229, DC. Cf *Wait and James v Midland Bank Ltd* (1926) 31 Com Cas 172 (where the bulk was disposed of until only the buyer's portion remained); *Karlshamns Oljefabriker v Eastport Navigation Corpn, The Elafi* [1982] 1 All ER 208, [1981] 2 Lloyd's Rep 679; *HM Customs and Excise v Everwine* [2003] EWCA (Civ) 593, [2003] All ER (D) 97 (Jul). Consequently, the Sale of Goods Act 1979 s 16 (as amended) (see PARA 124 ante) still applies and ascertainment remains a necessary precondition to the passage of property.

6 Sale of Goods Act 1979 s 20A(3) (as added: see note 5 supra).

- 7 Ibid s 20A(4) (as added: see note 5 supra).
- 8 For the meaning of 'delivery' see PARA 27 note 6 ante and PARA 163 post.
- 9 Sale of Goods Act 1979 s 20A(5) (as added: see note 5 supra).
- 10 Ibid s 20A(6) (as added: see note 5 supra).
- 11 Ibid s 20B(3) (as added: see note 5 supra).

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iv) Undivided Shares in Goods forming Part of a Bulk/135. Deemed consent by co-owner to dealings in bulk goods.

135. Deemed consent by co-owner to dealings in bulk goods.

A person who has become¹ an owner in common of a bulk² is deemed to have consented to:

- 179 (1) any delivery³ of goods⁴ out of the bulk to any other owner in common of the bulk, being goods which are due to him under his contract;
- 180 (2) any dealing with or removal, delivery or disposal of goods in the bulk by any other person who is an owner in common of the bulk in so far as the goods fall within that co-owner's undivided share in the bulk at the time of the dealing, removal, delivery or disposal⁵.

No cause of action⁶ accrues to anyone against a person by reason of that person's having acted in accordance with head (1) or head (2) above in reliance on any consent deemed to have been so given⁷.

Nothing in the above provisions:

- 181 (a) imposes an obligation on a buyer⁸ of goods out of a bulk to compensate any other buyer of goods out of that bulk for any shortfall in the goods received by that other buyer;
- 182 (b) affects any contractual arrangement between buyers of goods out of a bulk for adjustments between themselves; or
- 183 (c) affects the rights of any buyer under his contract⁹.

- 1 Ie by virtue of the Sale of Goods Act 1979 s 20A (as added): see PARA 134 ante.
- 2 For the meaning of 'bulk' see PARA 134 note 3 ante.
- 3 For the meaning of 'delivery' see PARAS 27 note 6 ante, 163 post.
- 4 For the meaning of 'goods' see PARA 30 ante.

5 Sale of Goods Act 1979 s 20B(1) (s 20B added by the Sale of Goods (Amendment) Act 1995 s 1(3)). See also *Sale of Goods forming Part of a Bulk* (Law Com no 215), which recommended (inter alia) that there should be a new rule on sales of goods out of bulk which would enable property in an undivided share in the bulk to pass before ascertainment of goods relating to specific sale contracts (see PARA 6.1).

6 For the meaning of 'action' see PARA 14 ante.

7 Sale of Goods Act 1979 s 20B(2) (as added: see note 5 supra).

8 For the meaning of 'buyer' see PARA 29 ante.

9 Sale of Goods Act 1979 s 20B(3) (as added: see note 5 supra).

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(iv) Undivided Shares in Goods forming Part of a Bulk/136. Appropriation by exhaustion in unascertained goods forming part of an identified bulk.

136. Appropriation by exhaustion in unascertained goods forming part of an identified bulk.

Where there is a contract for the sale¹ of a specified quantity of unascertained goods² in a deliverable state³ forming part of a bulk⁴ which is identified either in the contract or by subsequent agreement between the parties and the bulk is reduced to, or to less than, that quantity, then, if the buyer⁵ under that contract is the only buyer to whom goods are then due out of the bulk, the remaining goods are to be taken as appropriated to that contract at the time when the bulk is so reduced and the property⁶ in those goods then passes to that buyer⁷.

The above provisions apply also, with the necessary modifications, where a bulk is reduced to, or to less than, the aggregate of the quantities due to a single buyer under separate contracts relating to that bulk and he is the only buyer to whom goods are then due out of that bulk⁸.

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 As to unascertained goods see PARA 124 ante.

3 As to when goods are in a deliverable state see PARA 113 note 5 ante.

4 For the meaning of 'bulk' see PARA 134 note 3 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 For the meaning of 'property', in relation to goods see PARA 27 ante.

7 Sale of Goods Act 1979 s 18 r 5(3) (added by the Sale of Goods (Amendment) Act 1995 s 1(2)); and see *Karlshamns Oljefabriker v Eastport Navigation Corpn, The Elafi* [1982] 1 All ER 208, [1981] 2 Lloyd's Rep 679. See also *Sale of Goods forming Part of a Bulk* (Law Com no 215), which recommended (inter alia) that there

should be a new rule on sales of goods out of bulk which would enable property in an undivided share in the bulk to pass before ascertainment of goods relating to specific sale contracts (see PARA 6.1).

8 Sale of Goods Act 1979 s 18 r 5(4) (added by the Sale of Goods (Amendment) Act 1995 s 1(2)).

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(v) Reservation by Seller of Right of Disposal/137. Suspension of passing of property.

(v) Reservation by Seller of Right of Disposal

137. Suspension of passing of property.

Where there is a contract for the sale¹ of specific goods², or where goods are subsequently appropriated³ to the contract, the seller⁴ may, by the terms of the contract or appropriation⁵, reserve the right of disposal⁶ of the goods until certain conditions are fulfilled⁷. In such a case, notwithstanding the delivery⁸ of the goods to the buyer⁹, or to a carrier or other bailee for the purpose of transmission to the buyer¹⁰, the property¹¹ in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled¹².

The effect of such reservation is to prevent any unconditional appropriation to the contract by reason of delivery of the goods to a carrier or other bailee¹³, even if the seller's action is in breach of the contract¹⁴.

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 For the meaning of 'specific goods' see PARA 54 ante; and for the meaning of 'goods' see PARA 30 ante.

3 See the Sale of Goods Act 1979 s 18 r 5(1); and PARA 125 et seq ante.

4 For the meaning of 'seller' see PARA 27 ante.

5 It is conceived that the words 'terms of the contract or appropriation' are to be interpreted so that reservation by 'the terms of the contract' may occur in relation both to specific and to subsequently appropriated goods.

6 The expression 'right of disposal' is a translation of *jus disponendi*, found in the cases with reference only to shipment under bills of lading; but the Sale of Goods Act 1979 s 19(1) is a general provision not confined to cases of shipment, notwithstanding that s 19(2) (see PARA 370 post) and s 19(3) (see PARA 373 post) are so confined: see the cases cited in note 7 infra.

7 Ibid s 19(1). See *Godts v Rose* (1855) 17 CB 229 (where property was only intended to pass against payment of the price on delivery to the buyer of the warehouseman's transfer order); *Cohen v Foster* (1892) 61 LJQB 643, DC. See also the cases on shipment cited in PARA 370 note 3 post.

Typically, although not necessarily, the conditions to be fulfilled will relate to payment of the price of the goods (and, sometimes, also of other goods). Reservation of title (or 'Romalpa') clauses in various forms have achieved widespread use and significance as a possible means of protecting the seller, particularly against the risks of a buying company going into receivership or liquidation: see PARA 110 ante.

Where the performance of some obligation is imposed on the buyer, but is not made a condition of the transfer of the property, the property, once passed, is not re-vested in the seller by the buyer's subsequent default (*Key v Cotesworth* (1852) 7 Exch 595; *Re Tappenbeck, ex p Banner* (1876) 2 ChD 278, CA), unless there is an agreement to that effect (*Newington v Levy* (1870) LR 6 CP 180, Ex Ch). As to the reservation of the right of disposal over goods shipped see the Sale of Goods Act 1979 s 19(2), (3); and PARAS 343, 345, 354-355, 370 et seq post.

8 For the meaning of 'delivery' see PARAS 27 note 6 ante, 163 post.

9 *Turner v Liverpool Docks Trustees* (1851) 6 Exch 543, Ex Ch.

10 Ie under the Sale of Goods Act 1979 s 18 r 5(2): see PARA 127 ante.

11 For the meaning of 'property', in relation to goods see PARA 27 ante.

12 Sale of Goods Act 1979 s 19(1). See *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339, [1990] 3 All ER 481, HL, applied in *Pongakawa Sawmill Ltd v New Zealand Forest Products Ltd* [1992] 3 NZLR 304, NZ CA; and PARA 110 note 2 ante.

13 See note 10 supra.

14 *Wait v Baker* (1848) 2 Exch 1; *Browne v Hare* (1859) 4 H & N 822 at 830, Ex Ch; *Gabarron v Kreeft, Kreeft v Thompson* (1875) LR 10 Exch 274; *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60, HL. See also *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex D 164 at 170, CA, per Bramwell LJ, explaining *Wait v Baker* (1848) 2 Exch 1; and the judgment delivered by Lord Parker of Waddington in *The Parchim* [1918] AC 157 at 170, PC (cited in PARAS 370-371 post).

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(v) Reservation by Seller of Right of Disposal/138. Delivery in exchange for payment.

138. Delivery in exchange for payment.

Where, by the terms of the contract or of the appropriation of the goods by the seller, the delivery of the goods, or of a document giving control of the goods, is to be¹ in exchange for payment of, or security for, the price of the goods, the seller, unless a contrary intention appears², reserves the right of disposal and the property in the goods, until payment is made or security given accordingly³.

1 This postulates some express indication by or from the terms of the contract or appropriation. It is not sufficient that delivery of the goods or of a document giving control of the goods and payment of the price are, by the Sale of Goods Act 1979 s 28 (see PARA 162 post), prima facie concurrent conditions: see s 18 r 1 (cited in PARA 113 ante) and s 18 r 5 (as amended) (cited in PARA 125 et seq ante). That is merely a basis for an unpaid seller's lien: see PARA 242 et seq post.

2 Eg where the seller intends only to preserve his lien (*Browne v Hare* (1859) 4 H & N 822, Ex Ch; *Re Middleton, ex p Middleton* (1864) 3 De GJ & Sm 201; *Tarling v Baxter* (1827) 6 B & C 360; *Sweeting v Turner* (1871) LR 7 QB 310 (sale at auction)), the goods in *Tarling v Baxter* supra and *Sweeting v Turner* supra being specific. See also *Anderson v Clark* (1824) 2 Bing 20.

3 Blackburn's Contract of Sale (3rd Edn) 182-183; *Haswell v Hunt* (1726) cited in 5 Term Rep 231 (sale for ready money; waiver by seller of condition); *Barrow v Coles* (1811) 3 Camp 92 (bill of lading indorsed to buyer conditionally on acceptance and payment of draft); *Loeschman v Williams* (1815) 4 Camp 181 (cash on delivery); *Bishop v Shillito* (1819) 2 B & Ald 329n (delivery of iron against redelivery of seller's acceptances) (explained in *Re Middleton, ex p Middleton* (1864) 3 De GJ & Sm 201); *Howes v Ball* (1827) 7 B & C 481 (exchange of goods and bills); *Bryans v Nix* (1839) 4 M & W 775 (transmission to buyer of boat receipt and bill of exchange); *Godts v Rose* (1855) 17 CB 229 (cheque against wharfinger's notice of transfer); *Schuster v McKellar* (1857) 7 E & B 704 (payment against delivery of mate's receipt); *Sheridan v New Quay Co* (1858) 4 CBNS 618 (cash against bill of lading); *Moakes v Nicolson* (1865) 19 CBNS 290 (cash against bill of lading in the buyer's name in the hands of the seller's agent); *Sanders Bros v Maclean & Co* (1883) 11 QBD 327, CA; *Cohen v Foster* (1892) 61 LJQB 643, DC; *Armstrong v Allan Bros* (1892) 67 LT 738, CA; *Ryan v Ridley & Co* (1902) 8 Com Cas 105 (cash against shipping documents); *The Charlotte* [1908] P 206, CA (cash or approved acceptance in exchange for bill of lading and policy of insurance); *Re Shipton, Anderson & Co and Harrison Bros & Co* [1915] 3 KB 676, DC; *Saks v Tilley* (1915) 32 TLR 148, CA (diamonds delivered with a bill of exchange for acceptance and an invoice marked 'settled by acceptance'). The seller's agent may be liable for parting with the control of the goods without receiving payment against the bill of lading: see *Stearine Kaarsen Fabrick Gonda Co v Heintzmann* (1864) 17 CBNS 56. As to the position where goods are shipped see the Sale of Goods Act 1979 s 19(3); and PARAS 343, 345, 354-355, 370 et seq post.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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139. Effect of documents on the passing of property.

Where the passing of property is made dependent on delivery of the goods, then, with the exception of bills of lading¹ and of certain delivery warrants issued under Act of Parliament², and in the absence of proof of a specific mercantile custom³, the issue or transfer by the seller to the buyer of a delivery order⁴, warrant⁵ or similar document, does not, as between the seller and the buyer⁶, of itself pass the property in the goods⁷; but, if under any such document the buyer obtains from the bailee of the goods actual delivery or an attornment constituting constructive delivery, property will pass⁸.

1 As to the possible effect of the transfer of bills of lading on the passing of property see PARA 366 et seq post, in particular para 368 post.

2 As to such delivery warrants see PARA 163 post.

3 See eg *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 ChD 205 (delivery warrant in iron trade); *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC (mate's receipt in trade between Sarawak and Singapore). See also *Groves & Sons v Webb and Kenward* (1916) 85 LJB 1533, CA; *Alicia Hosiery Ltd v Brown, Shipley & Co Ltd* [1970] 1 QB 195 at 205, [1969] 2 All ER 504 at 509.

4 The term 'delivery order' is a loose one, capable, according to context, of comprising a number of different documents: see *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146 at 153 per Kerr J. 'Order' suggests a document addressed to a person (eg a bailee or agent) containing instructions to deliver goods, but 'delivery order' is also used to comprise documents which, in the case of warehousemen or similar bailees, are sometimes described as 'delivery warrants' or, in the case of shipowners, as 'ship's releases'. For the purposes of the Carriage of Goods by Sea Act 1924, 'ship's delivery

order' means any document which is neither a bill of lading nor a sea waybill but contains an undertaking which: (1) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and (2) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person: see ss 1(4), 5(1); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 365.

5 A warrant may be a promise to deliver goods issued by a bailee (see eg *Sterns Ltd v Vickers Ltd* [1923] 1 KB 78, CA; *Britain Overseas Trading (Bristles) Ltd v Brooks Wharf and Bull Wharf Ltd* [1967] 2 Lloyd's Rep 51) or an authority by the owner to a bailee to deliver goods (see *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491). See also the Stamp Act 1891 s 111(1) (the expression 'warrant for goods' means any document or writing, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise). A mere certificate by a bailee that he is holding goods ready for shipment is not, therefore, a warrant (see *Gunn v Bolckow, Vaughan & Co* supra) and, a fortiori, its issue or transfer can have no effect on property in the goods.

6 Formerly a warehouseman, or a seller, in possession of goods might by attornment to the buyer estop himself from denying that he held and had set aside for the buyer specific goods belonging to the buyer, even though in fact he held no such goods or held only a larger quantity of unseparated goods remaining in law the seller's property: see *Stonard v Dunkin* (1809) 2 Camp 344; *Hawes v Watson* (1824) 2 B & C 540; *Gillett v Hill* (1834) 2 Cr & M 530; *Knights v Wiffen* (1870) LR 5 QB 660; *Henderson & Co v Williams* [1895] 1 QB 521, CA. Very little would suffice to create an attornment (see *Laurie and Morewood v John Dudin & Sons* [1926] 1 KB 223 at 237, CA, per Scrutton LJ), but there had to be some express or implied recognition of title and the party setting up an estoppel had further to establish that he was influenced thereby in his conduct (*Laurie and Morewood v John Dudin & Sons* supra; *Knights v Wiffen* supra). However, the common law rule that a bailee is estopped from denying his bailor's title appears to have been abolished, although the bailee's estoppel may be preserved where the bailee sues otherwise than in tort: see ESTOPPEL vol 16(2) (Reissue) PARAS 1043-1044.

7 *Tucker v Humphrey* (1828) 4 Bing 516 at 522 (shipping note and delivery order); *M'Ewan & Sons v Smith* (1849) 2 HL Cas 309 at 325 per Lord Cottenham LC (delivery order); *Kingsford v Merry* (1856) 1 H & N 503, Ex Ch (delivery order procured by a person who was not a buyer); *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195 at 200, 202 per Jessel MR; *Gillman, Spencer & Co v Carbutt & Co* (1889) 61 LT 281, CA (delivery order). See also *Busk v Davis* (1814) 2 M & S 397; *Shepley v Davis* (1814) 5 Taunt 617 (delivery order for unascertained goods); *Withers v Lyss* (1815) 4 Camp 237 (delivery order to weigh and ascertain price of specific goods); *Hayman & Son v M'Lintock* 1907 SC 936, Ct of Sess (delivery order for portion of larger bulk). Cf *Swanwick v Sothorn* (1839) 9 Ad & El 895 (delivery order for ascertained goods); *Dublin City Distillery Ltd v Doherty* [1914] AC 823, HL; *Laurie and Morewood v John Dudin & Sons* [1926] 1 KB 223, CA. As to delivery generally see PARA 163 et seq post.

8 *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195 at 201 per Jessel MR.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

139 Effect of documents on the passing of property

NOTE 5--Stamp Act 1891 s 111 repealed: Statute Law (Repeals) Act 2008.

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(vi) Effect of a Sale

140. Prima facie transfer of all rights and liabilities.

The completion of the sale confers on the buyer in respect of the goods all the rights and liabilities¹ of an owner. Subject, therefore, as between him and the seller, to any special agreement², he is invested with full powers of using or of dealing with the goods³, is entitled to all accretions and benefits attaching to them⁴, and is subject to the risk of loss or damage⁵.

1 *White v Crisp* (1854) 10 Exch 312.

2 As to special agreements see PARA 141 post.

3 *Betts v Willmott* (1871) 6 Ch App 239 at 245, CA, per Lord Hatherley LC; *Ajello v Worsley* [1898] 1 Ch 274.

4 *Sweeting v Turner* (1871) LR 7 QB 310 at 313 per Blackburn J; *The Vindobala* (1888) 13 PD 42 (revsd on other grounds (1889) 14 PD 50, CA). See also *Black v Homersham* (1878) 4 Ex D 24 (dividend on shares declared before transfer).

5 See the Sale of Goods Act 1979 s 20; and PARA 142 post. As owner he may sue in tort a person by whose negligence the goods are lost or damaged: *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 QB 219, [1967] 3 All ER 775; *Karlshamns Oljefabriker v Eastport Navigation Corp'n, The Elafi* [1982] 1 All ER 208, [1981] 2 Lloyd's Rep 679; *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL; and see PARA 346 post.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/ (vi) Effect of a Sale/141. Special agreements.

141. Special agreements.

At common law the buyer's rights and liabilities as owner of the goods may, as between him and the seller, be limited by special agreement¹. Such an agreement does not run with the property in the goods so as to bind any subsequent buyer, even with notice of it, or so as to qualify his right of property in the goods². However, a subsequent buyer with actual knowledge of a special agreement which is lawful as between the original buyer and seller may, perhaps, in appropriate circumstances be restrained by injunction from acting inconsistently with that special agreement³.

Any agreement which:

184 (1) directly or indirectly fixes purchase or selling prices or any other trading conditions;

185 (2) limits or controls production, markets, technical development or investment;

186 (3) shares markets or sources of supply;

187 (4) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive advantage;

- 188 (5) makes the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- 189 (6) is, or is intended to be, implemented in the United Kingdom⁴; and
- 190 (7) may affect trade within the United Kingdom and has as its object or effect the prevention, restriction or distortion of competition within the United Kingdom,

is void unless it is⁵ an exempt agreement⁶.

In the case of patented goods, the owner's rights under United Kingdom national law are limited if, at the time when he purchases, there is brought home to him the knowledge of conditions imposed on him by the patentee or those representing the patentee⁷; but such conditions will now commonly infringe European Union law⁸.

1 *Elliman Sons & Co v Carrington & Son Ltd* [1901] 2 Ch 275; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL; *Palmolive Co (of England) Ltd v Freedman* [1928] Ch 264, CA (all cases relating to resale price maintenance). See also *Dodsley v Varley* (1840) 12 Ad & El 632 (where the property and the risk passed but there was an agreement not to move the goods from the premises of a third person until the price was paid).

2 *Spencer's Case* (1583) 5 Co Rep 16a; Co Litt 223a (condition against alienation); *Splidt v Bowles* (1808) 10 East 279 (freight earned by ship sold); *Thompson v Dominy* (1845) 14 M & W 403 (bill of lading at CL); *Lybbe v Hart* (1885) 29 ChD 8 at 12, CA (tenant's covenant not to sell hay); *Taddy & Co v Sterious & Co* [1904] 1 Ch 354 (condition fixing price on resale); *McGruther v Pitcher* [1904] 2 Ch 306, CA (followed by the United States Supreme Court in *Dr Miles Medical Co v Park & Sons Co* 220 US 373 (1911)). See also *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* (1907) 96 LT 218; on appeal [1908] 1 Ch 335, CA. Cf *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, HL; *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, [1958] 1 All ER 787 (purchase of ship with notice of charterparty).

3 See *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch 548 at 570-574, [1979] 2 All ER 853 at 870-873 per Browne-Wilkinson J; varied on appeal on other grounds [1982] AC 584, [1980] 2 All ER 419, CA; [1982] AC 584 at 604, [1981] 2 All ER 449, HL, differing on this point from *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, [1958] 1 All ER 787, with regard to the correctness of the decision in *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, PC.

4 For these purposes, 'the United Kingdom' means, in relation to an agreement which operates, or is intended to operate, only in a part of the United Kingdom, that part: Competition Act 1998 s 2(7).

5 Ie in accordance with *ibid* Pt I (ss 1-60) (as amended): see COMPETITION vol 18 (2009) PARA 115 et seq.

6 See *ibid* s 2(1)-(4); and COMPETITION vol 18 (2009) PARA 116.

7 *National Phonograph Co of Australia Ltd v Menck* [1911] AC 336 at 353, PC, per Lord Shaw of Dunfermline, quoted by Lloyd Jacob J in *Dunlop Rubber Co Ltd v Longlife Battery Depot* [1958] 3 All ER 197 at 200, [1958] 1 WLR 1033 at 1037. See also *Incandescent Gas Light Co Ltd v Cantelo* (1895) 11 TLR 381; *British Motor Syndicate Ltd v Taylor & Son* [1901] 1 Ch 122, CA (innocent sub-buyer); *British Mutoscope and Biograph Co Ltd v Homer* [1901] 1 Ch 671 (sub-buyer with notice); *Badische Anilin und Soda Fabrik v Isler* [1906] 1 Ch 605 (affd [1906] 2 Ch 443, CA); *National Phonograph Co of Australia Ltd v Menck* supra (where the general rule as to restrictions on rights of ownership and the cases are fully considered). The restrictions on ownership are not by virtue of any contract with the patentee but are 'a limitation of the grant of the licence to use' (*British Mutoscope and Biograph Co Ltd v Homer* supra at 673-674); and the restrictions are not presumed (*National Phonograph Co of Australia Ltd v Menck* supra).

A limitation of the right of user does not affect the right of property in the goods: *British Mutoscope and Biograph Co Ltd v Homer* supra at 676. If there is no limitation of the licence, the buyer and any subsequent buyer may deal with the goods as if they were not the subject of a patent: *Thomas v Hunt* (1864) 17 CBNS 183. See generally PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 384. A manufacturer of goods subject to a trade mark, selling to a dealer in bulk, is to be taken to authorise a sale by the dealer in bulk in small quantities under the trade mark: *Condy and Mitchell Ltd v Taylor & Co Ltd* (1887) 3 TLR 665.

8 Ie under the provisions of the EC Treaty (Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) relating to the free movement of goods (arts 28-30) (as renumbered) and competition (art 81) (as renumbered): see PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 385.

UPDATE**109-160 Effects of the Contract**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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(vii) Incidence of the Risk**142. Passing of risk.**

Unless otherwise agreed¹, and unless the buyer deals as consumer², the goods³ remain at the seller's⁴ risk until the property⁵ in them is transferred to the buyer⁶; but, when the property is transferred to the buyer, the goods are at his risk, whether delivery⁷ has been made or not⁸. However, where the buyer deals as consumer, the goods remain at the seller's risk until they are delivered to the consumer⁹.

1 See *Martineau v Kitching* (1872) LR 7 QB 436 (transfer of risk after two months); *Castle v Playford* (1872) LR 7 Exch 98, Ex Ch (risk on receipt of bill of lading); *Anderson v Morice* (1876) 1 App Cas 713, HL (risk only on completion of cargo); *Sterns Ltd v Vickers Ltd* [1923] 1 KB 78, CA. Cf *Demby Hamilton & Co Ltd v Barden* [1949] 1 All ER 435 (buyer's delay). As to the risk where loss is caused by delay in delivery see PARA 148 post; and as to the obligations of either the buyer or the seller as bailee see PARA 149 post. Contractual clauses (commonly known as 'Romalpa' clauses) often provide for risk to pass before property: see PARAS 110, 137 note 7 ante. See also *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 319, [1949] 1 All ER 269 at 280-281, HL, per Lord Normand. As to the risk of separate instalments of the goods in the course of delivery see *Anderson v Morice* supra.

2 See the Sale of Goods Act 1979 s 20(4) (as added) (see the text to note 9 infra); and PARA 307 post.

3 For the meaning of 'goods' see PARA 30 ante.

4 For the meaning of 'seller' see PARA 27 ante.

5 For the meaning of 'property', in relation to goods see PARA 27 ante.

6 For the meaning of 'buyer' see PARA 29 ante.

7 For the meaning of 'delivery' see PARAS 27 note 6 ante, 163 post.

8 Sale of Goods Act 1979 s 20(1). See also *Wardar's (Import and Export) Co Ltd v W Norwood & Sons Ltd* [1968] 2 QB 663, [1968] 2 All ER 602, CA. The rule of the civil law, *res perit domino* (ie the loss falls on the owner), is the *prima facie* rule of English law: see *Martineau v Kitching* (1872) LR 7 QB 436 at 454 per Blackburn J; *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 319, [1949] 1 All ER 269 at 280, HL, per Lord Normand.

9 Sale of Goods Act 1979 s 20(4) (added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 4(1), (2)).

UPDATE**109-160 Effects of the Contract**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

142 Passing of risk

NOTE 1--The use of the expression 'CIP' (Carriage and Insurance Paid) in a contract for the sale of goods is not, in itself, determinative of when risk passes: *Stora Enso OYJ v Port of Dundee* (2006) Times, 11 April, OH.

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143. Insurance.

The fact that one party or the other is, by the terms of the contract, to insure the goods is a relevant indication that it was intended that he should take the risk¹.

In particular, where there is a cif contract, that is to say, where goods are contracted for on the terms that they are to be shipped, and that the price is to include the freight and the insurance premium², prima facie the risk attaches to the buyer at or as from the time of shipment of the goods³.

1 *Fragano v Long* (1825) 4 B & C 219; *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209 at 229, HL, per Blackburn J; *Anderson v Morice* (1875) LR 10 CP 609 at 613, Ex Ch, per Quain J (affd (1876) 1 App Cas 713 at 737, 746, HL, per Lord O'Hagan and Lord Selborne); *The Annie Johnson, The Kronprinsessan Margareta* [1918] P 154.

2 As to the elements of cif contracts see PARA 324 post.

3 As to the incidence of the risk in cif contracts see PARA 346 post; and as to the incidence of the risk in fob contracts see PARA 353 post.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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144. Risk and unascertained goods.

Goods may, by agreement, be at the risk of the buyer even though, at the time of the incidence of the risk, they are unascertained, and the property in them has, in consequence, not passed to the buyer¹.

1 *Stock v Inglis* (1884) 12 QBD 564, CA (affd (1885) 10 App Cas 263, HL); *Sterns Ltd v Vickers Ltd* [1923] 1 KB 78, CA; but cf *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 319, [1949] 1 All ER 269 at 280-281, HL, per Lord Normand.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(vii) Incidence of the Risk/145. Where price payable only on arrival.

145. Where price payable only on arrival.

When the contract, expressly or by implication, provides that the price of the goods, or some part of it, is to be payable only if the goods arrive at their destination, or are actually delivered to the buyer, or on similar terms, the risk during the transit remains the seller's, to the extent of so much of the price as is so contingently payable, even though the property in the goods may have passed to the buyer¹.

The mere fact that the price is payable on the delivery of shipping documents², or at a time calculated with reference to the arrival of the goods at their destination³, or their actual delivery to the buyer⁴, or is to be ascertained by weighing or the doing of some act or thing to or in relation to them after their arrival⁵, does not throw the risk during transit on the seller⁶.

1 *Calcutta and Burmah Steam Navigation Co v De Mattos* (1863) 32 LJQB 322 at 328 per Blackburn J and Mellor J, whose dissenting judgments were adopted by the majority on appeal at (1864) 33 LJQB 214, Ex Ch; *Dupont v British South Africa Co* (1901) 18 TLR 24 (contract stated to be cif); *Polenghi Bros v Dried Milk Co Ltd* (1904) 92 LT 64, 10 Com Cas 42. Accordingly, the seller cannot recover the part contingently payable, if the goods do not arrive; conversely, the buyer cannot recover the part absolutely payable, if paid, and is liable for it, if unpaid.

2 *Anderson v Morice* (1875) LR 10 CP 609 at 613, Ex Ch, per Quain J and at 619 per Blackburn J and Lush J; on appeal (1876) 1 App Cas 713, HL.

3 *Fragano v Long* (1825) 4 B & C 219; *Hale v Rawson* (1858) 4 CBNS 85.

4 *Houlder Bros & Co Ltd v Public Works Comr, Public Works Comr v Houlder Bros & Co Ltd* [1908] AC 276 at 291, PC.

5 *Castle v Playford* (1872) LR 7 Exch 98, Ex Ch.

6 Such provisions may be intended only to regulate the time of payment, or the amount of the price, as where the other terms of the contract show that the property or risk was intended to pass to the buyer on the dispatch of the goods to him (*Alexander v Gardner* (1835) 1 Bing NC 671 (passing of property on dispatch); *Calcutta and Burmah Steam Navigation Co v De Mattos* (1863) 32 LJQB 322 at 328 per Blackburn J; *Castle v Playford* (1872) LR 7 Exch 98, Ex Ch (whole risk)); or the seller contracted only conditionally to deliver (*Boyd v*

Siffkin (1809) 2 Camp 326). As to the position regarding risk in the context of international sale contracts see PARA 322 et seq post, in particular paras 346 (cif contracts), 353 (fob contracts) post.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(vii) Incidence of the Risk/146. Risk where price prepaid.

146. Risk where price prepaid.

If the price of the goods is payable before delivery, and no intention appears in the contract that the price is to be repaid, or will cease to be payable, if delivery is not made, and delivery is not made, the buyer must bear the risk, where the seller agreed to deliver the goods only on a contingency which fails without the seller's fault¹, or, the goods being specific, the seller is discharged by law² from delivering the goods. Where, however, the contract is void ab initio, the buyer may recover any part of the price which he has paid³.

1 *Whincup v Hughes* (1871) LR 6 CP 78 at 84 per Willes J (return of apprentice premium); *Oppert v Beaumont* (1887) 3 TLR 674, CA (where commission was payable if certain money was received); *Wheeler v Fradd* (1898) 14 TLR 302, CA.

2 The rule under the Sale of Goods Act 1979 s 7: see PARA 55 ante. The principle is a general one, and depends on the rule of law that the doctrine in *Taylor v Caldwell* (1863) 3 B & S 826 'only releases the parties from future performance of the contract. Therefore, the doctrine of failure of consideration does not apply - the law treats the contract as a good and subsisting contract with regard to things done and rights accrued in accordance with it up to that time': *Chandler v Webster* [1904] 1 KB 493 at 499-500, CA, per Collins MR. The reasoning of this passage down to this point was stated to be unassailable by Lord Atkin in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 51, [1942] 2 All ER 122 at 130-131, HL, where the decision in *Chandler v Webster* supra was overruled. See generally CONTRACT vol 9(1) (Reissue) PARA 909 et seq. Where a contract has been frustrated, sums paid or payable before the time of the frustration may be recoverable or cease to be payable by virtue of the Law Reform (Frustrated Contracts) Act 1943: see CONTRACT vol 9(1) (Reissue) PARA 914. The Law Reform (Frustrated Contracts) Act 1943 does not, however, apply to any contract to which the Sale of Goods Act 1979 s 7 applies or to any other contract for the sale of specific goods frustrated by such goods perishing: see the Law Reform (Frustrated Contracts) Act 1943 s 2(5)(c) (as amended); para 55 text and notes 10-13 ante; and CONTRACT vol 9(1) (Reissue) PARA 919.

3 As eg under the Sale of Goods Act 1979 s 6: see PARA 54 ante. See also *Strickland v Turner (Executrix of Lane)* (1852) 7 Exch 208 (sale of annuity which had ceased); *Clark v Lindsay* (1903) 88 LT 198 (followed in *Griffith v Brymer* (1903) 19 TLR 434 (coronation seat cases)); *The Salvador* (1909) 26 TLR 149 (price of towage). As to the distinction between a repayment under a contract which is avoided and under one which is void see *Blakeley v Muller & Co* [1903] 2 KB 760n, DC; *Chandler v Webster* [1904] 1 KB 493 at 499, CA, per Collins MR.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(vii) Incidence of the Risk/147. Risk where buyer may rescind contract.

147. Risk where buyer may rescind contract.

Where the buyer is entitled in a certain event, under an express power, to revest the property in the goods in the seller and such event occurs, the risk of loss or damage to the goods, not caused by the buyer's fault, while they are in the buyer's possession and before he has an opportunity of exercising his election, attaches to the seller as the contingent owner of the goods, and the buyer is not precluded by the loss or damage from reclaiming the price¹.

¹ *Head v Tattersall* (1871) LR 7 Exch 7 at 14; *Chapman v Withers* (1888) 20 QBD 824. It may be noted, however, that in both cases the event entitling the buyer to revest the property consisted of a breach of warranty and that such a breach had occurred.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(vii) Incidence of the Risk/148. Risk where loss is caused by delay in delivery.

148. Risk where loss is caused by delay in delivery.

Where delivery¹ has been delayed through the fault² of either the buyer³ or the seller⁴, the goods⁵ are at the risk of the party at fault as regards any loss which might⁶ not have occurred but for such fault⁷.

¹ For the meaning of 'delivery' see PARAS 27 note 6 ante, 163 post.

² For these purposes, 'fault' means wrongful act or default: Sale of Goods Act 1979 s 61(1). 'Wrongful' imports 'the infringement of some right': *Mogul Steamship Co v McGregor, Gow & Co* (1889) 23 QBD 598 at 612, CA, per Bowen LJ; affd [1892] AC 25, HL. 'Fault' would thus include a breach of the contract for sale. 'Default' is a purely relative term, just like negligence. It means 'nothing more, nothing less, than not doing what is reasonable under the circumstances - not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction': *Re Young and Harston's Contract* (1885) 31 ChD 168 at 174, CA, per Bowen LJ.

³ For the meaning of 'buyer' see PARA 29 ante.

⁴ For the meaning of 'seller' see PARA 27 ante.

⁵ I.e. the contractual goods which have been assembled by the seller for the purpose of fulfilling his contract and making delivery: see *Demby Hamilton & Co Ltd v Barden* [1949] 1 All ER 435 at 437. For the meaning of 'goods' see PARA 30 ante.

6 Thus, there need be no necessary connection between the delay and the loss: see *McConihe v New York and Erie Railroad Co* 20 NYSR 495 (1859). The word 'might' arguably throws on the party at fault the onus of proving that the loss would have occurred if there had been no fault and the maxim *omnia praesumuntur contra spoliatorem* (ie all things are presumed against a wrongdoer) may also apply: see *Armory v Delamirie* (1722) 1 Stra 505; *Heywood v Wellers (a firm)* [1976] QB 446 at 459, 463, [1976] 1 All ER 300 at 306-307, 310, CA. However, see also *Demby Hamilton & Co Ltd v Barden* [1949] 1 All ER 435 at 437 (where Sellers J would not go so far and said that all the facts and circumstances have to be looked at in very much the same way as a jury would look at them in order to see whether the loss can properly be attributed to the failure of the buyer to take delivery of the goods at the proper time).

7 Sale of Goods Act 1979 s 20(2). As to the obligations of either the buyer or the seller as bailee see PARA 149 post. See also *Rogers v Van Hoesen* 12 Johns (NY) 221 (1815) (fish spoilt by seller's delay); *Demby Hamilton & Co Ltd v Barden* [1949] 1 All ER 435 (apple juice spoilt by buyer's delay). This proposition is not, however, identical with the proposition in *Martineau v Kitching* (1872) LR 7 QB 436 at 456 (where Blackburn J speaks of delaying the passing of the property). Where the property has passed, the effect of the Sale of Goods Act 1979 s 20(2) will commonly be to cast on the seller, if he delays delivery, liabilities from which he would be exempt as a bailee of the buyer's goods, eg liabilities for theft or damage by fire occurring without his fault.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(1) TRANSFER OF THE PROPERTY FROM SELLER TO BUYER/(vii) Incidence of the Risk/149. Obligations of either party as bailee.

149. Obligations of either party as bailee.

Nothing in the statutory provisions relating to the risk passing with the property¹ affects the duties or liabilities of either the seller² or the buyer³ as a bailee of the goods⁴ of the other party⁵.

A seller in possession of the buyer's goods is probably subject to the obligations of a bailee for reward in respect of them until the expiration of the time expressly or by implication appointed for the buyer to take delivery⁶. After the expiration of that time the seller is subject to the obligations either of a gratuitous bailee or of an involuntary bailee⁷.

Similarly, a buyer in possession of the seller's goods⁸ is probably a bailee for reward until the expiration of the time expressly or by implication appointed for the passing of the property. It is thought that, after a rightful rejection of the goods and the expiration of a reasonable time for the seller to remove them, the buyer becomes an involuntary bailee⁹.

1 In the provisions of the Sale of Goods Act 1979 s 20(1), (2): see PARAS 142, 148 ante.

2 For the meaning of 'seller' see PARA 27 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 For the meaning of 'goods' see PARA 30 ante.

5 Sale of Goods Act 1979 s 20(3). Read together with s 20(2) (see PARA 148 ante), s 20(3) contemplates that there may be circumstances where eg delivery has been delayed through the buyer's fault but the seller is in breach of his duty as a bailee. It seems doubtful whether there could be any apportionment under the Law Reform (Contributory Negligence) Act 1945 in such a case. The seller's breach of duty as a bailee could, it is

thought, constitute 'fault' within the meaning of the Law Reform (Contributory Negligence) Act 1945, but the buyer's 'fault' under the Sale of Goods Act 1979 s 20(2) would not seem to be within the concept of 'fault' as defined by the Law Reform (Contributory Negligence) Act 1945 s 4 (see NEGLIGENCE vol 78 (2010) PARA 75): see *Basildon District Council v JE Lesser (Properties) Ltd* [1985] QB 839, [1985] 1 All ER 20; *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA. See also *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370, [1965] 3 All ER 801 (affd on other grounds [1966] 2 QB 370 at 381, [1966] 2 All ER 283, CA); *de Meza and Stuart v Apple, Van Straten, Shena and Stone* [1974] 1 Lloyd's Rep 508 (on appeal [1975] 1 Lloyd's Rep 498, CA). The issue would thus appear to be one of causation.

6 3 Salk 61; *Koon v Brinkerhoff* 39 Hun (New York) 130 (1886); Story on Sales ss 300a, 300b, 393; Pothier's Contrat de Vente arts 53-55. The Sale of Goods Act 1979 s 20 does not define the degree of responsibility of the seller or buyer, and there is little authority on the subject. On principle, it would seem that the seller should be a bailee for reward, as part of the consideration for the price is the custody of the goods until the time of delivery. If, due to the buyer's fault, the time for delivery is itself postponed, the bailment should, to the extent of the delay, be regarded as gratuitous. However, in *Wiehe v Dennis Bros* (1913) 29 TLR 250 (a pony cif Rotterdam after the Olympia Show), Scrutton J treated the sellers as gratuitous bailees, even though it was in the interests of both parties that the pony remained in the sellers' custody.

The common law has traditionally expressed the standard of care required in gratuitous bailment as being that which a person of ordinary prudence would take for his own goods (see *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *China Pacific SA v Food Corp of India* [1982] AC 939, [1981] 3 All ER 688, HL) and in bailment for reward as being reasonable care (see *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA). The line between these two standards is, however, very fine: see *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* supra at 589 and 339. The classification of bailments is now of diminished significance in identifying the care required which may be better and more simply expressed as reasonable care in all the circumstances: *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA; *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779. All the cases cited supra also make it clear that the onus is on any bailee, whether gratuitous or for reward, to establish, if he can, that any loss or damage to the goods occurred notwithstanding the exercise of due care. As to the measure of diligence to be exercised by a bailee see BAILMENT vol 3(1) (2005 Reissue) PARA 15. As to the liability of a vendor of land before conveyance see *Clarke v Ramuz* [1891] 2 QB 456, CA; and SALE OF LAND vol 42 (Reissue) PARA 177 et seq.

7 The suggestion in the text that the seller is subject to the obligations of an involuntary bailee rather than those of a gratuitous one is to be preferred, being consistent both with the Sale of Goods Act 1979 s 37(1) (see PARA 205 post), and with the analogous case of a carrier after a consignee's refusal to accept delivery of the goods: see *Heugh v London and North Western Rly Co* (1870) LR 5 Exch 51.

Whichever analysis is correct, it is submitted that the seller will owe a duty to take care, and not merely to avoid intentional or reckless loss or damage, in respect of the goods. As to the standard of care in gratuitous bailment see note 6 supra. The standard in involuntary bailment should not, logically, be any higher, but a number of cases of involuntary bailment speak simply of a duty of reasonable care: see eg *Heugh v London and North Western Rly Co* supra; *Hiort v Bott* (1874) LR 9 Exch 86; *Elvin and Powell Ltd v Plummer Roddis Ltd* (1933) 50 TLR 158.

Cases where goods are delivered or left unsolicited at a person's premises and subsequently lost or damaged do not, it is thought, provide an exact analogy to the circumstances under discussion. In such cases, recovery has sometimes been denied absolutely, short of intentional or reckless loss or damage (see *Lethbridge v Phillips* (1819) 2 Stark 544; *Howard v Harris* (1884) 1 Cab & El 253), but an involuntary recipient assuming at least some control over the goods has also been held to owe a duty of care (*Newman v Bourne and Hollingsworth* (1915) 31 TLR 209; *Elvin and Powell Ltd v Plummer Roddis Ltd* supra). See further BAILMENT vol 3(1) (2005 Reissue) PARA 10.

8 As eg under the Sale of Goods Act 1979 s 18 r 4 (see PARA 120 ante) or under a hire-purchase agreement (see CONSUMER CREDIT vol 9(1) (Reissue) PARAS 23, 95).

9 This seems to follow from the principles stated in note 7 supra.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(i) General Rule as to Title/150. General rule as to buyer's title where seller is not owner.

(2) DEFECT IN TITLE

(i) General Rule as to Title

150. General rule as to buyer's title where seller is not owner.

Subject to the Sale of Goods Act 1979¹, and without prejudice to:

- 191 (1) the provisions of the Factors Acts² or of any enactment³ enabling the apparent owner of goods to dispose of them as if he were their true owner⁴; or
- 192 (2) the validity of any contract of sale under any special common law or statutory⁵ power of sale or under the order of a court⁶ of competent jurisdiction⁷,

where goods are sold by a person who is not their owner and who does not sell them under the authority or with the consent⁸ of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is precluded by his conduct from denying the seller's authority to sell⁹.

¹ See subject to the Sale of Goods Act 1979 s 23 (sale under voidable title: see PARA 154 et seq post), s 24 (sales by sellers in possession: see PARA 157 post), s 25 (sales by buyers in possession: see PARA 158 et seq post) and s 48(2) (sale by seller exercising lien: see PARA 250 post).

² See the Factors Act 1889 and any enactment amending or substituted for that Act. The principal relevant provisions are contained in s 2 (dispositions by mercantile agent), s 8 (dispositions by seller in possession), s 9 (as amended) (dispositions by buyer in possession) and s 10 (transfer over of document of title). Sections 8-10 (as amended) are substantially the same as the Sale of Goods Act 1979 ss 24, 25(1), (2), 47 respectively: see PARAS 154 et seq, 253 post; and AGENCY vol 1 (2008) PARA 148.

³ See eg the Insolvency Act 1986 s 284(4); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 217.

⁴ Sale of Goods Act 1979 ss 21(2)(a), 61(1).

⁵ As to statutory powers of sale see PARA 17 ante.

⁶ As to sales by court order see PARA 18 ante.

⁷ Sale of Goods Act 1979 s 21(2)(b).

⁸ *Hooper v Gumm*, *McLellan v Gumm* (1867) 2 Ch App 282; *National Mercantile Bank v Hampson* (1880) 5 QBD 177, DC; *Gough v Wood & Co* [1894] 1 QB 713, CA; distinguished in *Ellis v Glover and Hobson Ltd* [1908] 1 KB 388, CA. Cf *Taylor v M'Keand* (1880) 5 CPD 358, DC; *Payne v Fern* (1881) 6 QBD 620, DC.

⁹ Sale of Goods Act 1979 s 21(1). See *Star Corn Millers' Society v Moore & Co* (1886) 2 TLR 620; affd 2 TLR 751, CA. Cf AGENCY vol 1 (2008) PARA 148. The purchaser in good faith of a ship previously engaged in piracy, and subsequently condemned to be forfeited, can obtain a good title: *R v McCleverty, The Telegrafo (or The Restauracion)* (1871) LR 3 PC 673 at 685. Cf SHIPPING AND MARITIME LAW vol 93 (2008) PARAS 235, 253.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(i) General Rule as to Title/151. Estoppel.

151. Estoppel.

The owner will be precluded by his conduct from denying the seller's authority to sell where he has clothed the seller with an ostensible authority to sell and the buyer has acted on the faith of it¹. Where he is so precluded, the buyer acquires a good title to the goods and not merely a right to plead an estoppel².

There must normally be a positive representation by the owner that, so far as he is concerned, the seller is entitled to sell the goods in the manner in which he purports to³, and that representation must be acted on by the buyer to his detriment⁴. An omission to act on the part of the true owner will not be sufficient to preclude him from denying the seller's authority to sell, unless that omission amounts to a breach by the owner of a duty of care owed by him to the buyer⁵. If the owner of goods signs and parts with a document which enables the seller to hold himself out as having authority to sell the goods, the owner will be unable to deny the seller's authority to sell unless he can prove that he acted carefully⁶.

1 *Cole v North Western Bank* (1875) LR 10 CP 354 at 362, Ex Ch; cf *Pickering v Busk* (1812) 15 East 38; *Boyson v Coles* (1817) 6 M & S 14; *Zwinger v Samuda* (1817) 7 Taunt 265 (issue by pledgee of delivery order in blank). See also *Gregg v Wells* (1839) 10 Ad & El 90 (owner standing by); *Waller v Drakeford* (1853) 1 E & B 749 (owner assisting in sale); *Woodley v Coventry* (1863) 2 H & C 164 (seller's assent to sub-sale of unascertained goods); *Hooper v Gumm*, *McLellan v Gumm* (1867) 2 Ch App 282 (estoppel on mortgagee); *Knights v Wiffen* (1870) LR 5 QB 660; *Farmeloe v Bain* (1876) 1 CPD 445 (no representation by seller to sub-buyer); *Gillman, Spencer & Co v Carbutt & Co* (1889) 61 LT 281, CA; *Armstrong v Allan Bros* (1892) 67 LT 738, CA (seller's assent to sub-sale); *Henderson & Co v Williams* [1895] 1 QB 521, CA (goods in seller's name with owner's consent); *Union Credit Bank Ltd v Mersey Docks and Harbour Board*, *Union Credit Bank Ltd v Mersey Docks and Harbour Board and North and South Wales Bank Ltd* [1899] 2 QB 205; *Farquharson Bros & Co v King & Co* [1902] AC 325, HL; *Heap v Motorists' Advisory Agency Ltd* [1923] 1 KB 577. Cf, however, *Commonwealth Trust v Akotey* [1926] AC 72 at 76, PC (which was not followed in *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] AC 287, [1938] 1 All ER 52, PC); *Jerome v Bentley & Co* [1952] 2 All ER 114.

2 *Eastern Distributors Ltd v Goldring (Murphy, third party)* [1957] 2 QB 600, [1957] 2 All ER 525, CA; *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242, [1964] 3 All ER 592, CA.

3 *Motor Credits (Hire Finance) Ltd v Pacific Motors Auctions Pty Ltd* (1963) 109 CLR 87, Aust HC (revsd on another ground sub nom *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867, [1965] 2 All ER 105, PC) (where there was a representation that the agent had authority to sell in a particular manner); *Lloyds and Scottish Finance Ltd v Williamson* [1965] 1 All ER 641, [1965] 1 WLR 404, CA (where there was a representation that the seller was the owner); *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537, [1965] 1 All ER 513, CA (same); *Canadian Laboratory Supplies Ltd v Engelhard Industries of Canada Ltd* (1979) 97 DLR (3d) 1, Can SC. For estoppel by representation made by conduct see ESTOPPEL vol 16(2) (Reissue) PARAS 1058. An owner does not hold out another person as having authority to sell his car merely by giving him the car together with its registration book: *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371, [1956] 3 All ER 905, CA; *J Sargent (Garages) Ltd v Motor Auctions (West Bromwich) Ltd* [1977] RTR 121, CA.

Normally, for a representation to give rise to an estoppel it must be unambiguous: *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL. See also ESTOPPEL vol 16(2) (Reissue) PARA 1067. There may, however, be cases where the maker of a representation intended it to be acted on and will have to bear the consequences of an ambiguity for which he is responsible: *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* supra at 757 and 281 per Lord Hailsham of St Marylebone LC and at 772 and 294 per Lord Salmon. See also *Ireland v Livingston* (1872) LR 5 HL 395 (followed in *Brown and Gracie Ltd v FW Green & Co Pty Ltd* [1960] 1 Lloyd's Rep 289 at 303, HL, per Lord Denning); *Falck v Williams*

[1900] AC 176, PC; *Miles v Haslehurst & Co* (1906) 23 TLR 142. As to estoppel in pais generally see ESTOPPEL vol 16(2) (Reissue) PARA 1043 et seq.

4 As to the representation being acted on as true by the person to whom it was made, and as to the prejudice suffered by the party misled see ESTOPPEL vol 16(2) (Reissue) PARAS 1072-1073.

5 *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, [1976] 2 All ER 641, HL. Such a duty may arise even after the contract of sale: *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA (sale of cars). See also *Commercial Bank of Wales v Illingworth* [1978] CA Transcript 72; *Canadian Laboratory Supplies Ltd v Engelhard Industries of Canada Ltd* (1979) 97 DLR (3d) 1, Can SC.

6 *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242, [1964] 3 All ER 592, CA; *United Dominions Trust Ltd v Western* [1976] QB 513, [1975] 3 All ER 1017, CA (applying *Saunders (Executrix of the Estate of Gallie) v Anglia Building Society* [1971] AC 1004 at 1027, [1970] 3 All ER 961 at 972-973, HL, per Lord Wilberforce); *Commercial Bank of Wales v Illingworth* [1978] CA Transcript 72.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(i) General Rule as to Title/152. Title passed by bills of lading and other documents.

152. Title passed by bills of lading and other documents.

Bills of lading, warrants and delivery orders and other similar documents are not negotiable instruments that, by their mere transfer to a buyer, pass to him a better title to the goods than the seller had¹, unless there is a usage of trade affecting the position². Dispositions under the Factors Act 1889³ are not dependent on the negotiability of the document.

1 *Newsom v Thornton* (1805) 6 East 17 at 44 (where the bill of lading was held to be only a symbol of the goods); *Ogle v Atkinson* (1814) 5 Taunt 759 (where the transfer of the bill of lading to a third person was held to be inoperative when the property had already passed to the buyer); *Jenkyns v Osborne* (1844) 7 Man & G 678; *M'Ewan & Sons v Smith* (1849) 2 HL Cas 309; *Gurney v Behrend* (1854) 3 E & B 622; *The Argentina* (1867) LR 1 A & E 370; *Fuentes v Montis* (1868) LR 3 CP 268 at 279 per Willes J; *Finlay v Liverpool and Great Western Steamship Co Ltd* (1870) 23 LT 251; *Barber v Meyerstein* (1870) LR 4 HL 317; *Cole v North Western Bank* (1875) LR 10 CP 354 at 363, Ex Ch; *Johnson v Crédit Lyonnais Co* (1877) 3 CPD 32, CA; *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027, CA (car registration book).

A fortiori, documents which do not represent the goods at all are not negotiable, eg mere engagements to deliver unascertained goods (*Dixon v Bovill* (1856) 3 Macq 1, HL; *Farmeloe v Bain* (1876) 1 CPD 445), or mere certificates that goods are ready for delivery (*Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491). As to the effect of delivery of documents of title see PARAS 163, 367-368 post; and as to negotiable instruments generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1400 et seq, 1610 et seq.

2 Eg in the iron trade: see *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 ChD 205 (warrant negotiable by custom).

3 See the Factors Act 1889 s 2(1) (disposition by mercantile agent), ss 8, 9 (as amended) (dispositions by sellers and buyers in possession respectively), s 10 (dispositions by transferees of documents of title); and PARA 150 note 2 ante.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(i) General Rule as to Title/153. Seller's want of title.

153. Seller's want of title.

A person who, not being the owner, sells goods, not purporting to do so as agent of the owner, or otherwise than as owner of the goods, is estopped, as between himself and the buyer, from afterwards alleging that he was not the owner at the time of the sale¹. Furthermore, if the buyer has not repudiated the contract, and the seller becomes the owner of the goods after the sale, his right of property thereupon vests in the buyer².

Non-disclosure by the seller to the buyer of a want of title of which the seller is aware, and the buyer is not, is a fraud on the buyer³.

¹ *Edmands v Best* (1862) 7 LT 279. It is doubtful whether, in an action at the suit of the seller, a third person may rely on this estoppel. As to estoppel generally see ESTOPPEL vol 16(2) (Reissue) PARA 951 et seq.

² *Whitehorn Bros v Davison* [1911] 1 KB 463, CA, followed in *Bradley and Cohn Ltd v Ramsay & Co* (1912) 106 LT 771, CA and *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286 (where there was a series of sales and it was held that the acquisition of title by the original seller perfected the previously defective titles of the subsequent purchasers). Cf the cases in equity with regard to subsequently acquired titles to land: *Morse v Faulkner* (1792) 3 Swan 429n; *Re Bridgwater's Settlement*, *Partridge v Ward* [1910] 2 Ch 342. See also ESTOPPEL vol 16(2) (Reissue) PARAS 955, 1020. Where the contract under which the seller becomes entitled to the property is voidable by the original seller, it is necessary, to perfect the buyer's title, that he should have taken in good faith under the Sale of Goods Act 1979 s 23 (see PARA 154 post): see *Whitehorn Bros v Davison* supra; and generally para 154 text and notes 6-8 post. See also *Denis Geary Motors Pty Ltd v Hunter Street Finance Ltd* [1979] Qd R 207, Qld SC (where goods were sold to two different buyers, with the seller subsequently acquiring the legal title to the goods; the equitable interest of the first buyer was held to prevail).

³ *Morley v Attenborough* (1849) 3 Exch 500 at 510, citing (inter alia) *Springwell v Allen* (1648) Aleyn 91, 2 East 448n; *Ward v Hobbs* (1877) 3 QBD 150 at 161, CA, per Brett LJ (affd (1878) 4 App Cas 13, HL).

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(ii) Sale or Pledge under a Voidable Title/154. Seller or pledgor having voidable title.

(ii) Sale or Pledge under a Voidable Title

154. Seller or pledgor having voidable title.

When the seller¹ of goods² has a voidable title to them, but his title has not been avoided³ at the time of the sale⁴, the buyer⁵ acquires a good title to the goods, provided⁶ he buys them in good faith and without notice⁷ of the seller's defect of title⁸. A thing is deemed to be done in good faith when it is in fact done honestly, whether it is done negligently or not⁹.

Similar principles apply to a pledgor whose title is voidable by the person from whom he bought the goods. In such a case the seller's right of avoiding the sale is subject to the rights of the buyer's pledgee in good faith and without notice¹⁰.

A title may be voidable not only with respect to the whole right of property in the goods but also with respect to a limited interest in them, as, for example, where the seller of goods has fraudulently obtained possession of them from a person having (as against him) a special property in those goods¹¹.

The fact that a sub-purchaser knows of the defect in the original seller's title does not avoid his own title if his immediate seller bought in good faith, for, in such a case, the immediate seller, being himself a buyer in good faith, had perfected his title to the goods¹².

1 For the meaning of 'seller' see PARA 27 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 A person may elect to avoid or affirm a contract at any time after he knows of the fraud, or other ground of avoidance, and until, either expressly or by implication, he affirms the contract. So long as he does not affirm it, he may keep the matter open, subject to any intervening rights of third persons (*Clough v London and North Western Ry Co* (1871) LR 7 Exch 26), but lapse of time may be so great as to be conclusive of the election to affirm the contract (*Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459 at 475, [1954] 1 All ER 779 at 787 (15 months' delay)). Where the owner of goods is fraudulently induced to sell them to an individual who subsequently becomes bankrupt, the owner may generally rescind the contract and recover the goods (see *Re Eastgate, ex p Ward* [1905] 1 KB 465; *Tilley v Bowman Ltd* [1910] 1 KB 745); but the court has power to stay any action against the property of the bankrupt (see the Insolvency Act 1986 s 285; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 218). After avoidance the buyer cannot sue the seller for what is now termed the wrongful interference with the goods, but the seller may set off against the trustee's claim for the return of the purchase money paid damages to which the seller would be entitled in respect of the misrepresentation inducing the contract: *Tilley v Bowman Ltd* supra. The seller is not bound to any act in pais. The avoidance normally takes place when the election is made and communicated to the other party: *Clough v London and North Western Ry Co* supra; *Scarf v Jardine* (1882) 7 App Cas 345 at 361, HL, per Lord Blackburn. However, at least where the guilty party is fraudulent and cannot be found, the other party may avoid the contract by taking all possible steps to recover the goods or the price paid, as the case may be: *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, [1964] 1 All ER 290, CA. Even where the original seller rescinds the contract, a subsequent buyer may acquire a good title by virtue of the Factors Act 1889 ss 2, 9 (as amended): see PARA 158 post.

4 For the meaning of 'sale' see PARA 27 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 Notwithstanding the word 'provided' in the Sale of Goods Act 1979 s 23, the burden is on the person seeking to avoid the contract to show that the sub-buyer or pledgee did not take in good faith: *Whitehorn Bros v Davison* [1911] 1 KB 463 at 482, CA, per Buckley LJ. The Sale of Goods Act 1979 s 23 covers part of the ground covered by s 25: see PARA 158 post. Under s 25, however, the buyer must be in possession of the goods or documents of title and deliver or transfer them to the third person. There is no such provision in s 23. See also *White v Garden* (1851) 10 CB 919 (where the seller was in possession).

7 In general the equitable doctrines of constructive notice are not to be extended to purely commercial transactions: see *Manchester Trust Ltd v Furness, Withy & Co Ltd* [1895] 2 QB 539 at 545, CA, per Lindley LJ, followed in *Greer v Downs Supply Co* [1927] 2 KB 28, CA. Cf *Goodyear Tyre and Rubber Co (Great Britain) Ltd v Lancashire Batteries Ltd* [1958] 3 All ER 7 at 12, [1958] 1 WLR 857 at 863, CA, per Lord Evershed MR ('The word notice ... means something less than full knowledge. It means, no doubt, that the thing of which a man must have notice must be brought clearly to his attention'). See also PARA 158 note 15 post.

8 Sale of Goods Act 1979 s 23. Accordingly, the seller with a voidable title may recover the price from the buyer: *Hooper v Lane* (1857) 6 HL Cas 443 at 462 per Bramwell B. See also *Load v Green* (1846) 15 M & W 216 (where there was an avoidance by the seller before the buyer's disposition); *White v Garden* (1851) 10 CB 919; *Stevenson v Newnham* (1853) 13 CB 285, Ex Ch; *The Argentina* (1867) LR 1 A & E 370 (where there was a resale and a transfer of the bill of lading by a fraudulent buyer); *Clough v London and North Western Rly Co* (1871) LR 7 Exch 26, Ex Ch (where there was collusion by the consignee with a fraudulent buyer); *Attenborough v St Katharine's Dock Co* (1878) 3 CPD 450, CA; *Moyce v Newington* (1878) 4 QBD 32; *Loughnan v Barry and Byrne* (1872) IR 6 CL 457; *Babcock v Lawson* (1880) 5 QBD 284, CA (where possession was fraudulently obtained by the pledgor who repledged to another). See also *Zwinger v Samuda* (1817) 7 Taunt 265; *Pease v Gloahec, The Marie Joseph* (1866) LR 1 PC 219; *King's Norton Metal Co Ltd v Edridge, Merrett & Co Ltd* (1897) 14 TLR 98, CA (where there was a purchase by the buyer under an alias); *Tilley v Bowman Ltd* [1910] 1 KB 745 (where there was a representation that the buyer had a customer); *Robin and Rambler Coaches Ltd v Turner* [1947] 2 All ER 284; *Dennant v Skinner and Collom* [1948] 2 KB 164, [1948] 2 All ER 29.

9 Sale of Goods Act 1979 s 61(3). The expression 'in good faith' is similarly defined for the purposes of the Bills of Exchange Act 1882: see s 90; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1401.

10 *Attenborough v St Katharine's Dock Co* (1878) 3 CPD 450, CA; *Tilley v Bowman Ltd* [1910] 1 KB 745; *W Truman Ltd v Attenborough* (1910) 26 TLR 601; *Whitehorn Bros v Davison* [1911] 1 KB 463, CA; *Phillips v Brooks Ltd* [1919] 2 KB 243. See also the cases cited in note 8 supra. The same principle would apply to other dispositions by a buyer with a voidable title.

11 *Pease v Gloahec, The Marie Joseph* (1866) LR 1 PC 219; *Babcock v Lawson* (1880) 5 QBD 284, CA. An ownership voidable in part cannot be treated differently from an ownership voidable as to the whole: *Pease v Gloahec, The Marie Joseph* supra at 230.

12 *Pierce v London Horse and Carriage Repository Ltd* [1922] WN 170, CA.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(ii) Sale or Pledge under a Voidable Title/155. Void and voidable titles distinguished.

155. Void and voidable titles distinguished.

The voidable title of the seller is often due to the fact that he himself has obtained the goods under a contract voidable for fraud¹. Such a contract is effective to pass the property in the goods, but it is liable to be set aside and the property revested in the original owner. Such a voidable title must be distinguished from a void title, that is to say where the seller has never acquired the property in the goods at all, because the contract which purported to pass the property was void ab initio, as where there is a material mistake as to the identity of the person with whom the contract is made², or where, to the knowledge of the purchaser, the agent of the seller is acting outside his authority³. However, it is not always easy to determine whether a title is voidable within the Sale of Goods Act 1979⁴, or whether it is void and thus outside the operation of that Act⁵. A purchaser from a seller whose title is void acquires no property in the goods, unless the sale falls within other provisions of that Act which confer such protection⁶.

1 See *Cundy v Lindsay* (1878) 3 App Cas 459 at 464, HL, per Lord Cairns. See also *Kingsford v Merry* (1856) 11 Exch 577 at 579, Ex Ch; *Robin and Rambler Coaches Ltd v Turner* [1947] 2 All ER 284.

2 *Cundy v Lindsay* (1878) 3 App Cas 459, HL. See also *Boulton v Jones* (1857) 2 H & N 564; *Heap v Motorists' Advisory Agency Ltd* [1923] 1 KB 577 (larceny by a trick); *Lake v Simmons* [1927] AC 487, HL; *Ingram v Little* [1961] 1 QB 31, [1960] 3 All ER 332, CA. Cf *Phillips v Brooks Ltd* [1919] 2 KB 243; *Greer v Downs Supply Co* [1927] 2 KB 28, CA; *Dennant v Skinner and Collom* [1948] 2 KB 164, [1948] 2 All ER 29; *MacLeod v Kerr* 1965 SC 253; *Lewis v Averay* [1972] 1 QB 198, [1971] 3 All ER 907, CA. Where a person professing to be agent for a named person, with whom alone the owner professes to deal, obtains fraudulent possession of the goods, the contract may be void and not merely voidable: *Higgons v Burton* (1857) 26 LJ Ex 342; *Hardman v Booth* (1863) 1 H & C 803; *Morrisson v Robertson* 1908 SC 332, Ct of Sess; *Lake v Simmons* supra. Similarly, in the absence of fraud, the owner of goods may intend to pass to another only the possession and not the property in the goods: *Boyson v Coles* (1817) 6 M & S 14. See generally CONTRACT vol 9(1) (Reissue) PARA 704 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 783.

3 *Pilgram v Rice-Smith* [1977] 2 All ER 658, [1977] 1 WLR 671, DC (where there was a fraudulent sale at an undervalue by a shop assistant to a friend); cf *Dip Kaur v Chief Constable for Hampshire* [1981] 2 All ER 430, [1981] 1 WLR 578, DC (where there was a sale at an undervalue because, as the purchaser knew, the price ticket was incorrect, and it was held that the contract was voidable).

4 le within the Sale of Goods Act 1979 s 23: see PARA 154 ante.

5 See *Whitehorn Bros v Davison* [1911] 1 KB 463, CA; *Folkes v King* [1923] 1 KB 282, CA; *London Jewellers Ltd v Attenborough* [1934] 2 KB 206, CA; and the cases cited in notes 1-2 supra.

6 See eg the Sale of Goods Act 1979 s 21 (see PARA 150 ante), s 24 (see PARA 157 post) and s 25 (see PARAS 158, 254 post).

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(ii) Sale or Pledge under a Voidable Title/156. Disposition as affecting an equitable right.

156. Disposition as affecting an equitable right.

The owner of goods which, or the proceeds of which, are subject to an equitable right of a third person may pass a good title to them to a buyer in good faith and without notice of the equitable right¹.

1 *Lempriere v Pasley* (1788) 2 Term Rep 485 at 490; *Henderson & Co v Comptoir d'Escompte de Paris* (1873) LR 5 PC 253 (where there was a pledge of the bill of lading by the buyer displacing the equitable right of the seller in respect of the proceeds of resale); *Hathesing v Laing, Laing v Zeden* (1873) LR 17 Eq 92; *Chartered Bank of India, Australia and China v Henderson* (1874) LR 5 PC 501; *Joseph v Lyons* (1884) 15 QBD 280, CA; *Hallas v Robinson* (1885) 15 QBD 288, CA (equitable mortgage of chattels and subsequent legal mortgage to another). Cf *Lutscher v Comptoir d'Escompte de Paris* (1876) 1 QBD 709, DC (no subsequent legal title).

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(iii) Disposition by Seller or Buyer in Possession/157. Disposition by seller in possession.

(iii) Disposition by Seller or Buyer in Possession

157. Disposition by seller in possession.

Where a person¹, having sold goods, continues or is² in possession³ of the goods or of the documents of title to them, the delivery or transfer⁴ by that person, or by a mercantile agent⁵ acting for him, of the goods or documents of title under any sale, pledge or other disposition of them, or under any agreement for sale, pledge or other disposition of them, to any person receiving them in good faith and without notice⁶ of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorised by the owner⁷ of the goods to make the same⁸.

'Documents of title to goods' includes any bill of lading, dock warrant, warehouse-keeper's certificate and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented⁹.

As between buyer and seller a warehouse certificate, dock warrant or delivery order, or any similar document, does not, like a bill of lading, represent the goods themselves, and so its transfer does not in itself transfer possession but operates merely as an authority to receive the goods referred to in the document; an attornment by the person in possession to the buyer is necessary¹⁰. The registration book of a car is not a document of title but is the best evidence of title¹¹.

1 For these purposes, 'person' includes any body of persons, corporate or unincorporate: Factors Act 1889 s 1(6). The Sale of Goods Act 1979 s 24 (see note 8 infra) and s 25(1) (see PARA 158 post) are verbally identical with the Factors Act 1889 s 8 and s 9 (as amended) (see PARAS 158, 254 post) respectively, with the exception that in ss 8, 9 (as amended) after the words 'or other disposition' there follow the words 'or under any agreement for sale, pledge or other disposition': see the text; and PARA 158 post. For there to be a disposition there must be a disposal involving the transfer of an interest in property: *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210, [1971] 3 All ER 708, CA.

2 The words 'or is' have been said to refer only to a case where the person who sold the goods had not got the goods when he sold them but they came into his possession afterwards: *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210 at 217, [1971] 3 All ER 708 at 711, CA, per Lord Denning MR. It is questionable whether they also cover a sale by a seller who lawfully resumes possession of them in his capacity as seller.

3 The possession may be as seller or in some other capacity and either by virtue of a term in the contract of sale itself or by virtue of some other arrangement: *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210, [1971] 3 All ER 708, CA, following *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867, [1965] 2 All ER 105, PC, and not following *Eastern Distributors Ltd v Goldring (Murphy, third party)* [1957] 2 QB 600, [1957] 2 All ER 525, CA. This is so even if the seller is in breach of such arrangement and his right to possession of the goods has determined so that he holds them as trespasser: *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* supra. There must, however, be continuity of possession or at least no substantial break in the continuity: *Mitchell v Jones* (1905) 24 NZLR 932 (approved in *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* supra); *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* supra at 217-218 and 712 per Lord Denning MR. The possession may be possession by another person on behalf of

the seller: *City Fur Manufacturing Co Ltd v Fureenbond (Brokers) London Ltd* [1937] 1 All ER 799. See also note 2 supra; and PARA 158 note 5 post. As to what constitutes possession see *Beverley Acceptances Ltd v Oakley* [1982] RTR 417, CA.

4 What would seem to be contemplated is a physical delivery or transfer to the second donee after the sale to the buyer. It is not sufficient to change the character in which the second buyer or other donee already holds the goods, eg where the seller, after a sale to a third person, pledges the goods which were before the sale in the possession of the pledgee: *Nicholson v Harper* [1895] 2 Ch 415; *Ladbroke Leasing (South West) Ltd v Reekie Plant Ltd* 1983 SLT 155, Ct of Sess (sale by buyer in possession). Apparently 'delivery' applies to 'goods', and 'transfer' to documents of title (*Nicholson v Harper* supra per North J as reported in (1895) 73 LT 19 at 20); but 'transfer' may apply to goods when conveyed by deed (*Kitto v Bilbie, Hobson & Co* (1895) 72 LT 266 at 267 per Vaughan Williams J). It should also be noted that it is not the contract that is made valid under the Factors Act 1889 s 8, but the delivery or transfer under the contract. Accordingly it is not necessary that the donee should enter into the contract on the faith of the documents of title: *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA.

5 For these purposes, 'mercantile agent' means a mercantile agent having in the customary course of his business as such agent authority either: (1) to sell goods; (2) to consign goods for the purpose of sale; (3) to buy goods; or (4) to raise money on the security of goods: Factors Act 1889 s 1(1); Sale of Goods Act 1979 s 26. See *Oppenheimer v Attenborough & Son* [1908] 1 KB 221, CA; *Budberg v Jerwood and Ward* (1934) 51 TLR 99; and AGENCY vol 1 (2008) PARA 12. As to the authority of a mercantile agent to dispose of goods in his possession see AGENCY vol 1 (2008) PARA 148.

6 It is for the person receiving the goods to prove his good faith and lack of notice: *Heap v Motorists' Advisory Agency Ltd* [1923] 1 KB 577; *Halfway Garage (Nottingham) v Lepley* [1964] CLY 3285, CA. 'Without notice' means without actual notice and without turning a blind eye: *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210 at 218, [1971] 3 All ER 708 at 712, CA, per Lord Denning MR. See also PARA 154 note 7 ante.

7 Ie the buyer, the seller ex hypothesi 'having sold' the goods.

8 Sale of Goods Act 1979 s 24; Factors Act 1889 s 8. See also note 1 supra; *Nicholson v Harper* [1895] 2 Ch 415; *Union Transport Finance Ltd v Ballardie* [1937] 1 KB 510, [1937] 1 All ER 420; *City Fur Manufacturing Co Ltd v Fureenbond (Brokers) London Ltd* [1937] 1 All ER 799. A seller in possession of goods sold who acknowledges that he holds the goods on account for the buyer holds the goods as bailee for the buyer: *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] QB 514, [2001] 1 All ER 148, CA. The Factors Act 1889 s 8 extends the Factors Acts Amendment Act 1877 s 3 (repealed), which applied only to sellers in possession of documents of title and was enacted to do away with the decision in *Johnson v Crédit Lyonnais Co* (1877) 3 CPD 32, CA, that a seller was not 'an agent entrusted with the documents of title'. The Factors Act 1889 s 8 should be compared with the Sale of Goods Act 1979 s 48(2): see PARA 250 post. Under s 48(2), the seller can pass a good title only if the original buyer is in default. Moreover, he is, it is conceived, under no liability to the original buyer for breach of contract, whereas, under the Factors Act 1889 s 8, he is.

9 Ibid s 1(4). The definition is applied by the Sale of Goods Act 1979 s 61(1). For the purposes of the Factors Act 1889 (including the provisions of the Sale of Goods Act 1979 ss 24, 25, 47 (see PARAS 5 ante, 158, 251 et seq post), which reproduce certain provisions of the Factors Act 1889 ss 8-10 (as amended)), all the documents enumerated are put on the same footing as bills of lading. This extended operation is, however, strictly confined to the purposes of the Factors Act 1889 (see ss 2, 8-10 (as amended)), ie to dispositions, as affecting the title of third persons, of goods or documents by: (1) mercantile agents in possession with the consent of the owner; (2) sellers left in possession after sale; and (3) buyers, being transferees of the documents of title, or being in possession of the goods or documents with the seller's consent: see *Inglis v Robertson and Baxter* [1898] AC 616 at 630, HL. See also *Lamb v Attenborough* (1862) 1 B & S 831; *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA; *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027, CA; and generally AGENCY vol 1 (2008) PARAS 12 et seq, 147 et seq.

10 *Farina v Home* (1846) 16 M & W 119 at 123 (dock warrant); *M'Ewan & Sons v Smith* (1849) 2 HL Cas 309 (delivery order); *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491 (warehouse certificate). This is the rule for whatever purpose a delivery of the goods has to be proved. Even in cases within the Factors Act 1889, the question whether any document is a document of title will depend on whether its nature and operation fall within the concluding words of the definition: see *Gunn v Bolckow, Vaughan & Co* supra; *Dublin City Distillery Ltd v Doherty* [1914] AC 823, HL (delivery warrants not issued by warehousemen). As to the mode of transfer of a document of title see the Factors Act 1889 s 11; and PARA 158 note 8 post. As to the effect of bills of lading and other documents of title see also PARAS 152 ante, 163, 369 post; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 313 et seq.

11 See *Shaw v Metropolitan Police Comr (Natalegawa, claimant)* [1987] 3 All ER 405, [1987] 1 WLR 1332, CA; *Bishopsgate Motor Finance Corp Ltd v Transport Brakes Ltd* [1949] 1 KB 322, [1959] 1 All ER 37, CA; *Pearson v Rose & Young Ltd* [1951] 1 KB 275 at 289, [1950] 2 All ER 1027 at 1033, CA, per Denning LJ; *Lambert*

v G and C Finance Corp Ltd (1963) 107 Sol Jo 666; *Beverley Acceptances Ltd v Oakley* [1982] RTR 417, CA. The existence of a registration book in the hands of a seller does not, however, remove all occasion for inquiry and does not prove legal ownership: *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371, [1956] 3 All ER 905, CA. The owner of a car does not hold out another person as having authority to sell his car merely by giving him possession of the car and its registration book: *Central Newbury Car Auctions Ltd v Unity Finance Ltd* supra; *J Sargent (Garages) Ltd v Motor Auctions (West Bromwich) Ltd* [1977] RTR 121, CA. The purchase of a car without a registration book might be considered evidence of bad faith on the part of the purchaser (*Wilkes v Livingstone* (1955) 105 L Jo 170), but this inference may be rebutted (see eg *Astley Industrial Trust Ltd v Miller* [1968] 2 All ER 36). See also *Bentworth Finance Ltd v Lubert* [1968] 1 QB 680, [1967] 2 All ER 810, CA (where it was held that the provision of a log book is a condition of the contract which may be waived).

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(iii) Disposition by Seller or Buyer in Possession/158. Disposition by buyer in possession.

158. Disposition by buyer in possession.

Where a person¹, having bought or agreed to buy² goods, obtains, with the consent³ of the seller⁴, possession⁵ of the goods or the documents of title⁶ to them, the delivery⁷ or transfer⁸ by that person⁹, or by a mercantile agent¹⁰ acting for him, or of the goods or documents of title¹¹ under any sale, pledge or other disposition¹² or under any agreement for sale, pledge or other disposition¹³, to any person receiving them in good faith¹⁴, and without notice¹⁵ of any lien or other right¹⁶ of the original seller in respect of the goods, has the same effect as if¹⁷ the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner¹⁸.

The buyer under a conditional sale agreement is to be taken not to be a person who has bought or agreed to buy goods¹⁹.

1 As to the meaning of 'person' see PARA 157 note 1 ante.

2 Where the buyer has bought, no question of title can be involved, except that special rights may by agreement be reserved to the seller, consistent with the property and possession being in the buyer: *Dodsley v Varley* (1840) 12 Ad & El 632. Where, however, the buyer has only agreed to buy, the question of property is involved. The words 'agreed to buy' do not include the delivery of goods on approval etc under the Sale of Goods Act 1979 s 18 r 4 (see PARA 120 ante), as ex hypothesi such a person has only an option to buy: *Helby v Matthews* [1895] AC 471, HL; *Percy Edwards Ltd v Vaughan* (1910) 26 TLR 545, CA. The bailee of goods under a hire-purchase agreement is not normally a person who has 'agreed to buy' the goods, and persons deriving title through him cannot obtain the benefit of the Sale of Goods Act 1979 s 25(1): *Belsize Motor Supply Co v Cox* [1914] 1 KB 244. Cf *Shenstone & Co v Hilton* [1894] 2 QB 452 (where the buyer had 'agreed to buy' under the agreement in question). Rights under a hire-purchase agreement are assignable, and the option to buy conferred by the agreement may accordingly be assigned. In this case the assignee of the option obtains no better title than his immediate assignor: *Whiteley v Hilt* [1918] 2 KB 808, CA. The buyer must bind himself to pay the price (*Lee v Butler* [1893] 2 QB 318, CA), even though it may be called 'hire' or 'rent' (*McEntire v Crossley Bros Ltd* [1895] AC 457, HL). A buyer has 'agreed to buy' within the Sale of Goods Act 1979 s 25(1) when the sale is subject to a condition, even though the condition may not ultimately be fulfilled: *Marten v Whale* [1917] 2 KB 480, CA. The buyer of a car must have bought it himself, rather than simply agreed to act as the seller's agent in reselling the car: see *Shaw v Metropolitan Police Comr (Natalegawa, claimant)* [1987] 3 All ER 405, [1987] 1 WLR 1332, CA. See also PARA 150 note 9 ante. As to conditional sales generally see PARAS 29, 47 ante.

3 For the meaning of 'consent' see PARA 159 post.

4 A thief cannot be the seller for this purpose, nor can a person who bought in good faith from a thief: *National Employers' Mutual General Insurance Association Ltd v Jones* [1990] 1 AC 24, [1988] 2 All ER 425, HL; *Brandon v Leckie* (1972) 29 DLR (3d) 633. See also *Elwin v O'Regan and Maxwell* [1971] NZLR 1124.

5 For the meaning of 'possession' under the Factors Act 1889 see s 1(2); and AGENCY vol 1 (2008) PARA 148. See also PARA 157 note 3 ante.

6 For the meaning of 'documents of title to goods' see PARA 157 ante. The document of title must represent the goods. As to documents 'used ... as proof of the possession or control of goods' under the Bills of Sale Act 1878 s 4 see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1660.

7 Delivery must be voluntary: see the Sale of Goods Act 1979 s 61(1) (as amended); para 163 post; and *Forsythe International (UK) Ltd v Silver Shipping Co Ltd, The Saetta* [1994] 1 All ER 851, [1994] 1 WLR 1334 (shipowners who had withdrawn time-chartered vessel containing bunkers sold to charterers had no title to bunkers).

8 Cf the corresponding words in the Factors Act 1889 s 8: see PARA 157 ante. The transfer of a document may be by indorsement or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to bearer, then by delivery: s 11.

9 For these purposes, there is no distinction between a delivery of goods direct to a sub-purchaser by the seller and a delivery of goods by the seller to a buyer who then delivers to the sub-purchaser. In either case there is an effective delivery of goods to the sub-purchaser for the purpose of passing title to the sub-purchaser under the Sale of Goods Act 1979 s 25 since, in the case of delivery direct to the sub-purchaser by the seller, the buyer is deemed to take constructive delivery of the goods and the seller is deemed to act as the buyer's agent when making delivery to the sub-purchaser: *Four Point Garage Ltd v Carter* [1985] 3 All ER 12.

10 For the meaning of 'mercantile agent' see PARA 157 note 5 ante.

11 The documents need not be the same as those obtained by the person who makes the transfer: *DF Mount Ltd v Jay & Jay (Provisions) Co Ltd* [1960] 1 QB 159 at 169, [1959] 3 All ER 307 at 311 per Salmon J. Cf the wording of the Sale of Goods Act 1979 s 47(2): see PARA 253 post.

12 The consideration for a sale, pledge or other disposition in pursuance of the Factors Act 1889 may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration: s 5. As to the meaning of 'pledge' see AGENCY vol 1 (2008) PARA 148; PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 10. As the dealing by the buyer in possession, under the Factors Act 1889 s 9 (as amended), and the Sale of Goods Act 1979 s 25, must be by way of delivery or transfer, a mere hypothecation, ie the creation of an equitable charge on the goods without possession, will not suffice: see *Lutscher v Comptoir d'Escompte de Paris* (1876) 1 QBD 709, DC. Cf *Re Slee, ex p North Western Bank* (1872) LR 15 Eq 69; *Ladbroke Leasing (South West) Ltd v Reekie Plant Ltd* 1983 SLT 155, Ct of Sess. As to pledges for antecedent debts, or in exchange see PARA 160 post. A deposit of goods with an auctioneer in return for an advance on the auction sale proceeds is not a pledge: *Waddington & Sons v Neale & Sons* (1907) 96 LT 786, DC. By the Factors Act 1889 s 3 a pledge of the documents of title to goods is deemed to be a pledge of the goods. This provision primarily applies to pledges by mercantile agents, but it is thought that it governs the case of a pledge by a buyer who has satisfied the conditions of s 9 (as amended): *Inglis v Robertson and Baxter* [1998] AC 616, HL. See also PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 9 et seq.

13 The words 'or under any agreement for sale, pledge or other disposition' are omitted from the Sale of Goods Act 1979 s 25(1): see PARA 157 note 1 ante. Bruce J decided in *Shenstone & Co v Hilton* [1894] 2 QB 452 that 'agreement for sale' is not confined to agreements for sale by the person delivering the goods to the person receiving them, but includes a delivery to an auctioneer for sale. Cf *Waddington & Sons v Neale & Sons* (1907) 96 LT 786, DC.

14 As to the question of good faith see PARA 154 ante. In the case of joint disponees, the bad faith of one of them is deemed to affect the title of all: *Oppenheimer v Frazer and Wyatt* [1907] 2 KB 50, CA.

15 Ie knowledge, whether actual or implied by reason of the means of knowledge being wilfully disregarded: see *May v Chapman* (1847) 16 M & W 355 at 361 per Parke B; *Jones v Gordon* (1877) 2 App Cas 616. See also PARA 154 text and note 7 ante. A buyer cannot have constructive notice: *Manchester Trust Ltd v Furness, Withy and Co Ltd* [1895] 2 QB 539, CA; *Greer v Downs Supply Co* [1927] 2 KB 28, CA; *By Appointment (Sales) Ltd v Harrods* [1977] CA Transcript 465. If, however, by an objective test clear notice has been given, it has been held that liability cannot be avoided by the proof of absence of actual knowledge: *Feuer Leather Corp v Frank Johnstone & Sons* [1981] Com LR 251.

16 This may include a right of property (*Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA), or a right to avoid the buyer's title under the Sale of Goods Act 1979 s 23 (see PARA 154 ante). See also *Barrow v Coles* (1811) 3 Camp 92 (where the transferee of a bill of lading had notice of an indorsed condition suspending the passing of the property to the transferor).

17 It is as valid as if he were expressly authorised by the owner of the goods to make the same: see the Factors Act 1889 s 2(1). Where the buyer has only agreed to buy, the owner is the seller. It is the delivery or transfer that is to have the same effect as if the person making the delivery or transfer were a mercantile agent in possession with the consent of the owner, whereas under s 2 it is the disposition which is validated if made in the ordinary course of business of a mercantile agent: see AGENCY vol 1 (2008) PARA 148. Further, the time at which the good faith and lack of notice are to be determined is the time of the delivery or transfer and not (as in the case of a mercantile agent under s 2) the time of the disposition. Courts in Australia, New Zealand and Canada have all held that the sale is as valid as if the buyer in possession were a mercantile agent but without requiring him to act as such, so that, if the other requirements are satisfied, the delivery or transfer has the same effect as if a sale of goods had been effected by a mercantile agent acting in the ordinary course of his business: *Langmead v Thyer Rubber Co Ltd* [1947] SASR 29, S Aust FC; *Jeffcott v Andrew Motors Ltd* [1960] NZLR 721, NZ CA; *General Motors Acceptance Corp v Canada v Hubbard* (1978) 87 DLR (3d) 39. For somewhat tentative English dicta to the contrary see *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560 at 579, [1964] 3 All ER 532 at 539, CA, per Pearson LJ.

18 Sale of Goods Act 1979 s 25(1); Factors Act 1889 s 9. Section 9 (as amended) is identical with the Sale of Goods Act 1979 s 25(1), with the addition of the words quoted in note 13 supra. See also PARA 157 notes 1-2 ante. The Factors Act 1889 s 9 (as amended) extends the Factors Acts Amendment Act 1877 s 4 (repealed), which applied only to a buyer in possession of a document of title, and did not require a delivery or transfer by him, and was enacted to remove the effect of the decision in *Jenkyns v Osborne* (1844) 7 Man & G 678 that a buyer was not an 'agent entrusted' with goods or a document of title. See *Lee v Butler* [1893] 2 QB 318, CA (hire purchase and conditional sale) (followed in *Thompson and Shackell Ltd v Veale* (1896) 74 LT 130, CA); *Wylde v Legge* (1901) 84 LT 121, DC. Cf *Helby v Matthews* [1895] AC 471, HL; *Payne v Wilson* [1895] 2 QB 537, CA (hire with option to buy); *Hull Ropes Co Ltd v Adams* (1895) 73 LT 446, DC; *Shenstone & Co v Hilton* [1894] 2 QB 452 (where the sending of goods to an auctioneer for sale was held to be an agreement for sale or disposition). However see also *Waddington & Sons v Neale & Sons* (1907) 96 LT 786, DC; *Strohmenger v Attenborough* (1894) 11 TLR 7, DC; *Kitto v Bilbie, Hobson & Co* (1895) 72 LT 266; *Capital and Counties Bank Ltd v Warriner* (1896) 12 TLR 216 (pledge by buyer of warehouseman's warrant for unsevered bulk); *Robinson v Restell* (1896) 12 TLR 174; *Inglis v Robertson and Baxter* [1898] AC 616, HL; *Buller & Co Ltd v Tj Brooks Ltd* (1930) 142 LT 576. See also the cases cited in PARA 159 notes 2-3 post. It seems that an assignment for the benefit of creditors is not a disposition: *Kitto v Bilbie, Hobson & Co* supra. See also AGENCY vol 1 (2008) PARA 165.

Where goods are sold subject to a reservation of title clause and the purchaser then sells the goods on to a sub-purchaser, also subject to a retention of title clause, and delivers the goods to the sub-purchaser, then, unless and until the sub-purchaser pays the purchaser the price of the goods, the original seller may still claim title to the goods in the hands of the sub-purchaser; the Factors Act 1889 s 9 (as amended), read with s 2(1), does not serve to pass to the sub-purchaser the title to the goods delivered under the sub-sale agreement and the original seller may repossess the goods before being paid by the purchaser and sell them direct to the sub-purchaser: *Re Highway Foods International Ltd (in administrative receivership), Mills v C Harris (Wholesale Meat) Ltd* [1995] 1 BCLC 209.

19 Sale of Goods Act 1979 s 25(2)(a); Factors Act 1889 s 9(i) (added by the Consumer Credit Act 1974 s 192(3)(a), Sch 4 para 2). For these purposes, 'conditional sale agreement' means an agreement for the sale of goods which is a consumer credit agreement within the meaning of the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 81) under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller, notwithstanding that the buyer is to be in possession of the goods, until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled: Sale of Goods Act 1979 s 25(2)(b); Factors Act 1889 s 9(ii) (added by the Consumer Credit Act 1974 Sch 4 para 2). For special provisions which apply to the sale of a motor vehicle by a purchaser under a conditional sale agreement see the Hire Purchase Act 1964 Pt III (ss 27-29) (as substituted); and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 55-57. In relation to a contract under which a person buys or agrees to buy goods and which is made before 19 May 1985, the Sale of Goods Act 1979 s 25(2) is to be omitted: ss 1(2), 25(3), (4), Sch 1 paras 1(1), 9; Sale of Goods Act 1979 (Appointed Day) Order 1983, SI 1983/1572, art 2. For the meaning of 'contract' see PARA 5 note 12 ante.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(iii) Disposition by Seller or Buyer in Possession/159. Meaning of 'consent'.

159. Meaning of 'consent'.

Consent by the seller to the possession by the buyer of the goods or documents of title means a consent in fact¹. Accordingly, such a consent is valid, notwithstanding that it is induced by fraud², provided that the fraud is not such as to nullify the consent³, or is given subject to the fulfilment by the buyer of some condition subsequent, and such condition is not fulfilled⁴. It is irrelevant whether the consent has since been withdrawn⁵.

1 *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA. However, as the buyer has only to 'obtain' possession of the goods or the documents of title to the goods with the seller's consent (see the Factors Act 1889 s 9 (as amended); and PARA 158 ante), any subsequent revocation of the consent is immaterial (*Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* supra at 658 per Collins LJ), unless the buyer's donee is aware of this, as such knowledge would negative his good faith. See AGENCY vol 1 (2008) PARA 148. Although, by the Factors Act 1889 s 2(4), the consent of the owner is presumed in the absence of evidence to the contrary, the elaborate discussion which the question of consent underwent in *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* supra seems to show that the fact of the seller's consent must be proved affirmatively by the buyer's donee. It is open to question whether the reference in the Factors Act 1889 s 2(4) to 'the owner' does not show that that refers to dispositions by mercantile agents under s 2(1) only.

2 *Pease v Gloaher, The Marie Joseph* (1866) LR 1 PC 219; *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643 at 659, CA, per Collins LJ.

3 The consent is consent to obtaining possession. For that consent to be nullified there must be a fundamental mistake, eg as to the identity of the buyer: *Cundy v Lindsay* (1878) 3 App Cas 459, HL; *Folkes v King* [1923] 1 KB 282, CA; *London Jewellers Ltd v Attenborough* [1934] 2 KB 206, CA. See also *Buller & Co Ltd v TJ Brooks Ltd* (1930) 142 LT 576; *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027, CA (explained in *Du Jardin v Beadman Bros Ltd* [1952] 2 QB 712, [1952] 2 All ER 160). See, however, *Stadium Finance Ltd v Robbins* [1962] 2 QB 664, [1962] 2 All ER 633, CA (where the reasoning in *Pearson v Rose and Young Ltd* supra was rejected in part).

4 *Gurney v Behrend* (1854) 3 E & B 622; *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA.

5 *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560, [1964] 3 All ER 532, CA.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/3. EFFECTS OF THE CONTRACT/(2) DEFECT IN TITLE/(iii) Disposition by Seller or Buyer in Possession/160. Pledge by buyer for antecedent debt or in exchange.

160. Pledge by buyer for antecedent debt or in exchange.

Where a person who has agreed to buy goods pledges them¹ for an antecedent debt or liability², the pledgee acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge³.

Where such a person pledges the goods in consideration of the delivery or transfer of other goods, or of a document of title⁴, or of a negotiable security, the pledgee acquires no right or interest in the goods so pledged in excess of the value of the goods, documents or security when so delivered or transferred in exchange⁵.

1 le under the Factors Act 1889 s 9 (as amended): see PARA 158 ante. The buyer being in the position of a mercantile agent, the pledge of the documents of title is deemed to be a pledge of the goods: see s 3; *Inglis v Robertson and Baxter* [1898] AC 616, HL. As to pledges by mercantile agents or factors see PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 10.

2 The definitions of 'pledge' and 'consideration' (see PARA 158 note 12 ante) authorise the pledge for an antecedent debt or in exchange.

3 This is because the protection given to the disponent by the Factors Act 1889 s 9 (as amended) is expressly assimilated to that given to the disponent from a mercantile agent, as defined by s 1(1) (see PARA 157 note 5 ante), possessing the powers granted by s 2 (see AGENCY vol 1 (2008) PARA 148) and subject to the limitations imposed by s 4 (see PARA 254 post).

4 As to dispositions by the seller in possession see PARA 157 ante.

5 See the Factors Act 1889 s 5 (exchanges by mercantile agents by way of pledge). This proposition is based on the assumption that s 5 and s 9 (as amended) (see PARA 158 ante) are to be read together.

UPDATE

109-160 Effects of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(1) GENERAL DUTIES OF SELLER AND BUYER/161. General rule.

4. PERFORMANCE OF THE CONTRACT

(1) GENERAL DUTIES OF SELLER AND BUYER

161. General rule.

It is the duty¹ of the seller² to deliver³ the goods⁴, and of the buyer⁵ to accept⁶ and pay⁷ for them, in accordance with the terms of the contract of sale⁸.

1 The duty is enforceable by action, like all duties declared by the Sale of Goods Act 1979: see s 60; and PARA 14 ante. As to actions for non-acceptance and non-delivery see also PARAS 287 et seq, 292 et seq respectively post.

2 For the meaning of 'seller' see PARA 27 ante.

3 For the meaning of 'delivery' see PARAS 27 note 6 ante, 163 post.

4 The goods contracted for. Thus, if they are existing goods, similar goods afterwards acquired cannot be delivered (*Thomson Bros v Thomson* (1885) 13 R 88), and the goods must conform to the contract in description and quality or fitness (see the Sale of Goods Act 1979 ss 13-15 (as amended); and PARA 72 et seq ante). They must, moreover, be in a deliverable state, and be of the proper quantity and not mixed with other goods; and the seller must have the right to sell them: see s 12(1) (as amended) (see PARA 69 ante), s 18 r 5(1) (see PARA 125 ante), s 21(1) (see PARA 150 ante) and s 30 (as amended) (see PARA 172 post). As to when the seller is by law excused from delivering specific goods see s 7; and PARA 55 ante. As to the court's power to order specific performance of a contract to deliver ascertained goods see PARA 305 post.

5 As to the duties of the buyer or the seller to obtain export and other licences in international sale contracts see PARAS 339, 358 post; and CONTRACT vol 9(1) (Reissue) PARA 908. As to force majeure clauses, and as to the circumstances where the law excuses further performance of a contract under the doctrine of frustration see CONTRACT vol 9(1) (Reissue) PARA 897 et seq. See also PARA 67 ante.

6 The under the Sale of Goods Act 1979 s 35 (as amended): see PARA 199 post.

7 As to the fixing of the price see *ibid* s 8 (see PARA 56 ante) and s 9 (see PARAS 60-61 ante). Prima facie the liability to pay arises only when the property has passed (see s 2(1) (see PARA 29 ante), s 49(1) (see PARA 285 post); and *Laird v Pim* (1841) 7 M & W 474 at 478 per Parke B), but by agreement it may be payable independently of that fact or of delivery (see the Sale of Goods Act 1979 s 49(2); and PARA 286 post). The price is payable, even after the destruction of the goods, the property in which has not passed, if the buyer took the risk: see s 20; and PARAS 142, 148-149 ante, 214 post. An agreed price includes materials incorporated but not contracted for: *Wilmot v Smith* (1828) 3 C & P 453. As to the buyer's liability to pay the price to a third person by agreement see *Kleinwort Sons & Co v Reddaway & Co* (1904) 9 Com Cas 292, CA; and as to payment by the proceeds of a resale to be made by the seller's agent see *Hoffman v Heyman* (1822) 2 Dow & Ry KB 74.

8 Sale of Goods Act 1979 s 27. For the meaning of 'contract of sale' see PARA 29 ante. As to the specific rules relating to delivery and acceptance see PARAS 163 et seq, 196 et seq post. The parties may make what bargain they please: see PARA 12 ante. Thus, they may agree that delivery is to be made to a carrier (see s 32; and PARAS 188, 190 post), or at the destination of the goods, or they may agree that delivery to a carrier is sufficient, yet that the price, in whole or in part, will not be payable unless the goods arrive at their destination (*Calcutta and Burmah Steam Navigation Co v De Mattos* (1863) 32 LJQB 322 at 328; *affd* (1864) 33 LJQB 214, Ex Ch). The contract may also be conditional: see the Sale of Goods Act 1979 s 2(3); and PARA 29 text and note 14 ante. Thus, eg delivery may be made conditional on the buyer's request: *Bowdell v Parsons* (1808) 10 East 359. Where the mode of delivery is not stated in the contract, it may be shown by trade usage: *Robinson v United States* (1871) 13 Wallace 363. As to trade usage generally see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 653 et seq.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(1) GENERAL DUTIES OF SELLER AND BUYER/162. Delivery and payment concurrent conditions.

162. Delivery and payment concurrent conditions.

Unless otherwise agreed¹, delivery² of the goods³ and payment of the price are concurrent conditions⁴, that is to say, the seller⁵ must be ready and willing to give possession of the goods to the buyer⁶ in exchange⁷ for the price, and the buyer must be ready and willing to pay the

price in exchange for possession of the goods⁸. Similarly, delivery of the goods and acceptance of them are concurrent conditions⁹. Where the goods are deliverable by instalments, the same concurrent conditions prima facie exist with regard to each instalment¹⁰.

The readiness and willingness of one party to deliver or accept the goods may itself be dependent on a condition precedent to be performed by the other party¹¹.

Notwithstanding that, by the terms of the contract, there is a provision for credit, that provision is excluded if subsequently the buyer becomes insolvent¹².

1 Thus, the buyer may agree to pay the price at a date fixed which will or may arrive before the time for delivery, in which case rule 1 in *Pordage v Cole* (1669) 1 Wms Saund 319 applies, and delivery will not be a condition precedent to payment (*Smith v Woodhouse* (1806) 2 Bos & PNR 233, Ex Ch; *Dicker v Jackson* (1848) 6 CB 103); or the seller may agree to deliver similarly irrespective of payment, ie to sell on credit, in which case, under the same rule, payment is not a condition precedent to delivery (*Staunton v Wood* (1851) 16 QB 638). An agreement to sell on credit may be inferred from the very circumstances of the case, as where a person dines at a restaurant: *R v Jones* [1898] 1 QB 119, CCR. The rule has no application to a cif contract, where the terms as to payment and delivery are otherwise agreed: see PARA 342 post.

2 For the meaning of 'delivery' see PARAS 27 note 6 ante, 163 post.

3 For the meaning of 'goods' see PARA 30 ante.

4 Ie because delivery and payment are to be made at the same time, and so neither is a condition precedent to the other. All that is necessary is that the parties concur in the joint act (rule 5 in *Pordage v Cole* (1669) 1 Wms Saund 319; *Rawson v Johnson* (1801) 1 East 203 at 212 per Le Blanc J), whereas, in the case of a condition precedent, performance, or tender as equivalent to performance, must be proved (*Pickford v Grand Junction Rly Co* (1841) 8 M & W 372 at 377-378 per Parke B). The words 'ready and willing' imply not only the disposition but also the capacity to do the act: *De Medina v Norman* (1842) 9 M & W 820 at 827 per Lord Abinger CB. See also *Lawrence v Knowles* (1839) 5 Bing NC 399; *Measures Bros Ltd v Measures* [1910] 2 Ch 248, CA.

5 For the meaning of 'seller' see PARA 27 ante.

6 For the meaning of 'buyer' see PARA 29 ante.

7 This does not necessarily mean exchange then and there, but exchange in a business sense: *Ryan v Ridley & Co* (1902) 8 Com Cas 105. Where the price is payable in exchange for shipping documents, either expressly or by the effect of the Sale of Goods Act 1979 s 28, the seller performs his contract by tendering the documents, even though the goods may be then incapable of inspection and acceptance: *Polenghi Bros v Dried Milk Co Ltd* (1904) 92 LT 64; *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL. See also *Romariz and Pistacchini v Zeyen & Co* (1919) 35 TLR 299. See generally para 342 et seq post.

8 Sale of Goods Act 1979 s 28. Section 28 restates the common law rule: see, before the Sale of Goods Act 1893 (repealed), *Rawson v Johnson* (1801) 1 East 203 (no tender by buyer necessary) (followed in *Waterhouse v Skinner* (1801) 2 Bos & P 447; *Wilks v Atkinson* (1815) 1 Marsh 412); *Lawrence v Knowles* (1839) 5 Bing NC 399 (buyer's insolvency); *Hannuic v Goldner* (1843) 11 M & W 849 (no time specified for delivery or payment); *Startup v Macdonald* (1843) 6 Man & G 593, Ex Ch; *Staunton v Wood* (1851) 16 QB 638 (delivery a condition precedent); *Parker v Rawlings* (1827) 4 Bing 280; *Jackson v Allaway* (1844) 6 Man & G 942; *Dunlop v Grote* (1845) 2 Car & Kir 153; *Boyd v Lett* (1845) 1 CB 222; *Nelson v Pattrick* (1847) 3 CB 772; *Meniaeff v Reade* (1849) 7 CB 139; *Baker v Firminger* (1859) 28 LJ Ex 130; *King v Reedman* (1883) 49 LT 473, DC; *Forrestt & Son Ltd v Aramayo* (1900) 83 LT 335, CA; *Mess v Duffus & Co* (1901) 6 Com Cas 165 (effect of buyer's insolvency). Cf *Amos and Wood Ltd v Kaprow* (1948) 64 TLR 110, CA. The fraudulent taking by the buyer from the seller's premises of other goods in lieu of the goods contracted for does not necessarily amount to a rescission of the contract or prevent the buyer from showing that he is ready and willing to accept and pay for the goods contracted for: *Lewis v Clifton* (1854) 14 CB 245. See also *Greaves v Ashlin* (1813) 3 Camp 426; *Ford v Yates* (1841) 2 Man & G 549 (explained in *Lockett v Nicklin* (1848) 2 Exch 93).

9 See the cases cited in note 8 supra.

10 *Brandt v Lawrence* (1876) 1 QBD 344, CA.

11 *Great Northern Rly Co v Harrison* (1852) 12 CB 576, Ex Ch.

12 *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289; *Re Phoenix Bessemer Steel Co, ex p Carnforth Haematite Iron Co* (1876) 4 ChD 108, CA.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(i) In general/163. Meaning of 'delivery'.

(2) DELIVERY OF THE GOODS

(i) In general

163. Meaning of 'delivery'.

'Delivery' means voluntary transfer¹ of possession² from one person to another, except that, in relation to goods forming part of a bulk³, 'delivery' includes such appropriation of goods to the contract as results in property⁴ in the goods being transferred to the buyer⁵. It includes symbolic delivery and is not restricted to the physical transfer of the goods themselves, but covers also transfer of possession of documents of title to goods⁶. Where the buyer takes possession pursuant to the leave of the seller, whether concurrent or antecedent, that is a voluntary transfer of possession⁷.

Delivery orders⁸, warrants⁹, written engagements to deliver goods and similar documents do not, like bills of lading¹⁰, of themselves transfer possession. They are mere promises by the seller or other issuer or transferor to deliver, or authorities to the buyer to receive, possession¹¹. Although such documents may purport to be, or may commonly be treated as, transferable, they are not negotiable instruments¹², unless there is a general or local trade custom to that effect¹³. Accordingly, subject to the provisions of the Factors Act 1889¹⁴, a buyer receiving such a document cannot claim delivery of the goods except from the seller issuing or transferring the document to him¹⁵.

Certain port authorities may issue warrants for the delivery of goods which are true symbols of the goods and are transferable by indorsement¹⁶. Delivery of such warrants may, if the contract for sale so permits, constitute delivery of the goods, and be effective to pass the property in the goods without any acknowledgment by the warehouseman.

1 The transfer must be voluntary. If B steals goods from A, there is no delivery from A to B, even if possession is transferred. It was necessary to define 'delivery' for the purposes of sale because of the confused use of the term in the decided cases. When possession is voluntarily transferred from one person to another, there is always a delivery, which is either at once absolute or, if it is subject to a condition, absolute on the fulfilment of the condition. A delivery effectual for one purpose may be ineffectual for another purpose, and then it is often said that there has been no delivery. For example, when the seller of goods delivers them to a carrier to convey them to the buyer, it is in general as effectual as a delivery to the buyer himself for the purpose of passing the property and risk (see the Sale of Goods Act 1979 s 18 r 5(2); and PARA 127 ante), and in discharge of the seller's duty to deliver and to divest his lien (see ss 32, 43(1)(a); and PARAS 188, 244 post). It is, however, ineffectual for the purpose of defeating the seller's right of stoppage in transit, for to defeat this there must be a further delivery from the carrier to the buyer: see s 45(1); and PARA 259 post.

2 The Sale of Goods Act 1979 makes no attempt to define 'possession', and the term is probably too elusive for the purpose of a statutory definition. See, however, the judgment of Fletcher Moulton LJ in *Lord's Trustee v*

Great Eastern Rly Co [1908] 2 KB 54 at 61, CA. As to possession generally, and as to alienation see PERSONAL PROPERTY vol 35 (Reissue) PARAS 1211 et seq, 1249 et seq. Cf *Swanwick v Sothorn* (1839) 9 Ad & El 895; *Farina v Home* (1846) 16 M & W 119.

3 le in relation to the Sale of Goods Act 1979 s 20A (as added) (see PARA 134 ante) and s 20B (as added) (see PARA 135 ante).

4 For the meaning of 'property', in relation to goods see PARA 27 ante.

5 Sale of Goods Act 1979 s 61(1) (amended by the Sale of Goods (Amendment) Act 1995 s 2(b)).

6 *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814. The transfer of bills of lading is a special instance of symbolic delivery: *Biddell Bros v E Clemens Horst & Co* [1911] 1 KB 934 at 957, CA, per Kennedy LJ; *The Prinz Adalbert* [1917] AC 586 at 589, PC, per Lord Sumner. As to symbolic delivery generally see GIFTS vol 52 (2009) PARAS 238-239; PERSONAL PROPERTY vol 35 (Reissue) PARAS 1253-1254. As to transfer of ownership by delivery of a bill of lading or other documents of title to goods see PARAS 345, 354-355, 368 et seq post. As to the transfer of a ship at sea see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 306 et seq.

7 Thus, possession taken under a licence to seize operates as a delivery of the goods by the seller: *Congreve v Evetts* (1854) 10 Exch 298 at 308. See also *Thomas v Times Book Co Ltd* [1966] 2 All ER 241, [1966] 1 WLR 911 (where there was a gift of the lost manuscript of a play if the donee could find it). For certain purposes, part delivery may operate as if it were a delivery of the whole: see PARA 243 post.

8 As to delivery orders see PARA 139 note 4 ante.

9 As to warrants see PARA 139 note 5 ante.

10 As to bills of lading see note 6 supra; and PARA 366 et seq post.

11 *Gillman, Spencer & Co v Carbutt & Co* (1889) 61 LT 281, CA; *Laurie and Morewood v Dudin and Sons* [1926] 1 KB 223 at 236-238, CA. See further the cases cited in note 12 infra; para 139 notes 4-5 ante; and *M'Ewan & Sons v Smith* (1849) 2 HL Cas 309. The distinction in the text between documents promising delivery and documents merely authorising receipt of possession was approved and applied in *Alicia Hosiery Ltd v Brown, Shipley & Co Ltd* [1970] 1 QB 195, [1969] 2 All ER 504 (where a delivery order issued by the pledgee was held to be a mere authority for the release of goods to a buyer). See also *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146 at 155. Where a ship's delivery order contains an undertaking by a carrier to a person identified in the order to deliver goods to that person, that person's right to delivery of the goods is now recognised by statute as a contractual right: see the Carriage of Goods by Sea Act 1992 ss 1(4), 2(1)(c); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 365.

12 *Gilbertson & Co v Anderson and Coltman Ltd* (1901) 18 TLR 224 (delivery order). See also *Dixon v Bovill* (1856) 3 Macq 1, HL; *Farmeloe v Bain* (1876) 1 CPD 445. Clearly, therefore, a document not purporting to be transferable is not negotiable: *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491. See further PARA 139 ante. The phrase 'negotiable instruments' is not used here in the sense applicable to a bill of exchange, but means, in effect, documents of title by the transfer of which possession and property may at common law pass: see *Thompson v Dominy* (1845) 14 M & W 403 (the actual decision in which was affected by the Bills of Lading Act 1855 s 1 (repealed): see now the Carriage of Goods by Sea Act 1992; and CARRIAGE AND CARRIERS vol 7 PARAS 338 et seq, 364-365). Accordingly, at common law the transferee of a bill of lading could obtain no better title to possession of, or property in, the goods than the transferor had to give (*Gurney v Behrend* (1845) 3 E & B 622), but this was subject to the exception that a transferee of a bill of lading might, by making a further transfer, override the original transferor's right of stoppage in transit (*Lickbarrow v Mason* (1787) 6 East 20n; on appeal (1793) 6 East 22n, HL). This exception is now statutory: see the Factors Act 1889 s 10 and the Sale of Goods Act 1979 s 47(2), together with the further exceptions to the principle in ss 24, 25 (see PARAS 5, 8, 158 ante, 254 post). See also PARA 253 post.

13 *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 ChD 205. See also *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 386; *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC. As to mercantile custom or usage generally see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 650 et seq.

14 See the Factors Act 1889 ss 2(1), 9 (as amended), s 10; paras 157-158 ante; and AGENCY vol 1 (2008) PARA 148.

15 See the cases cited in note 12 supra; but see *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341 (where a contract was inferred with carriers on the terms of the delivery orders). Strictly speaking, the holder of the instrument claims delivery not under the instrument itself but under the contract in pursuance of which it was issued. The device used in *Cremer v General Carriers SA* supra, namely inferring the existence of a contract from the facts, is now no longer necessary because of the Carriage of Goods by Sea Act 1992 ss 1(4), 2(1)(c): see CARRIAGE AND CARRIERS vol 7 (2008) PARA 365.

16 See eg the Mersey Dock Acts Consolidation Act 1858 s 200 (Mersey Docks and Harbour Board); the Trafford Park Act 1904 ss 33, 34 (Trafford Park Company); the Liverpool Mineral and Metal Storage Company Limited (Delivery Warrants) Act 1921 ss 3, 4; and the Port of London Act 1968 s 183. The language of these statutes is very wide, eg deeming the goods to be for all purposes the property of an indorsee of such a warrant. As to harbour boards generally see PORTS AND HARBOURS vol 36(1) (2007 Reissue) PARA 619 et seq.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(i) In general/164. What operates as delivery.

164. What operates as delivery.

Delivery¹ of the goods may be made by the seller doing any act or thing by which the goods are put into the custody or under the control of the buyer or his agent in that behalf², or by which the buyer or his agent³ is enabled to obtain such custody or control⁴. Thus, delivery of goods may be effected by means of delivery of the key of the place where the goods are lying⁵, or by means of any act or thing which the parties agree is to be treated as a delivery⁶.

Where, at the time of the contract of sale, the goods are in the possession of the buyer or his agent, prima facie the completion of the sale operates as a delivery of the goods⁷.

1 Under an inseverable contract of sale of goods the buyer is entitled, in the absence of provision to the contrary, to have all the goods delivered at one time: see *Behrend & Co v Produce Brokers' Co* [1920] 3 KB 530. As to instalment deliveries see PARA 176 et seq post. If goods are sold 'subject to shipment', the seller has an option whether to ship or not, but, if the goods are in fact shipped, they must be delivered in fulfilment of the contract: *Hollis Bros & Co Ltd v White Sea Timber Trust Ltd* [1936] 3 All ER 895. Cf *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd* [1960] AC 684, [1960] 2 All ER 100, PC.

2 *Atkinson v Maling* (1788) 2 Term Rep 462; *Goodall v Skelton* (1794) 2 Hy Bl 316 (where the goods were packed in the buyer's cloths but were left with the seller); *Proctor v Jones* (1826) 2 C & P 532 (where the goods were marked with the buyer's name but were left with the seller); *Simmons v Swift* (1826) 5 B & C 857; *Holderness v Shackels* (1828) 8 B & C 612; *Boulter v Arnott* (1833) 1 Cr & M 333 (where the goods were packed in the buyer's boxes but were left with the seller); *Dixon v Yates* (1833) 5 B & Ad 313; *Townley v Crump* (1835) 4 Ad & El 58.

3 Where a seller contracted to deliver goods at the buyer's premises and delivered them there without negligence to a person apparently having authority to receive them, he was held to have discharged his obligation: *Galbraith and Grant Ltd v Block* [1922] 2 KB 155, DC (where it was held that a term in the contract to deliver at the buyer's premises did not impose on the seller any duty to verify the authority of the person receiving the goods). See also *Computer 2000 Distribution Ltd v ICM Computer Solutions plc* [2004] EWCA Civ 1634, (2004) Times, 29 December.

4 *Smith v Chance* (1819) 2 B & Ald 753; *Salter v Woollams* (1841) 2 Man & G 650; *Wood v Tassell* (1844) 6 QB 234; *Thöl v Hinton* (1855) 4 WR 26; *Buddle v Green* (1857) 27 LJ Ex 33; *Wood v Baxter* (1883) 49 LT 45, DC; *Re Magnus, ex p Salaman* [1910] 2 KB 1049, CA.

5 See *Ellis v Hunt* (1789) 3 Term Rep 464 at 468 per Lord Kenyon CJ; *Chaplin v Rogers* (1801) 1 East 192 at 195 per Lord Kenyon CJ; *Gough v Everard* (1863) 2 H & C 1; *Ancona v Rogers* (1876) 1 Ex D 285, CA; *Hilton v Tucker* (1888) 39 ChD 669. Cf *Milgate v Kebble* (1841) 3 Man & G 100; *Lloyds Bank Ltd v Swiss Bankverein*,

Union of London and Smith's Bank Ltd v Swiss Bankverein (1913) 108 LT 143 at 146, CA, per Farwell LJ. See generally PERSONAL PROPERTY vol 35 (Reissue) PARA 1254. As to delivery where the goods are held by a third person see the Sale of Goods Act 1979 s 29(4) (see PARA 170 post); and as to delivery to a carrier see s 32 (see PARAS 188, 190 post).

6 *Castle v Swooner* (1860) 5 H & N 281 at 288 per Bramwell B (revsd on the facts (1861) 6 H & N 828, Ex Ch). See also *Bull v Sibbs* (1799) 8 Term Rep 327; *Salter v Woollams* (1841) 2 Man & G 650; *Bartlett v Holmes* (1853) 13 CB 630; *E and S Ruben Ltd v Faire Bros & Co Ltd* [1949] 1 KB 254, [1949] 1 All ER 215. See further PARA 161 note 8 ante.

7 *Manton v Moore* (1796) 7 Term Rep 67; *Kilpin v Ratley* [1892] 1 QB 582, DC; *Cain v Moon* [1896] 2 QB 283, DC.

UPDATE

161-234 Performance of the Contract

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(i) In general/165. General rule as to the place of delivery.

165. General rule as to the place of delivery.

Whether it is for the buyer¹ to take possession of the goods² or for the seller³ to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties⁴. Where there is an express term as to the place of delivery, it is a condition of the contract to the benefit of which both parties are entitled⁵. Apart from any such contract, express or implied, the place of delivery is the seller's place of business⁶, if he has one, and, if not, his residence, except that, if the contract is for specific goods⁷ which, to the knowledge of the parties when the contract is made, are in some other place, then that place is the place of delivery⁸. A contract for the sale of goods on cif, fob, for, fas or ex-ship terms contains special terms as to delivery, and the ordinary rule as to place of delivery is displaced⁹.

1 For the meaning of 'buyer' see PARA 29 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'seller' see PARA 27 ante.

4 Sale of Goods Act 1979 s 29(1). The rule assumed and stated by text writers prior to the Sale of Goods Act 1893 (repealed) was that prima facie it is the duty of the buyer to take the goods, and that the seller's duty is fulfilled by his putting the goods at the disposal of the buyer at the place of delivery: see *Smith v Chance* (1819) 2 B & Ald 753 at 755 per Holroyd J; *Wood v Tassell* (1844) 6 QB 234; *Wilkinson v Lloyd* (1845) 7 QB 27 at 44. There seems to be nothing in the wording of either the Sale of Goods Act 1893 (repealed) or the Sale of Goods Act 1979 to displace this rule.

5 *Maine Spinning Co v Sutcliffe & Co* (1917) 87 LJB 382.

6 For the meaning of 'business' see PARA 78 note 3 ante.

7 For the meaning of 'specific goods' see PARA 54 ante.

8 Sale of Goods Act 1979 s 29(2).

9 As to international sale contracts generally see PARA 322 et seq post.

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161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(i) In general/166. Delivery on seller's land or premises.

166. Delivery on seller's land or premises.

Where, by the terms of the contract, the goods are to be taken by the buyer from the seller's land or premises, the contract of sale by implication confers on the buyer a licence by the seller to the buyer to enter on the land or premises to remove the goods¹. Such licence is irrevocable, at any rate as regards any part of the goods the property in which has passed to the buyer².

1 *Liford's Case* (1614) 11 Co Rep 46b at 52a; *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440 at 442 per Parker J. Such a licence does not normally require any special formalities: see *McManus v Cooke* (1887) 35 ChD 681 at 688 per Kay J; *Frank Warr & Co Ltd v LCC* [1904] 1 KB 713, CA. A contract conferring an irrevocable licence to enter land may, however, be a 'disposition of an interest in land' for the purposes of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) and may thus need to be made in writing, particularly where the goods sold are at the date of the contract attached to, and form part of, the land: see PARA 30 ante; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 9 et seq; REAL PROPERTY vol 39(2) (Reissue) PARA 77; SALE OF LAND vol 42 (Reissue) PARA 31.

2 *Thomas v Sorrell* (1673) Vaugh 330 at 351, Ex Ch, per Vaughan CJ; *Wood v Manley* (1839) 11 Ad & El 34. Whether a licence is ab initio irrevocable as regards goods which have not become the buyer's property seems to be doubtful. In *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440 at 444, Parker J in a considered dictum suggests on the authorities that the mere fact of a contract of sale for standing timber or growing hay to be cut by the buyer may confer such an interest at law on the buyer that a licence to cut is ab initio irrevocable. *Marshall v Green* (1875) 1 CPD 35 undoubtedly involves a decision to that effect, but the point about the irrevocableness of the licence does not seem to have been argued; and in *Web v Paternoster* (1619) Palm 71 the buyer had cut and stacked the hay on the seller's land, thereby becoming the owner of the hay (see *Wallis v Harrison* (1838) 4 M & W 538 at 544 per Parke B). In the United States of America the licence is treated as divisible, and thus revocable so far as it has not been acted on: see *Giles v Simonds* 81 Mass 441 (1860); *Drake v Wells* 93 Mass 141 (1865); *Fletcher v Livingston* 153 Mass 388 (1891). The point is, however, of little practical importance, as a buyer sued for trespass could counterclaim for a breach of contract by the revocation of the licence: *Smart v Jones* (1864) 15 CBNS 717; *Kerrison v Smith* [1897] 2 QB 445.

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161-234 Performance of the Contract

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(i) In general/167. Place of delivery uncertain.

167. Place of delivery uncertain.

Where the place of delivery is not indicated by the contract, and is within the option of the seller or of the buyer respectively, it is a condition precedent to the liability of the buyer or of the seller respectively to accept or to deliver the goods that he should receive notice of the place of delivery¹.

¹ *Armitage v Insole* (1850) 14 QB 728 (followed in *Sutherland v Allhusen* (1866) 14 LT 666); *Davies v McLean* (1873) 21 WR 264. Cf *Hobson v Riordan* (1886) 20 LR Ir 255; *Great Northern Rly Co v Harrison* (1852) 12 CB 576, Ex Ch; *Forrestt & Son Ltd v Aramayo* (1900) 83 LT 335, CA; *Wackerbarth v Masson* (1812) 3 Camp 270; *Sharp v Christmas* (1892) 8 TLR 687, CA. See also *Knox v Mayne* (1873) IR 7 CL 557.

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161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(i) In general/168. General rule as to the time of delivery.

168. General rule as to the time of delivery.

Where, under the contract of sale¹, the seller² is bound to send the goods³ to the buyer⁴ but no time for sending them is fixed⁵, the seller is bound to send them within a reasonable time⁶. Similarly, where the seller is not bound to send the goods, but the buyer is to take possession of them from the seller or a third person, the seller is deemed to promise that the buyer, if he applies for the goods within a reasonable time, will receive them⁷. In the absence of a contrary provision, the contract will be frustrated by delay occurring without the default of either party and defeating the commercial object of the contract⁸. Whether a stipulation as to the time of delivery is of the essence (and so entitling the innocent seller or buyer in the case of its breach to refuse to make or take delivery as the case may be) depends on the construction of the contract⁹. However, in international sale contracts stipulations as to time, and so in relation to delivery¹⁰, are in general of the essence¹¹.

Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour; and what is a reasonable hour is a question of fact¹².

The contractual time for delivery may be waived¹³. Unless the waiver is for a limited time¹⁴, time will cease to be of the essence of the contract, and can normally only be made so again by one party giving the other a notice specifying a reasonable final period for performance¹⁵. Such a notice will not, however, be required where it can be shown that, even if it were given, the other party could still not perform within such a period¹⁶.

¹ For the meaning of 'contract of sale' see PARA 29 ante.

2 For the meaning of 'seller' see PARA 27 ante.

3 For the meaning of 'goods' see PARA 30 ante.

4 For the meaning of 'buyer' see PARA 29 ante.

5 The question of the agreed time of delivery is one of construction. Various rules have been laid down: see generally TIME.

6 Sale of Goods Act 1979 s 29(3). What is a reasonable time is a question of fact: see PARA 120 text and note 16 ante. See *Ellis v Thompson* (1838) 3 M & W 445; *British Motor Body Co Ltd v Thomas Shaw (Dundee) Ltd* 1914 SC 922, Ct of Sess; *Macpherson Train & Co Ltd v J Milhem & Sons* [1955] 2 Lloyd's Rep 396. The circumstances surrounding the contract must be considered (see *Ellis v Thompson* supra), and also the facts subsequently causing delay without the seller's fault (*Hick v Raymond and Reid* [1893] AC 22 at 33, HL, per Lord Watson; *Re Carver & Co and Sassoon & Co* (1911) 17 Com Cas 59 (stranding and refloating of ship causing delay)). See also *Hartwells of Oxford Ltd v British Motor Trade Association* [1951] Ch 50, [1950] 2 All ER 705, CA; *Monkland v Jack Barclay Ltd* [1951] 2 KB 252, [1951] 1 All ER 714, CA. The rule under the Sale of Goods Act 1979 s 29(3) may, however, be changed by express agreement, or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract (see s 55(1); and PARAS 12, 100 ante), eg where the time of delivery is made indefinite and is within the option of the buyer (*Jones v Gibbons* (1853) 8 Exch 920); and the same principle no doubt applies where the option is the seller's.

7 *Buddle v Green* (1857) 27 LJ Ex 33. If delivery is to be made by means of some act requiring the co-operation of both parties, the implication is not that either party contracts that it will be done within a reasonable time, but that he will use reasonable diligence in performing his part: *Ford v Cotesworth* (1868) LR 4 QB 127 at 133-134 per Blackburn J; affd (1870) LR 5 QB 544, Ex Ch.

8 *Nickoll and Knight v Ashton, Edridge & Co* [1900] 2 QB 298 (on appeal [1901] 2 KB 126, CA); *Re Carver & Co and Sassoon & Co* (1911) 17 Com Cas 59 (where the delay was held to be insufficient to defeat the commercial object).

9 See the Sale of Goods Act 1979 s 10(2); and PARA 68 ante. See also *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL.

10 This includes the implied duty under the Sale of Goods Act 1979 s 29(3) to send the goods within a reasonable time where no time is fixed: *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431, [1958] 1 WLR 1126; *Thomas Borthwick (Glasgow) Ltd v Bunge & Co Ltd* [1969] 1 Lloyd's Rep 17.

11 *Cie Commerciale Sucres et Denrées v C Czarnikow Ltd, The Naxos* [1990] 3 All ER 641, [1990] 1 WLR 1337, HL; *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL, explaining the scope of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 1 All ER 474, CA, and *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, [1975] 3 All ER 739, CA, and distinguishing *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, [1977] 2 All ER 62, HL (time provisions in a rent review clause in a lease), as not concerned with a mercantile contract. See also *Ellis v Thompson* (1838) 3 M & W 445; *Macdonald v Longbottom* (1859) 1 F & F 538; *FC Bradley & Sons Ltd v Colonial and Continental Trading Ltd* [1964] 2 Lloyd's Rep 52, CA.

12 Sale of Goods Act 1979 s 29(5). Before the Sale of Goods Act 1893 (repealed) the reasonableness of the hour was a question of law, and elaborate rules for determining it were laid down in *Startup v Macdonald* (1843) 6 Man & G 593, Ex Ch. See also TIME vol 97 (2010) PARA 349.

13 *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA; and see *Panoutsos v Raymond Hadley Corpn of New York* [1917] 2 KB 473, CA; *Hartley v Hymans* [1920] 3 KB 475.

14 *Barclay v Messenger* (1874) 43 LJ Ch 449, DC; *Enrico Furst & Co v WE Fischer Ltd* [1960] 2 Lloyd's Rep 340 at 350 per Diplock J; *Jacobson Van den Berg & Co (UK) Ltd v Biba Ltd* (1977) 121 Sol Jo 333, CA.

15 See the cases cited in note 13 supra.

16 *Etablissements Chainbaux SARL v Harbormaster Ltd* [1955] 1 Lloyd's Rep 303.

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161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(i) In general/169. Seller's or buyer's option as to time of delivery.

169. Seller's or buyer's option as to time of delivery.

Where the time of delivery is indefinite and within the option of the buyer¹, as where the goods are deliverable 'on request' or 'as required'² or on similar terms, the seller is not bound to deliver the goods until the buyer calls for delivery; and, if he calls for delivery, the seller must then deliver within a reasonable time³.

If the buyer does not call for delivery within a reasonable time after the contract, the seller may give him notice to do so⁴. If the buyer fails to call for delivery within a reasonable time after the notice, the seller may repudiate the contract, if it is an entire one⁵.

Similar principles apply mutatis mutandis to the buyer's liability to accept the goods where the time of delivery is indefinite and within the option of the seller⁶.

¹ As to notice of a purely collateral event on which delivery depends see CONTRACT vol 9(1) (Reissue) PARA 963.

² The buyer must have agreed to buy. The rule does not apply if 'as required' means 'if required': *Moon v Camberwell Corpn* (1903) 89 LT 595, CA.

³ *Shep Touch* (8th Edn) 381; *Birks v Trippet* (1666) 1 Wms Saund 28, 32 at 33b; *Bowdell v Parsons* (1808) 10 East 359; *Great Northern Rly Co v Harrison* (1852) 12 CB 576, Ex Ch; *Honck v Muller* (1881) 7 QBD 92, CA (alternative times). The seller dispenses with a request if he wrongfully resells the goods (*Bowdell v Parsons* supra) or declares his inability to deliver (*Leeson v North British Oil and Candle Co* (1874) IR 8 CL 309).

⁴ Prima facie the buyer has the whole of his life to call for delivery: *Shep Touch* (8th Edn) 377; *Llanelly Rly and Dock Co v London and North Western Rly Co* (1875) LR 7 HL 550. The rule as to reasonable time is excluded. Consequently, the seller is not discharged because the buyer does not call for delivery within a reasonable time after the contract: *Jones v Gibbons* (1853) 8 Exch 920. The buyer's liability may, however, be hastened by notice (*Shep Touch* (8th Edn) 377; *Jones v Gibbons* supra); and long delay acquiesced in by both parties may amount to a mutual abandonment of the contract so as to put an end to the buyer's right to call for delivery (*Pearl Mill Co Ltd v Ivy Tannery Co Ltd* [1919] 1 KB 78, DC).

⁵ *Jones v Gibbons* (1853) 8 Exch 920. Where, however, the property has passed, the seller may, at his option, retain the goods, and charge the buyer the expenses of their custody: see the Sale of Goods Act 1979 s 37; and PARA 205 post. Where the goods are deliverable by instalments to be separately paid for, the contract is divisible, and a partial breach by the buyer does not necessarily entitle the seller to repudiate: see s 31(2); and PARA 187 post. See also *Eastern Counties Rly Co v Philipson* (1855) 16 CB 2. It is otherwise where the price is not apportioned, for in such a case the consideration for delivery is indivisible, and a partial breach is a total breach, and the seller may repudiate: *Chanter v Leese* (1840) 5 M & W 698, Ex Ch; *Kingdom v Cox* (1848) 5 CB 522.

⁶ Eg a contract for the sale of a waste product, deliverable when the seller has it to spare.

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161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(i) In general/170. Delivery of goods in the possession of a third person.

170. Delivery of goods in the possession of a third person.

Where at the time of sale¹ the goods² are in the possession of a third person, there is no delivery³ by the seller⁴ to the buyer⁵ unless and until the third person acknowledges⁶ to the buyer that he holds the goods on his behalf⁷; but this provision does not affect the operation of the issue or transfer of any document of title⁸ to goods⁹. An acknowledgment by the third person of the buyer's title to the goods must be given with the consent of both the seller and the buyer¹⁰. If the person in possession of the goods wrongfully refuses to acknowledge the buyer's title, the buyer may repudiate the contract¹¹.

The seller and the buyer must, each of them, so far as it depends on him, do all that is necessary to enable the buyer to obtain an acknowledgment by the third person of the buyer's title¹². If the acknowledgment is rightly withheld by reason of the buyer's default in that behalf, the seller, having done all that was incumbent on him, may treat the delivery as made¹³.

1 le at the time when the property passes. 'Sale' normally includes a bargain and sale as well as a sale and delivery (see the Sale of Goods Act 1979 s 61(1); and PARA 27 ante); but the latter part of the definition is in this context, from the nature of the case, excluded.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

4 For the meaning of 'seller' see PARA 27 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 In technical language, the third person must attorn to the buyer. An acknowledgment while the goods are unascertained is ineffectual, except as against the third person by way of estoppel: *Busk v Davis* (1814) 2 M & S 397. Cf *Swanwick v Sothorn* (1839) 9 Ad & El 895 (goods ascertained); *Hayman & Son v M'Lintock* 1907 SC 936.

7 *Farina v Home* (1846) 16 M & W 119. See also *Hammond v Anderson* (1803) 1 Bos & PNR 69; *Smith v Chance* (1819) 2 B & Ald 753; *Salter v Woollams* (1841) 2 Man & G 650 (where the third person attorned before the sale and afterwards withdrew his consent); *Lackington v Atherton* (1844) 7 Man & G 360; *Wood v Tassell* (1844) 6 QB 234 (attornment and part delivery); *Buddle v Green* (1857) 27 LJ Ex 33 (refusal to attorn to delivery order); *Poulton & Son v Anglo-American Oil Co Ltd* (1911) 27 TLR 216, CA.

8 le as defined in the Factors Act 1889 s 1(4): see PARAS 157 ante, 253 note 1 post. The question under the Sale of Goods Act 1979 s 29(4) being one between the seller and the buyer, a bill of lading would seem to be the only document of title in point, that being the document which in itself transfers possession; but certain dock authorities and warehousing companies are by statute permitted to issue warrants which are treated, like a bill of lading, as transferring possession without any necessity for attornment: see PARA 163 text and note 15 ante. All other documents, such as warrants and delivery orders, require an attornment by the bailee, unless the particular document has acquired negotiability by trade usage: see *Farina v Home* (1846) 16 M & W 119. See also *Harman v Anderson* (1809) 2 Camp 243; *Bentall v Burn* (1824) 3 B & C 423; *Haig v Wallace* (1831) 2 Hud & B 671; *Lackington v Atherton* (1844) 7 Man & G 360; *Buddle v Green* (1857) 27 LJ Ex 33; *Dublin City Distillery Ltd v Doherty* [1914] AC 823, HL; *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 2 All ER 294, [1953] 1 WLR 815, CA.

9 Sale of Goods Act 1979 s 29(4).

10 *Godts v Rose* (1855) 17 CB 229; *Poulton & Son v Anglo-American Oil Co Ltd* (1911) 27 TLR 216, CA.

11 *Pattison v Robinson* (1816) 5 M & S 105 at 110; but cf *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 2 All ER 294, [1953] 1 WLR 815, CA (unreasonable conduct by the buyer).

12 *Smith v Chance* (1819) 2 B & Ald 753; *Winks v Hassall* (1829) 9 B & C 372 (non-payment by the buyer of customs duties); *Bartlett v Holmes* (1853) 1 CLR 159 (non-surrender by the buyer of a warrant); *Buddle v Green* (1857) 27 LJ Ex 33 (presentation of the delivery order within a reasonable time); *Stray v Russell* (1860) 1 E & E 888 (affd 1 E & E 916, Ex Ch) (transfer of shares); *London Founders Association Ltd and Palmer v Clarke* (1888) 20 QBD 576 at 584, CA, per Lopes LJ (registration of shares).

13 *Bartlett v Holmes* (1853) 1 CLR 159. Similarly, if the acknowledgment is withheld by reason of the seller's default, there is no delivery: *Smith v Chance* (1819) 2 B & Ald 753.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(i) In general/171. Expenses in connection with delivery.

171. Expenses in connection with delivery.

Unless otherwise agreed, the expenses of, and incidental to, putting the goods¹ into a deliverable state² must be borne by the seller³. Similarly, unless otherwise agreed, the expenses of, and incidental to, making delivery of the goods are required by common law to be borne by the seller; but the expenses of, and incidental to, receiving delivery, or incurred subsequently to delivery, must be borne by the buyer⁴.

Special rules have been attached by the usage of merchants to international sale contracts⁵.

1 For the meaning of 'goods' see PARA 30 ante.

2 As to when goods are in a deliverable state see PARA 113 note 5 ante.

3 Sale of Goods Act 1979 s 29(6). For the meaning of 'seller' see PARA 27 ante. There is no previous English authority for this rule, but it is probably declaratory of the common law: *Story on Sale* (4th Edn) s 297(a). It should be noted that the rule does not deal with the expenses of delivery itself: see the text and note 4 infra.

4 *Neill v Whitworth* (1865) 18 CBNS 435 (affd (1866) LR 1 CP 684, Ex Ch); *Playford v Mercer* (1870) 22 LT 41; *Acme Wood Flooring Co v Sutherland Innes Co* (1904) 9 Com Cas 170; *Re Shell Transport and Trading Co and Consolidated Petroleum Co* (1904) 20 TLR 517; *White v Williams* [1912] AC 814, PC.

5 As to these special rules, and as to international sale contracts generally see PARA 322 et seq post. As to the duty to obtain export and other licences in the case of those contracts see PARAS 339, 358 post; and CONTRACT vol 9(1) (Reissue) PARA 908.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(ii) Delivery of Wrong Quantity or of Mixed Goods/172. Delivery of wrong quantity or wrong goods.

(ii) Delivery of Wrong Quantity or of Mixed Goods

172. Delivery of wrong quantity or wrong goods.

Where the seller¹ delivers to the buyer² a quantity of goods³ less than he contracted to sell, the buyer may reject them⁴; but, if the buyer accepts the goods so delivered, he must⁵ pay for them at the contract rate⁶. Where, however, the contract is for delivery by instalments and the seller makes short delivery on an instalment, the buyer may reject the goods only if the short delivery amounts to a repudiation of the contract by the seller⁷. Where the seller delivers a quantity of goods less than he contracted to sell, a buyer who does not deal as consumer⁸ may not so reject the goods if the shortfall is so slight⁹ that it would be unreasonable for him to do so¹⁰.

Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may¹¹ accept the goods included in the contract and reject the rest, or he may reject the whole¹². If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate¹³. Where, however, the seller delivers a quantity of goods larger than he contracted to sell, a buyer who does not deal as consumer may not so reject the whole, if the excess is so slight¹⁴ that it would be unreasonable for him to do so¹⁵.

1 For the meaning of 'seller' see PARA 27 ante.

2 For the meaning of 'buyer' see PARA 29 ante.

3 For the meaning of 'goods' see PARA 30 ante.

4 This is so because every contract for a quantity of goods is prima facie an entire contract for that quantity: *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 439, HL, per Lord Selborne LC. See also *Baldev v Parker* (1823) 2 B & C 37; *Bigg v Whisking* (1853) 14 CB 195; *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60, HL; *Wilkinson v Barclay* [1946] 2 All ER 337n, CA. Conversely, the buyer cannot call for a portion of the goods without being ready and willing to accept all: *Kingdom v Cox* (1848) 5 CB 522. The Sale of Goods Act 1979 s 30(1) must also be read subject to s 31, under which the goods may be deliverable by instalments: see *Regent OHG Aisenstadt und Barig v Francesco of Jermyn Street Ltd* [1981] 3 All ER 327; and PARAS 176, 187 post.

5 It is subject to any usage of trade, special agreement or course of dealing between the parties. Thus, by agreement, the quantity stated may be intended to be, not an absolute, but a maximum quantity, so that the buyer may be bound to accept less than the stated quantity: *Graham v Jackson* (1811) 14 East 498; *Beckh v Page* (1859) 5 CBNS 708; *Morgan v Gath* (1865) 3 H & C 748; *Arbuthnot v Streckeisen* (1866) 35 LJCP 305; *Symes v Hutley* (1860) 2 LT 509; *A-G v Stewards & Co Ltd* (1901) 18 TLR 131, HL. Similarly, by usage of trade, a delivery order for 'about' the quantity of goods sold from a warehouse may be good: *Moore v Campbell* (1854) 10 Exch 323. As to delivery by instalments see PARA 176 et seq post; and as to a minimum quantity see PARA 173 post.

6 Sale of Goods Act 1979 s 30(1), (5). See *Bragg v Cole* (1821) 6 Moore CP 114; *Shipton v Casson* (1826) 5 B & C 378; *Richardson v Dunn* (1841) 2 QB 218; *Gorrissen v Perrin* (1857) 2 CBNS 681; *Morgan v Gath* (1865) 3 H & C 748; *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239, CA; *Lister and Biggs v Barry & Co* (1886) 3 TLR 99; *Harland and Wolff Ltd v J Burstall & Co* (1901) 84 LT 324. At common law the buyer was liable not for the price as such but for the value of the goods (*Shipton v Casson* supra at 383), and the contract rate was the best evidence of this; but the statutory rule lays down that the contract rate will be payable, and thus there is no

room for evidence that the value of the goods is different from the contract rate. As to the liability of the principal to accept a lesser quantity where the seller is his agent see *Johnston v Kershaw* (1867) LR 2 Exch 82; *Ireland v Livingston* (1870) LR 5 QB 516, Ex Ch (revsd on other grounds (1872) LR 5 HL 395).

7 *Regent OHG Aisenstadt und Barig v Francesco of Jermyn Street Ltd* [1981] 3 All ER 327. See further PARA 180 post.

8 As to the meaning of 'dealing as consumer' see PARA 73 note 8 ante.

9 At common law, where the deficiency is so small as to be negligible, the court applies the maxim *de minimis non curat lex* (the law takes no account of very trifling matters): *Harland and Wolff Ltd v J Burstall & Co* (1901) 17 TLR 338 per Bigham J; *Jackson v Rotax Motor and Cycle Co* [1910] 2 KB 937, CA; *Payne and Routh v Lillico & Sons* (1920) 36 TLR 569. Cf *Rapalli v KL Take Ltd* [1958] 2 Lloyd's Rep 469, CA. Thus, where the parties have agreed on a limit of tolerance, the court will not extend it unless the excess or short delivery is infinitesimal: see PARA 173 post.

10 Sale of Goods Act 1979 s 30(2A) (added by the Sale and Supply of Goods Act 1994 s 4(2)). It is for the seller to show that a shortfall fell within the Sale of Goods Act 1979 s 30(2A) (as added): s 30(2B) (added by the Sale and Supply of Goods Act 1994 s 4(2)).

11 See note 5 supra.

12 Sale of Goods Act 1979 s 30(2), (5). See *Cross v Eglin* (1831) 2 B & Ad 106; *Dixon v Fletcher* (1837) 3 M & W 146; *Hart v Mills* (1846) 15 M & W 85; *Cunliffe v Harrison* (1851) 6 Exch 903; *Rylands v Kreitman* (1865) 19 CBNS 351; *Lomas & Co v Barff Ltd, Frangopulo & Co v Lomas & Co* (1901) 17 TLR 437 (on appeal (1902) 18 TLR 461, CA).

13 Sale of Goods Act 1979 s 30(3).

14 The common law *de minimis* rule applies to excess delivery: *Shipton, Anderson & Co v Weil Bros & Co* [1912] 1 KB 574.

15 Sale of Goods Act 1979 s 30(2A) (as added: see note 10 supra). It is for the seller to show that an excess fell within s 30(2A) (as so added): s 30(2B) (as added: see note 10 supra)

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(ii) Delivery of Wrong Quantity or of Mixed Goods/173. Particular rules as to quantity.

173. Particular rules as to quantity.

The quantity of goods contracted for is determined by the construction of the contract¹.

Such quantity may be specified by reference to particular circumstances or a particular standard². If in such a case a specified quantity is also mentioned, with the addition of qualifying words such as 'about', 'more or less' or similar words, such quantity *prima facie*³ represents only an anticipative estimate of quantity⁴, but such an estimate may specify a minimum quantity as a term of the contract⁵.

In other cases, the quantity of goods mentioned in the contract is material⁶, subject, where qualifying words are used, to a reasonable latitude with regard to quantity⁷, or where, by the

terms of the contract, usage of trade or otherwise, the qualifying words mean a definite latitude, to that latitude^a.

1 As to construction generally see CONTRACT vol 9(1) (Reissue) PARA 778 et seq (implied terms); DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq (general rules of interpretation).

2 Eg an entire lot deposited in a particular warehouse, all the goods manufactured by the seller, or that may be shipped by the seller, or required by the buyer etc: see *Wood v Copper Miners' Co* (1854) 14 CB 428 (supply for particular manufacture); *Eastern Counties Rly Co v Philipson* (1855) 16 CB 2 (buyer's requirements); *Tancred, Arrol & Co v Steel Co of Scotland Ltd* (1890) 15 App Cas 125, HL (buyer's requirements). It is a matter of construction whether 'required' means 'requested' or 'wanted': *Whitehouse v Liverpool Gas Co* (1848) 5 CB 798. Cf *Von Mehren & Co v Edinburgh Roperie and Sail Cloth Co Ltd* (1902) 4 F 232, Ct of Sess. See also *JL Kier & Co Ltd v Whitehead Iron and Steel Co Ltd* [1938] 1 All ER 591; *Cory Bros & Co Ltd v Universe Petroleum Co Ltd* (1933) 46 Ll L Rep 309; and the cases cited in note 4 infra. If the buyer renders the ascertainment by the standard impossible, the seller is discharged: see *Pringle v Taylor* (1809) 2 Taunt 150.

3 The contract may, however, show that the quantity mentioned is material: *Bourne v Seymour* (1855) 16 CB 337.

4 *Hayward v Scougall* (1809) 2 Camp 56; *Gwillim v Daniell* (1835) 2 Cr M & R 61; *Bealey v Stuart* (1862) 7 H & N 753; *McConnel v Murphy* (1873) LR 5 PC 203; *Borrowman v Drayton* (1876) 2 Ex D 15, CA; *Levi and Browse Island Guano Co Ltd v Berk & Co* (1886) 2 TLR 898, CA; *McLay & Co v Perry & Co* (1881) 44 LT 152; *Tancred, Arrol & Co v Steel Co of Scotland Ltd* (1890) 15 App Cas 125, HL. Cf *A-G v Stewards & Co Ltd* (1901) 18 TLR 131, HL; *FW Berk & Co Ltd v International Explosives Co* (1901) 7 Com Cas 20; *Re Harrison and Micks, Lambert & Co* [1917] 1 KB 755, DC; *Tebbitts Bros v Smith* (1917) 33 TLR 508, CA; *Three Rivers Trading Co Ltd v Givinear and District Farmers Ltd* (1967) 111 Sol Jo 831, CA.

5 *Leeming v Snaith* (1851) 16 QB 275; *Doe v WH Bowater Ltd* [1916] WN 185; *Re Thornett and Fehr and Yuills Ltd* [1921] 1 KB 219, DC. As to a maximum quantity see PARA 172 note 5 ante.

6 See the Sale of Goods Act 1979 s 30 (as amended); and PARA 172 ante.

7 *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239 at 244, CA, per Thesiger LJ. See also *Cross v Eglin* (1831) 2 B & Ad 106; *Moore v Campbell* (1854) 10 Exch 323; *Brawley v United States* 96 US 168 (1877); *Payne and Routh v Lillico & Sons* (1920) 36 TLR 569; *Louis Dreyfus & Cie v Parnaso Cia Naviera SA* [1960] 2 QB 49, [1960] 1 All ER 759, CA. It is thought that what is a reasonable latitude is a question of fact. As to qualifying words in instalment contracts see PARA 177 post.

8 *Société Anonyme l'Industrielle Russo-Belge v Scholefield & Son* (1902) 7 Com Cas 114, CA; *Lomas & Co v Barff Ltd, Frangopulo & Co v Lomas & Co* (1901) 17 TLR 437 (revsd on another ground (1902) 18 TLR 461, CA); *Re Harrison and Micks, Lambert & Co* [1917] 1 KB 755, DC.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(ii) Delivery of Wrong Quantity or of Mixed Goods/174. Sale of a cargo.

174. Sale of a cargo.

A contract for the sale of a cargo is prima facie a contract for the sale of the entire cargo¹ loaded or to be loaded on the vessel on the particular voyage, whatever its quantity may prove to be². In such a contract, unless a contrary intention plainly appears, words of quantity will be

treated as a mere estimate³; but, where such an intention does plainly appear, they may introduce an upper or lower limit of quantity, in which case the goods must both constitute the entire cargo and satisfy the contractual limit of quantity⁴.

1 A contract may be one for the sale of a cargo in this sense, whether or not the word 'cargo' is mentioned in the contract, the question being one of construction: *Ireland v Livingston* (1872) LR 5 HL 395, HL; *Borrowman v Drayton* (1876) 2 Ex D 15, CA.

2 *Sargent v Reed* (1745) 2 Stra 1228; *Bryans v Nix* (1839) 4 M & W 775 (bargeload); *Kreuger v Blanck* (1870) LR 5 Exch 179; *Borrowman v Drayton* (1876) 2 Ex D 15, CA. Cf *Covas v Bingham* (1853) 2 E & B 836; *Bourne v Seymour* (1855) 16 CB 337; *Levi and Browse Island Guano Co Ltd v Berk & Co* (1886) 2 TLR 898, CA; *Re Harrison and Micks, Lambert & Co* [1917] 1 KB 755, DC; but see *Paul Ltd v Pim & Co Ltd* [1922] 2 KB 360. An American judge has called a cargo or boatload as entire a thing as an animal of a certain weight, strength or speed: *Flanagan v Demarest* 26 NY Sup Ct 173 at 188 (1865) per Robertson CJ. See also *Hays v Pittsburgh G and B Packet Co* 33 F 552 (1888); and *Rochester and Oleopolis Oil Co v Hughes* 56 Pa 322 (1867) (both cases of bargeloads). It was said in *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128, PC, that 'cargo' was a word susceptible of different meanings. The question in that case was, however, whether the property or risk passed in a portion of the goods while being shipped. It was not doubted that the buyer might ultimately have rejected part of a cargo. See also the cases cited in PARA 173 note 4 ante. As to the passing of the property in a cargo see PARA 132 ante.

3 *Levi and Browse Island Guano Co Ltd v Berk & Co* (1886) 2 TLR 898, CA; *Re Harrison and Micks, Lambert & Co* [1917] 1 KB 755, DC.

4 *Borrowman v Drayton* (1876) 2 Ex D 15, CA.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(ii) Delivery of Wrong Quantity or of Mixed Goods/175. Mutual risk of correctness of quantity.

175. Mutual risk of correctness of quantity.

The parties may by agreement mutually take the risk of the quantity of the goods being on delivery more or less than the specified quantity on which the price was calculated¹.

1 *Covas v Bingham* (1853) 2 E & B 836.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/A. IN GENERAL/176. Instalment deliveries not ordinarily allowable.

(iii) Instalment Deliveries

A. IN GENERAL

176. Instalment deliveries not ordinarily allowable.

Unless otherwise agreed, the buyer¹ of goods² is neither bound to accept delivery³ by instalments⁴ nor entitled to demand the delivery of an instalment⁵.

In the absence of an express agreement⁶, an agreement to accept delivery by instalments may be inferred from the conduct of the parties and the circumstances of the case⁷, and, in particular, from the delivery of part of the goods as an instalment, and acceptance of it by the buyer without objection that complete delivery was not made⁸.

1 For the meaning of 'buyer' see PARA 29 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

4 Sale of Goods Act 1979 s 31(1). By s 30(1) (see PARA 172 ante) the buyer is not bound to accept, in performance of the seller's contract, less than the full quantity, unless, that is, the shortfall is so slight as to make rejection unreasonable where the buyer does not deal as consumer: see s 30(2A) (as added); and PARA 172 ante. By s 31(1) he is entitled to receive the goods in one delivery: see *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239, CA; *Honck v Muller* (1881) 7 QBD 92 at 99, CA, per Bramwell LJ. Cf *Leidemann v Gray* (1857) 3 Jur NS 219, Ex Ch; *Brandt v Lawrence* (1876) 1 QBD 344, CA (as explained in *Reuter Hufeland & Co v Sala & Co* supra).

5 *Kingdom v Cox* (1848) 5 CB 522; *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239 at 247, CA, per Thesiger LJ; *Honck v Muller* (1881) 7 QBD 92 at 99, CA, per Bramwell LJ. Such conduct of the buyer shows that he is not ready and willing to perform all his contract. The Sale of Goods Act 1979 s 31 does not in terms apply to cases in which the amount of the instalments is or is not specified, but the same principle applies. Thus, if the goods are deliverable 'as required', and the buyer fails to require an instalment, the seller may or may not be entitled under s 31(2) (see PARA 187 post) to repudiate the contract, according to whether the buyer's breach is or is not a vital one: *Eastern Counties Rly Co v Philipson* (1855) 16 CB 2.

6 *Brandt v Lawrence* (1876) 1 QBD 344, CA; *Jackson v Rotax Motor and Cycle Co* [1910] 2 KB 937, CA.

7 *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128 at 138, PC. See also *Thornton v Simpson* (1816) 6 Taunt 556; *Nicholson v Bradfield Union* (1866) LR 1 QB 620; *Tarling v O'Riordan* (1878) 2 LR Ir 82 at 86, Ir CA, per Ball LC and at 89 per Morris CJ (contract for existing and future goods); *Howell v Evans* (1926) 42 TLR 310, DC (engravings 'to be sent to me as published').

8 *Tarling v O'Riordan* (1878) 2 LR Ir 82 at 86, Ir CA, per Ball LC. See also *Champion v Short* (1807) 1 Camp 53; *Bragg v Cole* (1821) 6 Moore CP 114.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/B. PARTICULAR RULES/177. Qualifying words.

B. PARTICULAR RULES

177. Qualifying words.

Where qualifying words such as 'about', 'more or less' or similar words are used in a contract for a quantity of goods deliverable by stated instalments, it depends on the construction of the contract whether the qualifying words apply to the whole quantity of goods or to the amount of the instalments¹.

¹ *Société Anonyme l'Industrielle Russo-Belge v Scholefield and Son* (1902) 7 Com Cas 114, CA (where it was held that the qualifying words applied only to the full quantity). As to qualifying words in non-instalment contracts see PARA 173 ante.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/B. PARTICULAR RULES/178. Buyer's position where price not apportioned to instalments.

178. Buyer's position where price not apportioned to instalments.

Where the goods are deliverable by instalments and the price of each instalment is not separately payable, although the price may be calculated with reference to separate portions of the goods, the buyer may reject any instalment delivered if the full quantity of the goods is not made up¹, but he must pay at the contract rate for such of the goods as he has dealt with as owner or otherwise accepted². If he retains the goods delivered beyond the time appointed for complete delivery or otherwise beyond a reasonable time for complete delivery, he must pay for them at the contract rate³.

¹ *Oxendale v Wetherell* (1829) 9 B & C 386 at 387-388 per Parke B, approved in *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128 at 138, PC. Where the price is payable only after full delivery, or where no time of payment is specified, which amounts to the same thing, a full delivery by the seller is a condition precedent to the payment of any part of the price: see the Sale of Goods Act 1979 s 30(1); and PARA 172 ante. See also the general principle stated in *Chanter v Leese* (1840) 5 M & W 698, Ex Ch. The mere receipt by the buyer of an instalment is not a final acceptance of it: *Hardman v Bellhouse* (1842) 9 M & W 596 at 600 per Alderson B.

² *Nicholson v Bradfield Union* (1866) LR 1 QB 620 at 625. See also *Clarke v Westrope* (1856) 18 CB 765.

- 3 *Oxendale v Wetherell* (1829) 9 B & C 386; cf *Waddington v Oliver* (1805) 2 Bos & PNR 61.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/B. PARTICULAR RULES/179. How far each delivery is a separate contract.

179. How far each delivery is a separate contract.

For the purpose of delivery or acceptance, each instalment is deemed to be the subject of a separate contract¹. Accordingly, the seller is bound to deliver, and the buyer to accept, each instalment duly demanded or tendered in the course of performance of the contract².

- 1 This is now also the case in the context of the buyer's right of partial rejection: see PARA 200 post.

- 2 *Jackson v Rotax Motor and Cycle Co* [1910] 2 KB 937, CA (following *Tarling v O'Riordan* (1878) 2 LR Ir 82, Ir CA); *Brandt v Lawrence* (1876) 1 QBD 344, CA (as explained in *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239, CA). Thus, the fact of an acceptance of previous instalments does not preclude the rejection of subsequent ones (*Jackson v Rotax Motor and Cycle Co* supra); and the fact that subsequent instalments are not delivered does not excuse the buyer for not having accepted previous ones (*Brandt v Lawrence* supra). The buyer need not, however, accept any instalment where it is apparent at the time of tender that the subsequent instalments would not be delivered: *Brandt v Lawrence* supra (as explained in *Reuter Hufeland & Co v Sala & Co* supra). Cf *Braithwaite v Foreign Hardwood Co* [1905] 2 KB 543, CA (applied in *Sinason-Teicher Inter-American Grain Corp v Oilcakes and Oilseeds Trading Co Ltd* [1954] 2 All ER 497, [1954] 1 WLR 935 (affd [1954] 3 All ER 468, [1954] 1 WLR 1394, CA)); *Taylor v Oakes, Roncoroni & Co* (1922) 127 LT 267, CA. See also *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48 at 70, HL; and CONTRACT vol 9(1) (Reissue) PARA 969.

UPDATE

161-234 Performance of the Contract

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/B. PARTICULAR RULES/180. Rescission of the contract by the buyer.

180. Rescission of the contract by the buyer.

Notwithstanding that the instalments of the goods are to be separately paid for¹, or that some of the instalments have been delivered, the buyer may², on the seller's default in the delivery of any instalment, and on returning any instalments previously received³, repudiate the

contract ab initio and recover any part of the price paid⁴, where the seller's breach constitutes a total failure of the consideration, as where the instalments of the goods are portions of a quantity which in its nature is an indivisible whole⁵, or a full delivery of which is otherwise of the essence of the contract⁶.

1 *Poussard v Spiers and Pond* (1876) 1 QBD 410 shows that the division of payment does not prevent a rescission ab initio where the partial breach goes to the root of the contract. See note 4 infra.

2 Clear words in a contract are needed to replace a party's common law right to rescind the contract ab initio with a party's right to do so under a contractual term: see *Stoczni Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL; and CONTRACT vol 9(1) (Reissue) PARA 990. See note 4 infra.

3 See *Hunt v Silk* (1804) 5 East 449; *Clarke v Dickson* (1858) EB & E 148.

4 The cases mentioned in notes 1, 3 supra are probably covered by the language of what is now the Sale of Goods Act 1979 s 31(2) (see PARA 187 post) ('treat the whole contract as repudiated'), these words being wide enough to apply to a rescission ab initio.

5 Eg a book to be published in parts or a machine deliverable in parts or a suit of clothes. See *Honck v Muller* (1881) 7 QBD 92 at 99, CA, per Bramwell LJ.

6 There is no decided authority on this point but it follows from principle: see *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 444, HL, per Lord Blackburn. Notwithstanding the division of the price, delivery of all the goods would in some cases be the consideration for the buyer's promise to accept any of them: see the principle stated in *Chanter v Leese* (1840) 5 M & W 698 at 701-702, Ex Ch. Where the design and construction of vessels formed part of a shipbuilding yard's contractual duties, the yard was able to assert that there had been no total failure of consideration, notwithstanding that the property in the vessels had not passed to the buyers: see *Stoczni Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL; and CONTRACT vol 9(1) (Reissue) PARA 992.

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161-234 Performance of the Contract

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/B. PARTICULAR RULES/181. Amount of instalments.

181. Amount of instalments.

Where the amount of the instalments is not specified in the contract, it is a question dependent on its construction whether the instalments must be distributed rateably over the period appointed for the delivery of the whole quantity of the goods¹.

If rateable instalments are not contemplated by the contract, the amount of any instalment tendered or demanded must be reasonable, having regard to the time and circumstances of such tender or demand², and, in particular, to the amount of the goods contracted for, and the period specified for complete delivery³.

1 *Calaminus v Dowlais Iron Co* (1878) 47 LJQB 575 (where the circumstances indicative of an intention that the instalments should not be rateable are stated).

- 2 *Calaminus v Dowlais Iron Co* (1878) 47 LJQB 575.
- 3 *Coddington v Paleologo* (1867) LR 2 Exch 193 at 197 per Martin B.

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161-234 Performance of the Contract

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/B. PARTICULAR RULES/182. Seller's election of single or instalment delivery.

182. Seller's election of single or instalment delivery.

Where the seller has the option of delivering the goods either as a whole or by instalments, and elects to deliver them as a whole, and the goods are rejected by the buyer as not being in accordance with the contract, the seller's election is revocable, and, in the absence of a mutual intention to abandon the contract, he may subsequently in due time tender other goods or an instalment of them¹.

1 It is submitted that this follows from *Borrowman, Phillips & Co v Free and Hollis* (1878) 4 QBD 500, CA; *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239, CA. See also *Ashmore & Son v CS Cox & Co* [1899] 1 QB 436 at 440 per Lord Russell of Killowen CJ. In *Reuter Hufeland & Co v Sala & Co* supra the tender of 20 tons as an instalment, after the rejection of the 25 tons, would, it seems, have been good if the tender had been in time: see especially at 245, 248. See also PARA 179 note 2 ante.

UPDATE

161-234 Performance of the Contract

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/B. PARTICULAR RULES/183. 'Average' or 'about equal' instalments.

183. 'Average' or 'about equal' instalments.

Where goods are deliverable by 'average' or 'about equal' instalments with reference to specified times of delivery, or on similar terms, it is a question of fact whether, at any particular time, the contract quantities have, in a reasonable commercial sense, been delivered, or whether at such time there is any excess or deficiency so as to constitute a breach of contract¹.

It is submitted that, if there is an excess which has been accepted, the excess will be taken into account in the calculation of the quantities in connection with subsequent deliveries.

1 *Barningham v Smith* (1874) 31 LT 540; *Nederlandsche Cacaofabrik v David Challen & Co Ltd* (1898) 14 TLR 322. In *Ireland & Son v Merryton Coal Co* (1894) 21 R 989, Ct of Sess, 'average or about equal monthly quantities' seems to have been treated as meaning in substance 'about equal monthly quantities', as the buyer was held to be bound to buy in against the seller every month.

UPDATE

161-234 Performance of the Contract

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/B. PARTICULAR RULES/184. Pro tanto discharge of contract by breach.

184. Pro tanto discharge of contract by breach.

The contract, so far as it applies to any particular instalment of the goods, is discharged where default has been made in the delivery or acceptance of the instalment¹, or an event has happened which, by the terms of the contract, excuses delivery². Accordingly, the seller cannot afterwards claim to deliver the instalment, nor can the buyer demand it.

The fact that, where the party entitled to enforce or require delivery of any instalment of the goods, fails to do so, or that by mutual consent neither party has insisted on delivery at the contract time, is relevant, but not conclusive, to show a mutual agreement to rescind the contract, so far as it applies to the instalment undelivered³.

1 *Simpson v Crippin* (1872) 42 LJQB 28 at 33 per Blackburn J; *Barningham v Smith* (1874) 31 LT 540 at 543 per Bramwell B; *De Oleaga v West Cumberland Iron and Steel Co* (1879) 4 QBD 472 at 475, DC; *Nederlandsche Cacaofabrik v David Challen & Co Ltd* (1898) 14 TLR 322 at 323 per Bigham J. A fortiori, where each delivery is to be deemed a separate contract: *Higgin v Pumpherston Oil Co Ltd* (1893) 20 R 532 at 535, Ct of Sess per the Lord President. The liability in damages of the party in default remains, as does the right of the other party to repudiate the contract, under the Sale of Goods Act 1979 s 31(2) (see PARA 187 post), if the breach was a vital one. *Tyers v Rosedale and Ferryhill Iron Co* (1875) LR 10 Exch 195, Ex Ch is not inconsistent with the proposition stated in the text; in that case the claimant was not in default.

2 *De Oleaga v West Cumberland Iron and Steel Co* (1879) 4 QBD 472, DC ('dangers or accidents of the mines'); *Stephens, Mawson & Co v Great Western Colliery Co Ltd* (1899) 15 TLR 432 (strike); *Belgaard v Green, Holland & Co* (1908) Times, 26 November ('hindrances interfering with production'). If the seller has the option of omitting delivery, wholly or partially, he may do so wholly, even though he is able to make a partial delivery: *Belgaard v Green, Holland & Co* supra. *De Oleaga v West Cumberland Iron and Steel Co* supra shows the distinction between a provision which excuses, and one which merely entitles the seller to postpone, delivery.

3 See and cf *Tyers v Rosedale and Ferryhill Iron Co* (1875) LR 10 Exch 195, Ex Ch; *Higgin v Pumpherston Oil Co Ltd* (1893) 20 R 532, Ct of Sess; *Pearl Mill Co Ltd v Ivy Tannery Co Ltd* [1919] 1 KB 78, DC.

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161-234 Performance of the Contract

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/B. PARTICULAR RULES/185. Postponement of delivery of instalments.

185. Postponement of delivery of instalments.

When the delivery of an instalment of the goods is postponed after the contract, and no period of postponement is fixed by the parties, the instalment must be delivered within a reasonable time¹.

When postponement is made under a power in the contract exercisable during the existence of a specified state of affairs, the reasonable time runs from the state of affairs coming to an end². Where it is made on the request of one party assented to by the other, the time runs from the last request for postponement³.

Where postponement is made on the coming into existence of a specified state of affairs, and a reasonable time for the delivery and acceptance of the undelivered residue of the goods elapses before the state of affairs has come to an end, the contract is wholly discharged as against both parties⁴.

An assent to a request for postponement is revocable, unless it amounts to a new contract; accordingly, it has been held that the party assenting may afterwards require the other party to deliver or accept the goods on the terms of the contract⁵. However, it seems likely that an assent to a request for postponement will usually amount to a new contract.

1 *Tyers v Rosedale and Ferryhill Iron Co* (1875) LR 10 Exch 195, Ex Ch; *Hickman v Haynes* (1875) LR 10 CP 598; *King v Parker* (1876) 34 LT 887; *De Oleaga v West Cumberland Iron and Steel Co* (1879) 4 QBD 472, DC; *Hartley v Hymans* [1920] 3 KB 475. A continued postponement is, however, some evidence of a mutual intention to rescind: see PARA 184 text and note 3 ante. In determining a reasonable time, regard must be had to the contemplated duration of the contract, the means which the seller had to make up the arrears and possibly other circumstances: see *De Oleaga v West Cumberland Iron and Steel Co* supra at 475-476.

2 *De Oleaga v West Cumberland Iron and Steel Co* (1879) 4 QBD 472, DC.

3 *Hickman v Haynes* (1875) LR 10 CP 598; *Hartley v Hymans* [1920] 3 KB 475. It was decided in *Plevins v Downing* (1876) 1 CPD 220, that, if the original contract is relied on, the request must be made during the contract period by the party to be charged only; but cf *Tyers v Rosedale and Ferryhill Iron Co* (1873) LR 8 Exch 305 at 318 per Martin B. See also *Tyers v Rosedale and Ferryhill Iron Co* (1875) LR 10 Exch 195 at 197, Ex Ch, per Blackburn J; *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274, CA; and *Hartley v Hymans* supra at 491.

4 *De Oleaga v West Cumberland Iron and Steel Co* (1879) 4 QBD 472, DC. See also *Geipel v Smith* (1872) LR 7 QB 404 (charterparty); *King v Parker* (1876) 34 LT 887. To enforce the contract after excessive delay might have the effect of making it applicable to circumstances which the parties did not contemplate: *Jackson v Union Marine Insurance Co* (1873) LR 8 CP 572. The parties must, therefore, be presumed to have intended from the first that an unreasonable delay should discharge them: *Behn v Burness* (1863) 3 B & S 751 at 758, Ex Ch. As to frustration generally see PARA 67 ante; and CONTRACT vol 9(1) (Reissue) PARA 897 et seq.

5 *Ogle v Earl Vane* (1867) LR 2 QB 275 (affd (1868) LR 3 QB 272, Ex Ch); *Hickman v Haynes* (1875) LR 10 CP 598; *Levey & Co v Goldberg* [1922] 1 KB 688. All these cases were concerned with the waiver of terms in contracts required by law to be evidenced in writing: see CONTRACT vol 9(1) (Reissue) PARAS 623, 1026-1027.

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161-234 Performance of the Contract

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186. Payment not ordinarily a condition precedent.

Payment of the price due for previous deliveries is not, in the absence of an agreement to that effect¹, a condition precedent to the liability of the seller to deliver subsequent instalments of the goods²; but, if the buyer becomes insolvent, such a condition is then implied by law³.

1 *Ebbw Vale Steel, Iron and Coal Co Ltd v Blaina Iron and Tinplate Co Ltd* (1901) 6 Com Cas 33, CA.

2 *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289 at 293 per Mellish LJ. See also *Clarke v Burn* (1866) 14 LT 439; *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434, HL. Cf *Howell v Evans* (1926) 42 TLR 310, DC. A positive refusal to pay for subsequent instalments would, however, generally be a repudiation of the contract by the buyer under the Sale of Goods Act 1979 s 31(2): see PARA 187 post.

3 *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289; *Re Phoenix Bessemer Steel Co, ex p Carnforth Haematite Iron Co* (1876) 4 ChD 108, CA. See also PARAS 242 note 9, 281 note 2 post. Cash must be paid or tendered: *Re Edwards, ex p Chalmers* supra; *Re Nathan, ex p Stapleton* (1879) 10 ChD 586, CA.

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iii) Instalment Deliveries/C. REPUDIATION FOR PARTIAL BREACH/187. When either party may repudiate for partial breach.

C. REPUDIATION FOR PARTIAL BREACH

187. When either party may repudiate for partial breach.

Where there is a contract for the sale of goods¹ to be delivered by stated instalments which are to be separately paid for, and the seller² makes defective³ deliveries⁴ in respect of one or more instalments, or the buyer⁵ neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract⁶ and the circumstances of the case, whether the breach of contract is a repudiation⁷ of the whole contract, or whether it is a severable breach⁸ giving rise to a claim for compensation, but not to

a right to treat the whole contract⁹ as repudiated¹⁰. A similar principle applies where the instalments are not stated¹¹.

In particular, a breach in relation to one or more instalments of such a kind, or committed in such circumstances, as to lead to a reasonable inference that similar breaches will be committed in relation to subsequent instalments justifies the party not at fault in treating the contract as repudiated by the party at fault, and he may himself rescind the whole contract¹², provided that such recurring breaches would go to the root of the contract¹³. The rule may apply even where there is a provision in the contract that each instalment of the goods is deemed to be the subject of a separate contract¹⁴.

In contracts for the sale of goods where delivery is to be made by instalments to be separately paid for, the consideration is not entire; it has been divided, and consequently a breach as regards one or more instalments of the goods is not necessarily the breach of a condition precedent to the liability of the other party to accept or deliver the remainder. In such a case each delivery is really like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties may well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract¹⁵. The party who commits a breach which is merely partial is, therefore, allowed by law to aver that he is ready and willing to perform the rest of the contract, subject to compensating the other party for the partial breach¹⁶.

1 For the meaning of 'goods' see PARA 30 ante.

2 For the meaning of 'seller' see PARA 27 ante.

3 It is noticeable that no provision appears to be made for the case where the seller wholly omits to deliver an instalment, but the same principle applies.

4 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 See eg *Withers v Reynolds* (1831) 2 B & Ad 882 (as explained in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA); *Ebbw Vale Steel Iron and Coal Co Ltd v Blaina Iron and Tinplate Co Ltd* (1901) 6 Com Cas 33, CA (where all payments were to be made on the due date as a condition precedent to future deliveries). Where the question whether a breach is a vital one depends on the construction of a contract in writing, it is one for the court: *George D Emery Co v Wells* [1906] AC 515, PC. A clause providing that each delivery is to be treated as a separate contract does not prevent prolonged default operating as a repudiation of the whole contract: see the text and notes 12-14 infra.

7 The breach may consist in an express refusal to perform the contract according to its terms, or, in an implied refusal, to be inferred from the party's conduct: *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1882) 9 QBD 648 at 657, CA, per Jessel MR. 'The test is whether the conduct of one party to the contract is really inconsistent with an intention to be bound any longer by the contract': *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* supra at 670 per Bowen LJ. Cf *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60, HL. A failure to perform a vital part of the contract necessarily amounts to an implied repudiation: *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 443, HL, per Lord Blackburn, quoted in *Rhymney Rly Co v Brecon and Merthyr Tydfil Junction Rly Co* (1900) 83 LT 111 at 117, CA. For there to be a repudiation it is not necessary that the party in breach should intend to repudiate, so long as the breach goes to the root of the contract: *Robert A Munro & Co Ltd v Meyer* [1930] 2 KB 312; *Warinco AG v Samor SpA* [1979] 1 Lloyd's Rep 450, CA. If the breach is reasonably capable of an explanation by virtue of which it would not go to the root of the contract, the party in breach should be given an opportunity to account for it: *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 2 All ER 294, [1953] 1 WLR 815, CA. A breach is vital where it renders the performance of the rest of the contract something substantially different from what the party not at fault contracted for: *Bettini v Gye* (1876) 1 QBD 183 at 188; *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* supra at 443 per Lord Blackburn. The main tests are: (1) the quantitative ratio of the faulty instalments to the whole contract; and (2) the degree of probability of a repetition of the breach: *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148, CA. As to repudiation generally see CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

8 There is no necessary inference that a partial breach is a severable breach (*Millar's Karri and Jarrah Co (1902) v Weddel, Turner & Co* (1908) 100 LT 128 per curiam), or that it is a vital one (*Cornwall v Henson* [1900] 2 Ch 298 at 304, CA, per Collins LJ).

9 It is not clear whether 'the whole contract' means the whole contract ab initio, or only the unfulfilled part of the contract. The Sale of Goods Act 1979 s 31(2) is based on a series of cases in which the question was whether a partial breach by one party exonerated the other party from further performance, but the language of the provision seems to be wide enough to cover cases in which the partial breach by either party amounts to a total failure of the consideration moving from him.

10 Ibid s 31(2); *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434, HL. The Sale of Goods Act 1979 s 30(1) (see PARA 172 ante) lays down the general rule that delivery by the seller of the full quantity is prima facie a condition precedent to the buyer's duty to accept and pay for any of the goods delivered. Conversely, as the duties of the parties are correlative (see s 28; and PARA 162 ante), the seller is prima facie not bound to deliver any goods unless the buyer is ready and willing to accept and pay for all (*Kingdom v Cox* (1848) 5 CB 522), but this is so because the consideration is entire on both sides, and a partial breach is a total breach. See further CONTRACT vol 9(1) (Reissue) PARA 998.

11 *Coddington v Paleologo* (1867) LR 2 Exch 193 at 197; *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239, CA; *Jackson v Rotax Motor and Cycle Co* [1910] 2 KB 937, CA.

12 *Berk & Co Ltd v Day and White* (1897) 13 TLR 475; *Millar's Karri and Jarrah Co (1902) v Weddel, Turner & Co* (1908) 100 LT 128; *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148, CA.

13 Repeated minor breaches causing only slight damage to the other party will not go to the root of the contract, even where they are likely to be continued: *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA.

14 *Berk & Co Ltd v Day and White* (1897) 13 TLR 475; *Robert A Munro & Co v Meyer* [1930] 2 KB 312; cf *Peene v Taylor* (1916) 32 TLR 674.

15 *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239 at 246, CA, per Thesiger LJ.

16 Illustrations of the principle enacted in what is now the Sale of Goods Act 1979 s 31(2), although not always within its terms, are *Withers v Reynolds* (1831) 2 B & Ad 882; *Kent v Godts* (1855) 26 LTOS 88 (buyer's rejection of first instalment based on mistake); *Jonassohn v Young* (1863) 4 B & S 296 (shipping inferior coal and detaining buyer's ship); *Clarke v Burn* (1866) 14 LT 439; *Simpson v Crippin* (1872) LR 8 QB 14; *Corcoran v Proser* (1873) 22 WR 222 (buyer's claim to deduct value of short weight); *Freeth v Burr* (1874) LR 9 CP 208 (refusal to pay for first instalment explained); *Morgan v Bain* (1874) LR 10 CP 15 (notice of buyer's insolvency, and no tender of cash); *Leeson v North British Oil and Candle Co* (1874) LR 8 CL 309; *Bloomer v Bernstein* (1874) LR 9 CP 588 (notice of buyer's insolvency and other facts); *Re Phoenix Bessemer Steel Co, ex p Carnforth Haematite Iron Co* (1876) 4 ChD 108, CA (credit asked for, but no declaration of buyer's insolvency); *Honck v Muller* (1881) 7 QBD 92, CA (buyer takes no coal in first month of three); *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434, HL (hesitation on erroneous grounds of law to pay); *Dickinson v Fanshaw* (1892) 8 TLR 271, CA (non-acceptance of full quantity of some instalments by reason of trade depression); *Booth v Bowron* (1892) 8 TLR 641; *Mess v Duffus & Co* (1901) 6 Com Cas 165; *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293, PC; *Payzu Ltd v Saunders* [1919] 2 KB 581, CA; *Taylor v Oakes, Roncoroni & Co* (1922) 127 LT 267, CA (no general repudiation); *James Shaffer Ltd v Findlay Durham and Brodie* [1953] 1 WLR 106, CA (dispute as to construction of contract); and see the cases cited in note 7 supra. The three cases of *Hoare v Rennie* (1859) 5 H & N 19, *Simpson v Crippin* supra and *Honck v Muller* supra have given rise to much controversy. They present this common feature, that the breach of the contract was a breach at the outset. Perhaps *Simpson v Crippin* supra, where the buyer was held not entitled to rescind, may be distinguished from *Honck v Muller* supra, where he was held to be so entitled, on the ground that, if the buyer had afterwards taken all the residue of the goods contracted for, his default in the first instalment would have amounted to no more than about 6% of the whole quantity, whereas in *Honck v Muller* supra at 100, Bramwell LJ considered that 33% of the goods was 'not a trifle', and that failure by the buyer to accept delivery of that amount went to the root of the contract. In *Hoare v Rennie* supra the only issue was whether the buyer had to accept and pay for a first instalment of goods much smaller than that contracted for, and it was held that he did not. It was not decided whether the seller's breach was a repudiation of the contract.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iv) Delivery to Carrier/188. Delivery to carrier prima facie a delivery to buyer.

(iv) Delivery to Carrier

188. Delivery to carrier prima facie a delivery to buyer.

Where, in pursuance of a contract of sale¹, the seller² is authorised or required to send³ goods⁴ to the buyer⁵, delivery of the goods to a carrier⁶, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie⁷ deemed to be a delivery⁸ of the goods to the buyer⁹. However, where the buyer deals as consumer¹⁰, delivery of the goods to the carrier is not delivery of the goods to the buyer¹¹.

1 For the meaning of 'contract of sale' see PARA 29 ante. Delivery of the goods to a carrier for transmission to a person on sale or return, approval etc is not a delivery to the consignee, there being at the time of delivery no contract of sale: *Swain v Shepherd* (1832) 1 Mood & R 223; *Jacobs v Harbach* (1886) 2 TLR 419.

2 For the meaning of 'seller' see PARA 27 ante.

3 Whether it is for the seller to send the goods to the buyer at all depends in each case on the contract: see the Sale of Goods Act 1979 s 29(1); and PARA 165 ante.

4 For the meaning of 'goods' see PARA 30 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 The Post Office, in this connection, is a carrier like any other carrier: see *Badische Anilin und Soda Fabrik v Basle Chemical Works, Bindschedler* [1898] AC 200 at 203-204, 207, HL. As to the law relating to carriers generally see CARRIAGE AND CARRIERS vol 7 (2008) PARA 1 et seq.

7 The presumption is that the carrier is the buyer's agent to take delivery: *Vale v Bayle* (1775) 1 Cowp 294; *Dawes v Peck* (1799) 8 Term Rep 330; *Dunlop v Lambert* (1839) 6 Cl & Fin 600 at 620, HL; *Wait v Baker* (1848) 2 Exch 1 at 7 per Parke B. This presumption applies even where the carrier wrongfully refuses to give the buyer actual possession on arrival: *Groning v Mendham* (1816) 5 M & S 189. The presumption may be rebutted, as where the seller agrees to deliver the goods at their destination, or reserves the right of disposal under the Sale of Goods Act 1979 s 19(1) (see PARA 137 ante) or, as the case may be, s 19(2) (see PARA 370 post). In either of these cases the carrier is the agent of the seller, or, as the case may be, of the person indicated by the bill of lading, and not of the buyer: *Gabarron v Kreeft, Kreeft v Thompson* (1875) LR 10 Exch 274 at 285 per Cleasby B; *Dunlop v Lambert* supra at 620 per Lord Cottenham LC; *Galbraith and Grant Ltd v Block* [1922] 2 KB 155, DC. As to the rules relating to international sale contracts see PARA 322 et seq post.

8 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante. It is also prima facie an appropriation of the goods: see the Sale of Goods Act 1979 s 18 r 5(2); and PARA 127 ante. Cf *Healy v Howlett & Sons* [1917] 1 KB 337, DC. It does not constitute acceptance by the buyer of the goods, since the carrier is not ordinarily the buyer's agent to examine (as distinct from receive) the goods: *Hanson v Armitage* (1822) 5 B & Ald 557; *Norman v Phillips* (1845) 14 M & W 277 at 283; *Meredith v Meigh* (1853) 2 E & B 364. See, however, *Commercial Fibres (Ireland) Ltd v Zabaida and Zabaida (t/a Lenmore Trading)* [1975] 1 Lloyd's Rep 27. As to the buyer's right of rejection see also PARA 347 post. Whilst in the carrier's hands, the goods may be stopped in transit by the seller in the event of the buyer's insolvency: see PARA 256 post.

9 Sale of Goods Act 1979 s 32(1), which complements s 29(2) (see PARA 165 ante) by which the place of delivery is prima facie the seller's place of business or residence or the place where the goods are. Delivery to a carrier discharges the seller's duty to deliver, but he may, by agreement, take the risk of the goods' arrival: see PARAS 142 ante, 191 post.

10 As to the meaning of 'dealing as consumer' see PARA 307 note 5 post.

11 Sale of Goods Act 1979 s 32(4) (added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 4(3)).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iv) Delivery to Carrier/189. Seller's duty to follow buyer's instructions.

189. Seller's duty to follow buyer's instructions.

The seller must duly follow any instructions of the buyer as to the mode of transmission of the goods consistent with the terms of the contract. If he fails to do so, the goods are at his risk during the transit¹.

1 *Ullock v Reddelein* (1828) Dan & LI 6 (where the goods were sent by the wrong route). Cf *Hills v Lynch* 26 NY Sup Ct 42 (1864); *Wheelhouse v Parr* 141 Mass 593 (1886). If the instructions are duly followed, the risk is with the buyer: *Vale v Bayle* (1775) 1 Cowp 294. See also *Cooke v Ludlow* (1806) 2 Bos & PNR 119; *Wimble, Sons & Co v Rosenberg & Sons* [1913] 3 KB 743, CA.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(iv) Delivery to Carrier/190. Seller's duty as to contract with carrier.

190. Seller's duty as to contract with carrier.

Unless otherwise authorised by the buyer¹, or unless the buyer deals as consumer², the seller³ must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods⁴ and the other circumstances of the case⁵; and, if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery⁶ to the carrier as a delivery to himself⁷, or may hold the seller responsible in damages⁸.

- 1 For the meaning of 'buyer' see PARA 29 ante.
- 2 See the Sale of Goods Act 1979 s 32(4) (as added); and PARA 188 ante. As to the meaning of 'dealing as consumer' see PARA 307 note 5 post.
- 3 For the meaning of 'seller' see PARA 27 ante.
- 4 For the meaning of 'goods' see PARA 30 ante.
- 5 The circumstances of the case are those existing at the time when the seller has to make the contract with the carrier: see by analogy the position under a cif contract as stated in *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL (where the usual shipping route via Suez was closed after the contract for sale was made but before the goods were shipped, and it was held that it was the seller's duty to ship the goods via the Cape of Good Hope).
- 6 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.
- 7 This has the effect of throwing the risk of the transit, in the circumstances mentioned, on the seller.
- 8 Sale of Goods Act 1979 s 32(2). See *Clarke v Hutchins* (1811) 14 East 475; cf *Cothay v Tute* (1811) 3 Camp 129; *Buckman v Levi* (1813) 3 Camp 414. The rule has been thus stated, that it is the seller's duty 'to take the usual and ordinary precaution ... to do whatever is necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance as that in case of a loss the defendant (buyer) might have his indemnity against the carriers': *Clarke v Hutchins* supra at 476 per Lord Ellenborough CJ. As the seller's duty under the Sale of Goods Act 1979 s 32(2) is only to act reasonably in the circumstances to provide against loss or damage in transit, it is conceived that he is under no liability to enter into such a contract with the carrier as will ensure an indemnity to the buyer in all events, as eg against loss or damage by act of God or other perils excepted in the case of carriers: see *Law and Bonar Ltd v British American Tobacco Co Ltd* [1916] 2 KB 605; *Thomas Young & Sons Ltd v Hobson & Partners* (1949) 65 TLR 365, CA. The buyer's remedy for a breach by the seller of his duty under the Sale of Goods Act 1979 s 32(2) is either to treat the contract as repudiated and to claim damages or to elect to affirm the contract and to claim damages for breach of the particular duty imposed by s 32(2). As to insurance where goods are sent by a route involving sea transit see s 32(3); and PARA 352 post.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(v) Deterioration of Goods in Transit/191. Risk where seller agrees to deliver at destination.

(v) Deterioration of Goods in Transit

191. Risk where seller agrees to deliver at destination.

Where the seller¹ of goods² agrees to deliver them at his own risk³ at a place other than that where they are when sold⁴, the buyer⁵ must nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit⁶. The seller must bear the risk of any extraordinary or unusual deterioration during transit⁷.

1 For the meaning of 'seller' see PARA 27 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 Where the seller agrees to deliver the goods at their destination, the property ordinarily does not pass until delivery is made accordingly (see PARA 133 ante), and the risk prima facie attaches to the property (see PARA 142 ante). Even where the property has passed (which is apparently the case contemplated here), the seller may take the risk: *Calcutta and Burmah Steam Navigation Co v De Mattos* (1863) 32 LJQB 322 at 328 per Blackburn J. That risk is here qualified.

4 The Sale of Goods Act 1979 s 33 does not say 'where they are at the time of the contract', so the enactment seems to apply only where the property has passed. For the meaning of 'sale' see PARA 27 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 Sale of Goods Act 1979 s 33. See *Bull v Robison* (1854) 10 Exch 342 (where it is conceived the property did not pass until the arrival of the goods, so that the case may not strictly be an authority under the Sale of Goods Act 1979 s 33). Where the seller's duty is simply to dispatch goods to another place, then ordinarily he undertakes that they will, on dispatch, be fit to withstand normal transit and to remain of satisfactory quality (formerly merchantable) for a reasonable time after its conclusion: see PARA 192 post. Thus, in the present case, where the seller retains the risk during transit, it is thought that the words 'necessarily incident' presuppose compliance with a similar undertaking.

7 *Bull v Robison* (1854) 10 Exch 342; *Walker v Langdale's Chemical Manure Co* (1873) 11 M 906 (where the carcase of a whale was becoming putrid by delay).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(v) Deterioration of Goods in Transit/192. Risk where perishable goods are to be dispatched.

192. Risk where perishable goods are to be dispatched.

Where the seller of goods agrees to dispatch them to the buyer by delivering them to a carrier or other agent for transmission on behalf of the buyer, the seller normally undertakes that the goods will be dispatched in a condition such that they will:

- 193 (1) be able to withstand ordinary transit;
- 194 (2) be of satisfactory quality both on arrival at their destination and for a reasonable time thereafter; and
- 195 (3) where relevant, be reasonably fit for any particular purpose made known to the seller¹.

Thus, in effect, the seller takes the risk of deterioration in the ordinary course of transit, whereas the buyer takes the risk only of extraordinary deterioration due to abnormal conditions².

¹ *Beer v Walker* (1877) 46 LJQB 677; *Mash and Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 All ER 485, [1961] 1 WLR 862 (revsd on other grounds [1962] 1 All ER 77n, [1962] 1 WLR 16n, CA). See also *Ollett v Jordan* [1918] 2 KB 41 at 47, DC, per Atkin J; *AB Kemp Ltd v Tollard* [1956] 2 Lloyd's Rep 681; *Cordova Land Co Ltd v*

Victor Bros Inc [1966] 1 WLR 793. Cf *Oleificio Zucchi SpA v Northern Sales Ltd* [1965] 2 Lloyd's Rep 496 at 517-518.

2 See *Mash and Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 All ER 485 at 493, [1961] 1 WLR 862 at 871-872 per Diplock J. However, the risk of deterioration of a kind which all goods of the contract description would necessarily or very probably suffer in the ordinary course of the contemplated transit would, it is thought, normally be outside the scope of the seller's undertaking and so fall on the buyer: see *Dickson v Zizinia* (1851) 10 CB 602; *Bull v Robison* (1854) 10 Exch 342. See also *Broome v Pardess Co-operative Society of Orange Growers (Est 1900) Ltd* [1940] 1 All ER 603, CA (broker's contract).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(vi) Buyer's Position with regard to Insurance by Seller/193. Right of buyer to seller's insurance.

(vi) Buyer's Position with regard to Insurance by Seller

193. Right of buyer to seller's insurance.

The seller of goods may effect insurance on the goods in terms covering the buyer also as an insured¹. Where the seller of goods insures them, his interest in the insurance ceases on transfer² of the goods to the buyer. Neither the seller nor the buyer³ will thereafter be able to recover on such an insurance unless it is validly⁴ assigned to the buyer contemporaneously with the sale or is agreed by the contract for sale to be so assigned⁵. It is a question of construction whether the seller has expressly or impliedly agreed to procure and assign to the buyer any, and if so what, insurance⁶.

Subject to:

- 196 (1) any contrary provision in the contract;
- 197 (2) any requisite consents by the insurers; and
- 198 (3) payment by the buyer of the proportionate amount of the premium from the date of the contract,

any insurance money which, after the date of the contract for sale, becomes payable under any policy of insurance maintained by the seller in respect of damage to or destruction of property included in the contract is, on completion of the contract, held or recoverable by the seller on behalf of the buyer, and must be paid over by the seller⁷.

1 The buyer must either authorise or ratify such insurance before he may claim on it: see INSURANCE vol 25 (2003 Reissue) PARA 388.

2 Ie when he has parted with property, risk and probably any unpaid vendor's lien: see INSURANCE vol 25 (2003 Reissue) PARA 377.

3 Ie assuming that the buyer cannot maintain that he was covered as an original insured: see note 1 supra.

4 In non-marine (other than life) insurance such an assignment generally requires consent of the insurers; a marine insurance is generally assignable before or after loss: see *Peters v General Accident and Life Assurance Corp Ltd* [1937] 4 All ER 628 at 633 per Goddard J (on appeal [1938] 2 All ER 267, CA); and INSURANCE vol 25 (2003 Reissue) PARAS 389, 624.

5 *Powles v Innes* (1843) 11 M & W 10; *North of England Oil-Cake Co v Archangel Insurance Co* (1875) LR 10 QB 249, DC; *Rayner v Preston* (1881) 18 ChD 1, CA.

6 The commonest instance is a cif contract: see PARAS 325, 336 post. See also *Ionides v Harford* (1859) 29 LJ Ex 36; *Ralli v Universal Marine Insurance Co* (1862) 4 De GF & J 1; *Yuill & Co v Scott-Robson* [1908] 1 KB 270, CA; *Vincentelli & Co v John Rowlett & Co* (1911) 16 Com Cas 310; *Cantiere Meccanico Brindisino v Janson* [1912] 3 KB 452, CA.

7 See the Law of Property Act 1925 s 47(1), which applies to sales of goods as well as to real property: see s 205(1)(xx); and INSURANCE vol 25 (2003 Reissue) PARA 625.

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161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(vi) Buyer's Position with regard to Insurance by Seller/194. Seller's insurance exceeding contract price.

194. Seller's insurance exceeding contract price.

As between himself and the seller, the buyer is entitled to the full benefit of the insurance on the goods effected by or available to the seller, notwithstanding that the money secured by it may exceed the contract price, where he has contracted for the goods as being or to be so insured¹; and, even where he has not so contracted, he is entitled to all the money secured where the seller has in the performance of the contract unconditionally delivered the policy to the buyer to whom the property in the goods and the insurable interest have passed².

1 *Ralli v Universal Marine Insurance Co* (1862) 4 De GF & J 1 (contemporaneous policy).

2 *Landauer v Asser* [1905] 2 KB 184, DC (pointing out that, if the buyer could not claim the full insurance money in such a case, the seller would have no insurable interest which would entitle him to claim the excess).

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161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(2) DELIVERY OF THE GOODS/(vi) Buyer's Position with regard to Insurance by Seller/195. Seller's independent insurance.

195. Seller's independent insurance.

Even where the buyer has contracted for the benefit of an insurance on the goods by the seller, he is not, unless specially agreed, entitled as against the seller to the benefit of any insurance supplementary to the contract, that is to say, effected by the seller for his own purposes independently of the contract; and, if the buyer has in fact received from the insurer the money secured by it, he must hold it for the seller¹.

¹ *Harland and Wolff Ltd v J Burstall & Co* (1901) 6 Com Cas 113 (seller's profit policy); *Strass v Spillers and Bakers Ltd* [1911] 2 KB 759 ('increased value' honour policy). In both cases the insurance was binding on the insurers in honour only, as well as being purely for the sellers' own interests.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/196. Buyer's right to examine the goods.

(3) ACCEPTANCE OF THE GOODS

196. Buyer's right to examine the goods.

Unless otherwise agreed¹, when the seller² tenders delivery³ of goods⁴ to the buyer⁵, he is bound on request to afford the buyer a reasonable opportunity⁶ of examining the goods for the purpose of ascertaining whether they are in conformity with the contract⁷ and, in the case of a contract for sale by sample⁸, of comparing the bulk with the sample⁹.

Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract and, in the case of a contract for sale by sample, of comparing the bulk with the sample¹⁰.

¹ *Pettitt v Mitchell* (1842) 4 Man & G 819; *Polenghi Bros v Dried Milk Co Ltd* (1904) 92 LT 64; *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL; *GF Taylor & Co v E Ofverberg & Co* (1923) 39 TLR 637, CA. The right of examination may, subject to the Unfair Contract Terms Act 1977, be negated or varied by express agreement, course of dealing between the parties or usage: see the Sale of Goods Act 1979 s 55(1); and PARAS 12, 100 ante. While the right to examine itself may be thus varied, it would appear, however, that, where the buyer deals as consumer, he cannot be taken to have accepted goods as conforming with the contract or, in the case of a sale by sample, with the bulk, unless he has been afforded a reasonable opportunity to examine the goods: see the Sale of Goods Act 1979 s 35(3) (as substituted); and PARA 199 post.

In a contract on cif terms, or where otherwise payment is to be made in exchange for shipping documents, an examination of the goods on or before the tender of the documents is waived: *Polenghi Bros v Dried Milk Co Ltd*

supra (cif terms); *E Clemens Horst Co v Biddell Bros* supra. In an fob contract the buyer does not lose his right of rejection because he does not inspect the goods until the arrival of the ship at its destination: *Bragg v Villanova* (1923) 40 TLR 154, DC. As to cif contracts see PARA 324 et seq post; and as to fob contracts see PARA 351 et seq post. Examination may also be waived by the buyer, as eg where the goods are to be delivered at a particular place and there is no one there to examine them: *Castle v Swarder* (1860) 5 H & N 281 at 288 per Bramwell B; revsd on other grounds (1861) 6 H & N 828 at 837, Ex Ch, per Cockburn CJ. As to the buyer's right to damages notwithstanding a waiver of examination see *Khan v Duché* (1905) 10 Com Cas 87.

2 For the meaning of 'seller' see PARA 27 ante.

3 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

4 For the meaning of 'goods' see PARA 30 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 le at the place expressly or by implication appointed for inspection: see PARA 197 post. If the buyer requests an examination, he must examine the goods at a convenient time: *Lorymer v Smith* (1822) 1 B & C 1.

7 For the meaning of 'contract of sale' see PARA 29 ante.

8 As to sales by sample see PARAS 93-94 ante.

9 Sale of Goods Act 1979 s 34 (amended by the Sale and Supply of Goods Act 1994 ss 2(2), 7(2), Sch 3). See *Isherwood v Whitmore* (1843) 11 M & W 347 (tender of goods in closed casks); *Startup v Macdonald* (1843) 6 Man & G 593 at 610, Ex Ch, per Rolfe B.

10 See the Sale of Goods Act 1979 s 35(2) (as substituted); and PARA 199 post.

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161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/197. Time and place of examination.

197. Time and place of examination.

The time and place of delivery is prima facie the time and place for the examination of the goods by the buyer¹; but the circumstances of the case may indicate some other place and time², especially where the goods contain a latent defect not discoverable by ordinary diligence at the place of delivery³. In the last case an examination of the goods at the place of delivery is not binding on the buyer, and he may, on a subsequent inspection, reject the goods, if they are not in conformity with the contract⁴. Where a buyer is, to the knowledge of the seller, purchasing the goods for resale to an ultimate buyer, the inspection is postponed, if the place at which delivery to the immediate buyer takes place is unsuitable for inspection or the nature or packing of the goods makes inspection there unreasonable⁵.

The prima facie rule does not, however, apply to cif and fob contracts, where commercial usage has imported a different rule⁶.

1 *Perkins v Bell* [1893] 1 QB 193, CA. Cf *Scaliaris v E Ofverberg & Co* (1921) 37 TLR 307, CA; *Long v Lloyd* [1958] 2 All ER 402 at 407, [1958] 1 WLR 753, CA.

2 Eg where the original place of examination is changed by agreement (*Heilbutt v Hickson* (1872) LR 7 CP 438), or where the goods are delivered at a place where effective examination is impossible (*Grimoldby v Wells* (1875) LR 10 CP 391 (where goods were delivered to the buyer's cart halfway to the buyer's farm)), or where it would be unreasonable to require an examination (*Molling & Co v Dean & Son Ltd* (1901) 18 TLR 217, DC (where books were sold and packed by the seller for export by the buyer)). Cf *Perkins v Bell* [1893] 1 QB 193, CA (where examination was possible at the place of delivery). There is no general rule that under fob contracts the buyer must inspect at the port of shipment: *Boks & Co v JH Rayner & Co* (1921) 37 TLR 800, CA; *Bragg v Villanova* (1923) 40 TLR 154.

3 *Heilbutt v Hickson* (1872) LR 7 CP 438 at 456 per Brett J; *Grimoldby v Wells* (1875) LR 10 CP 391.

4 See the cases cited in note 3 supra.

5 *Saunt v Belcher and Gibbons Ltd* (1920) 90 LJB 541.

6 As to cif contracts see PARA 324 et seq post; and as to fob contracts see PARA 351 et seq post.

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161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/198. When tender by the seller is revocable.

198. When tender by the seller is revocable.

A tender by the seller not made according to the terms of the contract is revocable by him unless it has been accepted¹, or unless it is no longer possible to tender in conformity with the contract², or, it would appear, unless the incorrect tender is to be construed as a repudiation of the contract³. Thus, a non-conforming tender may, save in the three cases mentioned above, be substituted⁴ by a valid tender made within the contract time, or, if no time is specified, within a reasonable time⁵.

1 In *Borrowman, Phillips & Co v Free and Hollis* (1878) 4 QBD 500, CA, it was not decided whether an invalid tender could be withdrawn after it had been accepted; but it is submitted that, being the offer of a new contract, it is irrevocable after acceptance.

2 See *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, [1997] 2 All ER 215, PC; and CONTRACT vol 9(1) (Reissue) PARA 1002.

3 See CONTRACT vol 9(1) (Reissue) PARA 974. As to whether this applies to an incorrect tender of documentation in international sales see PARA 340 note 14 post.

4 *Tetley v Shand* (1871) 25 LT 658; *Borrowman, Phillips & Co v Free and Hollis* (1878) 4 QBD 500, CA. Cf *Gath v Lees* (1865) 3 H & C 558 (where the seller made a proper election which was assented to). See also *Imperial Ottoman Bank v Cowan* (1874) 31 LT 336, Ex Ch; *Ashmore & Son v CS Cox & Co* [1899] 1 QB 436 at 440. As to tender generally see CONTRACT vol 9(1) (Reissue) PARA 971 et seq.

5 What is a reasonable time is a question of fact: see PARA 120 text and note 16 ante.

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161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/199. When acceptance takes place.

199. When acceptance takes place.

The buyer¹ is deemed to have accepted² the goods³:

- 199 (1) when he intimates⁴ to the seller⁵ that he has accepted them⁶; or
- 200 (2) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller⁷.

Where, however, goods are delivered to the buyer, and he has not previously examined them, he is not deemed so to have accepted them until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract⁸ and, in the case of a contract for sale by sample, of comparing the bulk with the sample⁹. Where the buyer deals as consumer¹⁰, the buyer cannot lose that right¹¹ to be deemed not to have accepted the goods by agreement, waiver or otherwise¹².

The buyer is also deemed to have accepted the goods when, after the lapse of a reasonable time¹³, he retains¹⁴ the goods without intimating to the seller that he has rejected them¹⁵. The questions that are material in so determining whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods¹⁶.

The buyer is not deemed¹⁷ to have accepted the goods merely because he asks for, or agrees to, their repair by or under an arrangement with the seller or the goods are delivered to another under a sub-sale or other disposition¹⁸.

Where the contract is for the sale of goods making one or more commercial units¹⁹, the buyer accepting any goods included in a unit is deemed to have accepted all the goods making the unit²⁰.

1 For the meaning of 'buyer' see PARA 29 ante.

2 The question whether the buyer has accepted the goods arises only where the buyer has a right to reject: *Perkins v Bell* [1893] 1 QB 193, CA; *Varley v Whipp* [1900] 1 QB 513. Thus, if the goods have been appropriated, and are in accordance with the contract, the property passes, and a rejection by the buyer is futile, as the goods are his own.

Prior to 22 April 1967 (ie the date on which the Misrepresentation Act 1967 came into operation: see s 6(2); and note 8 infra) the buyer lost the right to reject specific goods once the property in those goods passed to him: see the Sale of Goods Act 1893 s 11(1)(c) (repealed). Since the property in specific goods normally passed under s 18 r 1 (repealed), when the contract was made, the question of acceptance would not arise in relation to such goods. Section 11(1)(c) (repealed) was, however, amended by the Misrepresentation Act 1967 s 4(1) (repealed by the Sale of Goods Act 1979 s 63(2), Sch 3) to omit the reference to specific goods, so that the Sale of Goods Act 1893 ss 34, 35 (repealed) thereafter applied, and the Sale of Goods Act 1979 ss 34, 35 (as amended) (see infra; and PARA 196 ante) now apply to specific goods in the same way as other goods.

3 For the meaning of 'goods' see PARA 30 ante.

4 Notice of acceptance under the Sale of Goods Act 1979 s 35 (as amended) may be by words spoken or written: see *Abbott & Co v Wolsey* [1895] 2 QB 97, CA. The intimation of acceptance need not be explicit but it must be clear: *AC Daniels & Co Ltd v Jungwoo Logic (a firm)* (14 April 2000, unreported).

5 For the meaning of 'seller' see PARA 27 ante.

6 Sale of Goods Act 1979 s 35(1)(a) (substituted by the Sale and Supply of Goods Act 1994 s 2(1)). See *Saunders v Topp* (1849) 4 Exch 390; cf *Varley v Whipp* [1900] 1 QB 513. Requests by a buyer for information which might inform his decision as to whether or not to accept the goods do not amount to an intimation of acceptance: *Clegg v Andersson* [2003] EWCA Civ 320, [2003] 1 All ER (Comm) 721.

7 Sale of Goods Act 1979 s 35(1)(b) (substituted by the Sale and Supply of Goods Act 1994 s 2(1)). Where, when the goods are accepted, property has passed, the phrase 'the ownership of the seller' must be taken to mean 'the resumption of such ownership': see *AC Daniels & Co Ltd v Jungwoo Logic (a firm)* (14 April 2000, unreported).

8 See the Sale of Goods Act 1979 s 34 (as amended); and PARA 196 ante. In relation to a contract made before 22 April 1967 (ie the date on which the Misrepresentation Act 1967 came into force: see s 6(2)), this exception under the Sale of Goods Act 1979 s 35(1) (as amended) does not apply: see s 35(8), Sch 1 paras 1(1), 10. The exception was introduced by the Misrepresentation Act 1967 s 4(2) (repealed by the Sale of Goods Act 1979 Sch 3), which amended the Sale of Goods Act 1893 s 35 (repealed). Before 22 April 1967 s 35 (repealed) cut down the buyer's rights under s 34 (repealed) for, if a buyer did any act which was inconsistent with the ownership of the seller, such as reselling the goods, he would lose his right to reject them. For cases decided before 22 April 1967 see *Chapman v Morton* (1843) 11 M & W 534 (notice of resale and resale by buyer); *Parker v Palmer* (1821) 4 B & Ald 387 (resale); *Parker v Wallis* (1855) 5 E & B 21 (spreading out seed); *Harnor v Groves* (1855) 15 CB 667 (use and resale); *Perkins v Bell* [1893] 1 QB 193, CA; *Molling & Co v Dean & Son* (1901) 18 TLR 217; *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394, HL (where seed with a latent defect was sown by a sub-buyer); *Mechan & Sons Ltd v Bow, M'Lachlan & Co Ltd* (1910) 47 SLR 650; *E Hardy & Co (London) Ltd v Hillerns and Fowler* [1923] 2 KB 490, CA (resale before examination); *Benaim & Co v Debono* [1924] AC 514, PC (resale); *E and S Ruben Ltd v Faire Bros & Co Ltd* [1949] 1 KB 254, [1949] 1 All ER 215 (where there was a delivery to a third person by the seller at the buyer's request); *Pelhams (Materials) Ltd v Mercantile Commodities Syndicate* [1953] 2 Lloyd's Rep 281 (resale); *Mechans Ltd v Highland Marine Charters Ltd* 1964 SC 48 (where a latent defect was not discoverable when the goods were accepted). See also *Commercial Fibres (Ireland) Ltd v Zabaida and Zabaida (t/a Lenmore Trading)* [1975] 1 Lloyd's Rep 27 (where defective packing was apparent to the agents forwarding the goods to the sub-buyer); *Hitchcock v Cameron* [1977] 1 NZLR 85 (where there was a resale by the buyer pending an appeal from a decision holding him liable for the price). As to cif contracts see *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779; *J Rosenthal & Sons Ltd v Esmail* [1965] 2 All ER 860 at 869, [1965] 1 WLR 1117 at 1131, HL, per Lord Pearson. Where there has been a resale, the buyer has put it out of his power to return the goods to the seller, unless the ultimate buyer also consents. The Sale of Goods Act 1893 s 35 (repealed) thus cut down the buyer's rights under s 34 (repealed). Cases relating to the period before 22 April 1967 must now be read subject to the change effected by the Misrepresentation Act 1967 s 4(2) (repealed by the Sale of Goods Act 1979 Sch 3). For the meaning of 'contract of sale' see PARA 29 ante.

9 Sale of Goods Act 1979 s 35(2) (substituted by the Sale and Supply of Goods Act 1994 s 2(1)).

10 As to the meaning of 'dealing as consumer' see PARA 73 note 8 ante.

11 Ie the right to rely on the Sale of Goods Act 1979 s 35(2) (as substituted): see the text to notes 8-9 supra.

12 Ibid s 35(3) (substituted by the Sale and Supply of Goods Act 1994 s 2(1)).

13 *Morrison and Mason Ltd v Clarkson Bros* (1898) 25 R 427, Ct of Sess; *Fisher, Reeves & Co Ltd v Armour & Co Ltd* [1920] 3 KB 614 at 624, CA, per Scrutton LJ. What is a reasonable time is a question of fact: see PARA 120 text and note 16 ante. See also the Sale of Goods Act 1979 s 59; and *Truk (UK) Ltd v Tokmakidis GmbH* [2000] 2 All ER (Comm) 594, [2000] 1 Lloyd's Rep 543; *Jones v Gallagher (t/a Gallery Kitchens and Bathrooms)* [2004] EWCA Civ 10, [2005] 1 Lloyd's Rep 377. The time may be provided for by the contract (*Sharp v Great Western Rly Co* (1841) 9 M & W 7), or may be implied by trade usage (*Sanders v Jameson* (1848) 2 Car & Kir 557 (one day)). After what is prima facie an unreasonable delay in rejection, the burden is on the buyer to show that it is reasonable, eg where he could not discover a breach of a condition before: *Hyslop v Shirlaw* (1905) 7 F 875 at 882, Ct of Sess, per Lord Kyllachy (genuineness of picture). See also *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220, [1987] RTR 384 (nature of particular defect and speed with which it might have been discovered were held to be irrelevant). In assessing what is a reasonable time, allowance must be made for time taken to ascertain what would be required to effect modification or repair: *Clegg v Andersson (t/a Nordic Marine)* [2003] EWCA Civ 320, [2003] 1 All ER (Comm) 721.

14 *Bushel v Wheeler* (1844) 15 QB 442n (silence and delay for five months); *Norman v Phillips* (1845) 14 M & W 277 (refusal and six weeks' silence); *Currie v Anderson* (1860) 2 E & E 592 (retention for a year of bill of lading) (all cases decided under the Statute of Frauds (1677), s 16 (repealed)). See also *Milner v Tucker* (1823) 1 C & P 15; *Re A Debtor (No 38 of 1938)* [1939] Ch 225, [1938] 4 All ER 308, DC. The time for rejection, after the discovery of a breach of contract, is not extended because the goods were warranted for a period: *Upton Manufacturing Co v Huiske* 69 Iowa 557 (1886).

15 Sale of Goods Act 1979 s 35(4) (substituted by the Sale and Supply of Goods Act 1994 s 2(1)).

16 Sale of Goods Act 1979 s 35(5) (substituted by the Sale and Supply of Goods Act 1994 s 2(1)).

17 *Ibid* by virtue of the Sale of Goods Act 1979 s 35 (as amended).

18 *Ibid* s 35(6) (substituted by the Sale and Supply of Goods Act 1994 s 2(1)).

19 For these purposes, 'commercial unit' means a unit division of which would materially impair the value of the goods or the character of the unit: Sale of Goods Act 1979 s 35(7) (substituted by the Sale and Supply of Goods Act 1994 s 2(1)).

20 Sale of Goods Act 1979 s 35(7) (as substituted: see note 19 *supra*). As to a buyer's right of partial rejection see PARA 200 post.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

199 When acceptance takes place

NOTE 18--See *J & H Ritchie Ltd v Lloyd Ltd* [2007] UKHL 9, [2007] 2 All ER 353 (Buyer was entitled to reject faulty goods that were returned to the seller who repaired them but refused to reveal the nature of the fault or extent of the repair).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/200. Buyer's right of partial rejection.

200. Buyer's right of partial rejection.

If the buyer¹ has the right to reject the goods² by reason of a breach on the part of the seller³ that affects⁴ some or all of them but accepts⁵ some of the goods, including, where there are any goods unaffected by the breach, all such goods, then, unless a contrary intention appears in, or is to be implied from, the contract⁶, he does not, by accepting them, lose his right to reject the rest⁷.

1 For the meaning of 'buyer' see PARA 29 ante.

2 For the meaning of 'goods' see PARA 30 ante. In the case of a buyer having the right to reject an instalment of goods, the Sale of Goods Act 1979 s 35A(1) (as added) applies as if references to the goods were references to the goods comprised in the instalment: s 35A(2) (added by the Sale and Supply of Goods Act 1994 s 3(1)). As to instalment deliveries see PARAS 176, 187 ante.

3 For the meaning of 'seller' see PARA 27 ante.

4 For these purposes, goods are affected by a breach if, by reason of the breach, they are not in conformity with the contract: Sale of Goods Act 1979 s 35A(3) (added by the Sale and Supply of Goods Act 1994 s 3(1)).

5 As to acceptance see PARA 199 ante.

6 For the meaning of 'contract of sale' see PARA 29 ante.

7 Sale of Goods Act 1979 s 35A(1), (4) (added by the Sale and Supply of Goods Act 1994 s 3(1)). Formerly, the buyer could accept the goods which were in accordance with the contract and reject the rest, or he could reject the whole, only where the seller delivered to the buyer the goods he had contracted to sell mixed with goods of a different description not included in the contract: see the Sale of Goods Act 1979 s 30(4) (repealed). The right to reject the complete order of goods is unaffected: see HC Official Report, Standing Committee C (Sale and Supply of Goods Bill), 23 March 1994 col 45.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/201. Parties' conduct as affecting time for rejection.

201. Parties' conduct as affecting time for rejection.

In determining what is a reasonable time for the rejection of the goods by the buyer, regard is to be had to the conduct of the seller, as, for example, where he has induced the buyer to prolong the trial of the goods, or has by his silence acquiesced in a further trial¹, or has threatened the buyer that any rejection will be treated as a breach of contract², or has negotiated with the buyer with a view to settling the buyer's claim³, or has sought unsuccessfully to put the goods right⁴. Regard is also to be had to reasonable attempts by the buyer to put goods sold into working order⁵ or to have samples analysed or to ascertain the position of sub-buyers⁶. Whether the buyer has had a reasonable opportunity of examining the goods is also a material consideration⁷.

1 *Heilbutt v Hickson* (1872) LR 7 CP 438 at 452 per Bovill CJ and Byles J, citing *Adam v Richards* (1795) 2 Hy Bl 573. See also *Lucy v Mouflet* (1860) 5 H & N 229 (silence); *Munro & Co v Bennet & Son* (1910) 48 SLR 287 (inducing further trial); *Schofield v Emerson-Brantingham Implement Co* (1918) 43 DLR 509, [1918] 3 WWR 434, Can SC (inducing further trial); *Rafuse Motors Ltd v Mardo Construction Ltd* (1963) 48 MPR 296, 41 DLR (2d) 340, NS CA; *Freeman v Consolidated Motors Ltd* (1968) 65 WWR 234, 69 DLR (2d) 581, Man QB; *Beldessi v Island Equipment Ltd* (1973) 41 DLR (3d) 147, BC CA.

2 *Manifatture Tessile Laniera Wooltex v JB Ashley Ltd* [1979] 2 Lloyd's Rep 28, CA.

3 *Polar Refrigeration Service Ltd v Moldenhauer* (1967) 60 WWR 284, 61 DLR (2d) 462, Sask QB.

4 *Public Utilities Commission of City of Waterloo v Burroughs Business Machines Ltd* (1974) 6 OR (2d) 257, 52 DLR (3d) 481, Ont CA.

5 *Beldessi v Island Equipment Ltd* (1973) 41 DLR (3d) 147, BC CA. See also *Wathes (Western) Ltd v Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep 14, CA; overruled on other grounds in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL (where it was held that the right of rejection was not lost by retaining a machine for several months while trying to placate the neighbours to whom it was a nuisance).

6 *Manifatture Tessile Laniera Wooltex v JB Ashley Ltd* [1979] 2 Lloyd's Rep 28, CA. The consumption or destruction of a sample does not debar the buyer from rejecting the remainder of the goods if this is the only effective way of examining the goods: *Lucy v Moullet* (1860) 5 H & N 229 (beer); *Winnipeg Fish Co v Whitman Fish Co* (1909) 41 SCR 453, Can SC (frozen fish). See also *Algemene Oliehandel International BV v Bunge SA* [1978] 2 Lloyd's Rep 207.

7 See the Sale of Goods Act 1979 s 35(5) (as substituted); and PARA 199 ante.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/202. Return of rejected goods unnecessary.

202. Return of rejected goods unnecessary.

Unless otherwise agreed¹, where goods² are delivered to the buyer³ and he refuses to accept them, having the right to do so, he is not bound to return them to the seller⁴, but it is sufficient if he intimates to the seller that he refuses to accept them⁵.

1 See the Sale of Goods Act 1979 s 55(1); and PARAS 12, 100 ante. See also *Mellor v Street* (1866) 15 LT 223 (where there was an express power to return damaged goods); *Ornstein v Alexandra Furnishing Co* (1895) 12 TLR 128.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 For the meaning of 'seller' see PARA 27 ante.

5 Sale of Goods Act 1979 s 36. The rule before the Sale of Goods Act 1893 (repealed) was stated to be that the buyer could reject the goods either by giving prompt notice of rejection or by doing any unequivocal act notifying his rejection, and that he was not bound to return the goods or to place them in neutral custody: *Grimoldby v Wells* (1875) LR 10 CP 391, explaining the headnote in *Couston, Thomson & Co v Chapman* (1872) LR 2 Sc & Div 250, HL. The rule in the Sale of Goods Act 1979 is in substance the same; it does not profess to lay down an exhaustive rule. Expenses incurred by the buyer in looking after the goods should be taken into account in any claim by him for damages: *Kolfor Plant Ltd v Tilbury Plant Ltd* (1977) 121 Sol Jo 390.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/203.
Buyer's duty after rejection.

203. Buyer's duty after rejection.

After a rejection of the goods, the buyer must act in relation to them in a reasonable manner. Subject to this qualification, the goods, after a rejection duly made, are at the risk of the seller¹.

¹ *Okell v Smith* (1815) 1 Stark 107 at 109 per Bayley J. When it is said that the goods are at the risk of the seller, what is no doubt meant is that the buyer is not responsible for accidents not caused by his default. He is still a bailee, although an involuntary one, like a carrier after the refusal of the goods by the consignee: *Heugh v London and North Western Rly Co* (1870) LR 5 Exch 51. See also the Sale of Goods Act 1979 s 20; and PARA 142 ante. As to the duties of bailees generally see BAILMENT vol 3(1) (2005 Reissue) PARA 1 et seq.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/204.
Exclusion of right of rejection.

204. Exclusion of right of rejection.

Subject to the provisions of the Unfair Contract Terms Act 1977¹, the right of rejection may be excluded by the terms of the contract or by usage of trade², except that no trade usage which excludes a right of rejection of goods for their not conforming to their description under the contract will be valid, and the courts will not construe any agreement as excluding the right to reject goods for non-conformity with description unless it is clear and unambiguous on this point³.

¹ As to the Unfair Contract Terms Act 1977 see PARAS 103-104 ante, 450 et seq post.

² *Heyworth v Hutchinson* (1867) LR 2 QB 447; *C Leary & Co v Francis Briggs & Co* (1904) 6 F 857, Ct of Sess; *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152; *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co* [1953] 2 All ER 1471, [1953] 1 WLR 1468. See also *Sanders v Jameson* (1848) 2 Car & Kir 557; *Morgan v Gath* (1865) 3 H & C 748; *Beck & Co v Szymanowski & Co* [1924] AC 43, HL (where a clause limiting the right of rejection was held applicable to quality and not to quantity). A usage not to reject goods not excessively deficient in quality, or the deficiency in quality of which may be fairly compensated by an allowance, is reasonable and valid: *Re Walkers, Winser and Hamm and Shaw, Son & Co* supra at 157 per Channell J. As to usage generally see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 650 et seq.

³ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, [1983] 1 All ER 108, CA; affd in part [1983] 2 AC 803, [1983] 2 All ER 737, HL. See also *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101, HL. For earlier cases see *Shepherd v Kain* (1821) 5 B & Ald 240 (sale of ship 'with all faults, and without allowance'). Cf *Taylor v Bullen* (1850) 5 Exch 779 (where a ship was called, but was not sold under the description of, 'teak built'); *Nichol v Godts* (1854) 10 Exch 191 ('rape oil, warranted only equal to samples'); *Azémar v Casella* (1867) LR 2 CP 677, Ex Ch; *Gorton v Macintosh & Co* [1883] WN 103, CA (no allowance for 'imperfections'); *Re Green & Co and Balfour, Williamson & Co* (1890) 63 LT 325, CA (arbitrator to decide quality

only); *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394, HL (re-establishing *Howcroft v Laycock* (1898) 14 TLR 460, DC, and, perhaps, not overruling *Howcroft and Watkins v Perkins* (1900) 16 TLR 217); *Vigers Bros v Sanderson Bros* [1901] 1 KB 608 (followed in *Wilensko Slaski Towarzystwo Drewno v Fenwick & Co (West Hartlepool) Ltd* [1938] 3 All ER 429); *Green v Arcos Ltd* (1931) 47 TLR 336, CA; *Montague L Meyer Ltd v Osakeyhtio Carelia Timber Co Ltd* (1930) 36 Com Cas 17, CA. To allow a stipulation against rejection to apply to a case of non-conformity to description would render the contract nugatory (*Vigers Bros v Sanderson Bros* supra at 611 per Bigham J), and, therefore, a trade usage to that effect cannot be incorporated in a written contract (*Re North Western Rubber Co Ltd and Hüttenbach & Co* [1908] 2 KB 907, CA). A usage that goods, however deficient in quality, will, if they answer their general description, be accepted is also probably invalid: *Sinidino, Ralli & Co v Kitchen & Co* (1883) Cab & El 217 at 220 per Hawkins J. Cf *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152. The facts of the case may sometimes show that, although a name is given to goods, they are not really sold under that description, as where the goods are sold for what they are: *Carter v Crick* (1859) 4 H & N 412 (seed said to be 'seed barley'). Channell J, having regard to a clause excluding a warranty, seems to have so interpreted the contract in *Howcroft and Watkins v Perkins* supra.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/205. Buyer's refusal to take delivery after request.

205. Buyer's refusal to take delivery after request.

When the seller¹ is ready and willing to deliver the goods², and requests the buyer³ to take delivery⁴, and the buyer does not take delivery of the goods within a reasonable time⁵ after such request, he is liable⁶ to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods⁷.

Where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract, the seller's rights remain unaffected by the above provisions⁸.

1 For the meaning of 'seller' see PARA 27 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

5 What is a reasonable time is a question of fact: see PARA 120 text and note 16 ante.

6 The liability is enforceable by action: see the Sale of Goods Act 1979 s 60; and PARA 14 ante.

7 Ibid s 37(1), adopting the rule of Lord Ellenborough CJ in *Greaves v Ashlin* (1813) 3 Camp 426 at 427. See also *Hartley v Hitchcock* (1816) 1 Stark 408 (coachmaker's claim for standage); *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338 at 344 per Lord Cranworth. The seller cannot charge for keep if he detains the goods against the buyer's will in exercise of a right of lien: *Somes v British Empire Shipping Co* supra. See also *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep 81; on appeal [1962] 1 Lloyd's Rep 610, CA.

8 Sale of Goods Act 1979 s 37(2). The saving of the seller's rights on repudiation by the buyer causes difficulties of construction, as it implies that the buyer's neglect or refusal to take delivery within a reasonable time after request may not always be a repudiation, whereas it should be so, as being default extending to the

utmost limits allowed by law: *Howe v Smith* (1884) 27 ChD 89 at 105, CA, per Fry LJ. See also *Jones v Gibbons* (1853) 8 Exch 920; and PARA 169 ante.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(3) ACCEPTANCE OF THE GOODS/206. Rescission of contract by insolvent buyer.

206. Rescission of contract by insolvent buyer.

When the property in the goods has not passed¹ to an insolvent buyer, he is able, with the seller's consent, to reject the goods and rescind the contract without the transaction being deemed to be a transaction at an undervalue or a preference² under the law of bankruptcy³. A person is deemed to be insolvent if he has either ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due⁴.

1 Even where the property has passed, the contract may be rescinded where no question arises under the law of bankruptcy or where no previously vested right of any third person against the buyer is involved: *Smith v Field* (1793) 5 Term Rep 402; *Richardson v Goss* (1802) 3 Bos & P 119 (wharfinger's general lien); *Bartram v Farebrother* (1828) 4 Bing 579 (buyer's execution creditors); *Heinekey v Earle* (1857) 8 E & B 410 (no rescission) (affd (1858) 8 E & B 427, Ex Ch); *Re Devezze, ex p Cote* (1873) 9 Ch App 27 at 34 per Mellish LJ. As to the passing of property see PARA 109 et seq ante.

2 Ie under the Insolvency Act 1986 ss 339, 340: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 654 et seq. As to the saving of the rules in bankruptcy see the Sale of Goods Act 1979 s 62(1); and PARA 10 ante.

3 See *Barnes v Freeland* (1794) 6 Term Rep 80 (explaining *Salte v Field* (1793) 5 Term Rep 211); *Neate v Ball* (1801) 2 East 117; *Van Casteel v Booker* (1848) 2 Exch 691 (rule stated); *Nicholson v Bower* (1858) 1 E & E 172; *Booker & Co v Milne* (1870) 9 M 314, Ct of Sess; *Re Devezze, ex p Cote* (1873) 9 Ch App 27 (reclamation of letter posted abroad). It is otherwise where property has passed: *Barnes v Freeland* supra; *Neate v Ball* supra; *Re Fletcher, ex p Suffolk* (1891) 9 Morr 8, DC. See, however, note 1 supra. The intent to prefer may, however, be negated: *Bills v Smith* (1865) 6 B & S 314; *Lauritzen v Carr* (1894) 72 LT 56.

4 Sale of Goods Act 1979 s 61(4) (amended by the Insolvency Act 1985 s 235(3), Sch 10 Pt III; and the Bankruptcy (Scotland) Act 1985 s 75(2), Sch 8). See *Parker v Gossage* (1835) 2 Cr M & R 617 (general inability to pay debts); *Biddlecombe v Bond* (1835) 4 Ad & El 332 (same); *R v Saddlers' Co* (1863) 10 HL Cas 404 at 425 per Willes J; *Re Phoenix Bessemer Steel Co, ex p Carnforth Haematite Iron Co* (1876) 4 ChD 108, CA (avowed inability to pay); *Nixon v Verry* (1885) 29 ChD 196 (petition for liquidation etc). The definition of 'insolvent' is important in connection with the seller's rights of lien and stoppage in transit under the Sale of Goods Act 1979 s 39 (see PARAS 236-237, 279 post), s 41 (see PARA 242 et seq post) and s 44 (see PARA 256 et seq post).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(i) In general/207. When payment is ordinarily due.

(4) PAYMENT

(i) In general

207. When payment is ordinarily due.

Unless it is otherwise agreed¹, the price of the goods is not payable unless and until the property in them has passed to the buyer²; and, where a delivery of the goods is part of the consideration for, or a condition precedent to, payment, they must have been delivered³ unless delivery has been excused⁴. Where, however, the property in and possession of the goods are to pass to the buyer in contemporaneous exchange for the price, the buyer is bound to be ready and willing to pay the price in exchange for the possession of the goods⁵.

¹ Thus, the price may be made payable irrespective of delivery and an action may be maintained, even though the property has not passed: see PARA 286 post. Similarly, the buyer may take the risk of the loss of the goods although unappropriated to the contract: *Stock v Inglis* (1884) 12 QBD 564, CA; affd sub nom *Inglis v Stock* (1885) 10 App Cas 263, HL. See also PARA 144 ante.

² See the Sale of Goods Act 1979 ss 2, 49(1); para 27 ante; and PARA 285 post. See also *Kymer v Suwercropp* (1807) 1 Camp 109 (goods stopped in transit); *Atkinson v Bell* (1828) 8 B & C 277; *Laird v Pim* (1841) 7 M & W 474; *Scott v England* (1844) 2 Dow & L 520 (goods bargained and sold); *McEntire v Crossley Bros Ltd* [1895] AC 457 at 464, HL, per Lord Herschell LC.

³ *Forbes v Smith* (1863) 11 WR 574. See also *Kymer v Suwercropp* (1807) 1 Camp 109. Where the price is not payable for separate portions of the goods (see *Lockwood v Tunbridge Wells Local Board* (1884) Cab & El 289, DC), the full amount of the goods must first be delivered, even where the goods are deliverable by instalments: see the Sale of Goods Act 1979 s 30(1); and PARAS 172, 176 ante. As to instalment deliveries generally see PARA 176 et seq ante; and as to the liability for the price where the goods are retaken by the seller see PARA 284 post.

⁴ Eg where the buyer refuses to take delivery (*Hankey v Smith* (1796) Peake 42n), or it is otherwise prevented by his fault (*Studdy v Sanders* (1826) 5 B & C 628), or he takes the risk of the goods being lost (*Alexander v Gardner* (1835) 1 Bing NC 671).

⁵ See the Sale of Goods Act 1979 s 28; and PARA 162 ante. The condition concurrent under s 28 is also a promise: *Sanders Bros v Maclean* (1883) 11 QBD 327, CA; *Ryan v Ridley & Co* (1902) 8 Com Cas 105; *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL. The seller must be ready and willing to deliver.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(i) In general/208. Notice of amount of price.

208. Notice of amount of price.

Where the price of the goods is to be ascertained by reference to some fact or thing within the peculiar knowledge of the seller, the buyer is not liable to pay it unless he receives notice of the amount¹.

¹ *Holmes v Twist* (1615) Hob 51, Ex Ch (price the same as that charged to others) (cited by Bramwell B in *Makin v Watkinson* (1870) LR 6 Exch 25 at 29); *Henning's Case* (1617) Cro Jac 432 (a similar case) (cited by Parke B and Alderson B in *Vyse v Wakefield* (1840) 6 M & W 442 at 454, 456; affd 7 M & W 126). As to the general principle regulating notice see *Vyse v Wakefield* supra; *Makin v Watkinson* supra; *Clerke v Child* (1678) Freem KB 254; 2 Wms Saund (1871 Edn) 154 note (5). See also CONTRACT vol 9(1) (Reissue) PARA 965.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(i) In general/209. Payment to true owner.

209. Payment to true owner.

When goods are sold by a person who has no title to them and the owner claims payment from the buyer, the buyer may refuse to pay the price to the seller¹; and, if he has paid it to the owner, such payment is good as against the seller².

¹ *Dickenson v Naul* (1833) 4 B & Ad 638 (where the buyer had expressly promised to pay the auctioneer if he gave up his lien). As to the position of an auctioneer with regard to payment of the price where the principal is an owner see *Manley & Sons Ltd v Berkett* [1912] 2 KB 329; and AUCTION vol 2(3) (Reissue) PARA 258. As to waiver of the tort by the owners see PARA 26 ante.

² *Allen v Hopkins* (1844) 13 M & W 94.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(ii) Time and Mode of Payment/210. Course of dealing or trade usage.

(ii) Time and Mode of Payment

210. Course of dealing or trade usage.

Where no time or mode of payment is provided for by the contract¹, the course of dealing between the parties, whether under other contracts or under the contract in question², or the usage of trade³, is relevant to show the intention of the parties as to the time or mode of payment.

1 The parties may substitute a new mode of payment: see *Page v Meek* (1862) 3 B & S 259. Payment may also be 'at the convenience' of the buyer: see *Crawshaw v Hornstedt* (1887) 3 TLR 426, CA; *Barnes v Wilson* (1913) 29 TLR 639 (where there was an agreement to repurchase shares 'at such times as suit my convenience and at no other times'; the agreement was held not to be terminated by the death of a contracting party). As to the measure of an obligation involving foreign currency see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1299-1302.

2 *King v Reedman* (1883) 49 LT 473, DC. In such cases the course of dealing negatives the implication of law under the Sale of Goods Act 1979 s 28 (see PARA 162 ante) that payment and delivery are concurrent. As to the exclusion of implied terms see s 55(1); and PARAS 12, 100 ante. If, however, the contract is in writing and no time is mentioned for delivery or payment, oral evidence of a contrary course of dealing or trade usage is inadmissible, as by implication of law payment is to be concurrent with delivery: *Greaves v Ashlin* (1813) 3 Camp 426 (course of dealing), followed in *Ford v Yates* (1841) 2 Man & G 549 (usage of trade). Cf *Lockett v Nicklin* (1848) 2 Exch 93. See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq.

3 *Raitt v Mitchell* (1815) 4 Camp 146; *Clark v Smallfield* (1861) 4 LT 405; *R v Jones* [1898] 1 QB 119, CCR (meal at restaurant). See CUSTOM AND USAGE vol 12(1) (Reissue) PARA 687 et seq.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(ii) Time and Mode of Payment/211. Buyer's refusal to arrange mode of payment.

211. Buyer's refusal to arrange mode of payment.

Where the mode of payment is to be arranged after the contract and the buyer wrongfully refuses to enter into an agreement in that behalf within a reasonable time, the seller may recover the price of the goods, if it is then due, as an ordinary debt¹.

1 *Hall v Conder* (1857) 2 CBNS 22; affd 2 CBNS 53, Ex Ch. The sum is recoverable either as the price or as damages equal to the price: *Hall v Conder* supra.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(ii) Time and Mode of Payment/212. Payment by negotiable instrument.

212. Payment by negotiable instrument.

By agreement payment may be made by means of a bill of exchange, promissory note or other negotiable instrument¹. Such a payment is prima facie only² conditional on the instrument being honoured at maturity³, and operates during its currency and also so long afterwards as the instrument is outstanding in the hands of third persons, even after its dishonour⁴.

1 Usage may show the time of giving the security: *Whittaker v Mason* (1835) 2 Bing NC 359.

2 It may by agreement be taken as an absolute payment: *Lewis v Lyster* (1835) 2 Cr M & R 704; *Sard v Rhodes* (1836) 1 M & W 153; *Sibree v Tripp* (1846) 15 M & W 23. The question is one of fact: *Goldshede v Cottrell* (1836) 2 M & W 20. See further CONTRACT vol 9(1) (Reissue) PARA 951 et seq.

3 Is the debt revived on the dishonour of the instrument: see the Sale of Goods Act 1979 s 38(1)(b); and PARA 238 head (2) post. Accordingly, the seller may sue on the original consideration and without producing the bill, if it is in his or the buyer's possession at the time of action: *Hadwen v Mendizabel* (1825) 10 Moore CP 477; *Widders v Gorton* (1857) 1 CBNS 576; *Re A Debtor, ex p Debtor* [1908] 1 KB 344, CA (apparently overruling *Burden v Halton* (1828) 4 Bing 454). Where, however, the debt arises under a specialty, the taking of a bill or note is not even conditional payment: *Henderson v Arthur* [1907] 1 KB 10 at 14, CA, per Farwell LJ, followed in *Re J Defries & Sons Ltd, Eichholz v J Defries & Sons Ltd* [1909] 2 Ch 423, explaining *Palmer v Bramley* [1895] 2 QB 405, CA.

4 *Currie v Misa* (1875) LR 10 Exch 153, Ex Ch (on appeal sub nom *Misa v Currie* (1876) 1 App Cas 554, HL); *Burliner v Royle* (1880) 5 CPD 354 (reviver of larger original debt); *Re Matthew, ex p Matthew* (1884) 12 QBD 506, CA (no debt during currency of bill). See also *Re A Debtor, ex p Debtor* [1908] 1 KB 344, CA (bill outstanding), where the law is considered. The debt does not revive unless the instrument is in the seller's hands at the commencement of the action: *Davis v Reilly* [1898] 1 QB 1, DC (bill in hand at trial). If the instrument is duly paid, the payment dates back to the time of its receipt: *Felix Hadley & Co v Hadley* [1898] 2 Ch 680. See further CONTRACT vol 9(1) (Reissue) PARA 951 et seq.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(ii) Time and Mode of Payment/213. Payment by credit or charge card.

213. Payment by credit or charge card.

Where payment is made by credit or charge card, it is a matter of construction, to be drawn from the express terms of the contract of sale or inferred from the conduct of the parties, whether the buyer's duty to pay the price is discharged absolutely, or whether it is simply conditional on payment to the seller by the company issuing the credit or charge card¹. In most cases, it is likely that payment by credit or charge card will be construed absolutely to discharge the buyer's liability to pay the price to the seller, thus placing on the seller the risk of the intervening insolvency of the company issuing the card².

1 See CONTRACT vol 9(1) (Reissue) PARA 942.

2 See *Re Charge Card Services Ltd* [1989] Ch 497, [1988] 3 All ER 702, CA; and CONTRACT vol 9(1) (Reissue) PARA 945.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(ii) Time and Mode of Payment/214. Time of payment dependent on an event which fails.

214. Time of payment dependent on an event which fails.

Where the price is payable at a time calculated with reference to the arrival of the goods or their delivery to the buyer or other event, and that event becomes impossible because the goods perish or for some other reason, the buyer, if he is liable to pay the price¹, must pay it within a reasonable time after the event has become impossible².

1 He such as his having taken the risk of delivery under the Sale of Goods Act 1979 or through the property having passed to him: see s 20; and PARAS 140, 142 ante.

2 *Fragano v Long* (1825) 4 B & C 219 at 223. The buyer is not liable to pay the price if eg the contract itself is dependent on a contingency which never occurs, as where the goods are sold 'to arrive' and they never arrive, or if on the true construction of the contract payment is contingent on the happening of the event: see eg *Norsk Bjergningskompagni A/S v Pantanassa (Owners)*, *The Pantanassa* [1970] P 187, [1970] 1 All ER 848 ('the freight is payable in cash upon arrival of the vessel').

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(ii) Time and Mode of Payment/215. Buyer's option of longer or shorter credit.

215. Buyer's option of longer or shorter credit.

Where the buyer has the option of a shorter or of a longer credit and does not pay at the expiration of the shorter credit, he is deemed to have elected for the longer credit¹; but, if a shorter and a longer period of credit are specified with the addition of words of estimate, such as 'from' or 'about', it may be a question of fact whether at any particular time between the two periods the credit has not in a commercial sense expired².

1 *Price v Nixon* (1814) 5 Taunt 338 ('six or nine months'). The allowance of the longer credit may, however, be made conditional: see PARA 216 text and note 1 post. Cf *Dodd v Ponsford* (1859) 6 CBNS 324 (payment of interest).

2 *Ashforth v Redford* (1873) LR 9 CP 20. *Price v Nixon* (1814) 5 Taunt 338, was not cited but is distinguishable as containing no words of estimate. As to expressions of time generally see TIME vol 97 (2010) PARA 329 et seq.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(ii) Time and Mode of Payment/216. Credit where bill or note to be given.

216. Credit where bill or note to be given.

Where payment is to be made by a bill of exchange or promissory note payable at a future day and the bill or note is not given, then, unless credit is made conditional on such a bill or note being given¹, the buyer is nevertheless entitled to credit until the time when the bill or note would have matured². The seller's remedy in the meantime is an action for damages for breach of the agreement to give the bill or note³.

In particular, credit is conditional where the price of the goods is payable in cash with an option to the buyer to substitute a bill or note payable at a future day. It is not conditional where the price is payable by such a bill or note with an option to the buyer to substitute cash⁴.

Where the buyer has the option of giving a bill or note payable at a future day or of paying cash, and he pays part of the price in cash, he cannot, under the option as of right, claim credit for the payment of the residue of the price⁵.

1 *Lee v Risdon* (1816) 7 Taunt 188; *Nickson v Jepson* (1817) 2 Stark 227; *Rugg v Weir* (1864) 16 CBNS 471. As to documentary letters of credit generally see PARA 375 et seq post.

2 *Mussen v Price* (1803) 4 East 147; *Dutton v Solomonson* (1803) 3 Bos & P 582; *Brooke v White* (1805) 1 Bos & PNR 330; *Day v Picton* (1829) 10 B & C 120; *Helps v Winterbottom* (1831) 2 B & Ad 431; *Paul v Dod* (1846) 2 CB 800; *Rabe v Otto* (1903) 89 LT 562. The case is still stronger for credit where it is the seller's fault that the bills are not given: *Wayne's Merthyr Steam Coal and Iron Co v Morewood & Co* (1877) 46 LJQB 746. As to the effect of the buyer's repudiation of the contract see PARA 218 post.

3 The buyer is liable in damages for any loss caused to the seller by the bill or note not being given: *Mussen v Price* (1803) 4 East 147; *Rabe v Otto* (1903) 89 LT 562. These damages are not the price of the goods: *Mussen v Price* supra at 151 per Lawrence J; *Helps v Winterbottom* (1831) 2 B & Ad 431 at 434 per Lord Tenterden CJ and at 435 per Little Dale J; *Rabe v Otto* supra. Cf to the contrary *Hutchinson v Reid* (1813) 3 Camp 329. It has been decided, on a finding of a jury as to practice, that the seller must tender a draft for acceptance: *Reed v Mestaer* (1804) coram Lord Ellenborough CJ, at nisi prius, reported in Comyn's Law of Contract (2nd Edn) 181. See also *Spaeth v Hare* (1842) 1 Dowl NS 595. Cf *Foster v Eades* (1860) 2 F & F 103 at 104 obiter per Blackburn J. It is not fraudulent for the seller secretly to repurchase the goods through a broker from the buyer, if he cannot get a bill and doubts the buyer's solvency: *Harris v Lunell* (1819) 4 Moore CP 10.

4 *Anderson v Carlisle Horse Clothing Co Ltd* (1870) 21 LT 760; *Rabe v Otto* (1903) 89 LT 562. In the one case the seller does not give credit except on terms; in the other he gives credit to be secured by a bill. The question is a matter of intention whether the contract is a cash or a credit transaction.

5 *Schneider v Foster* (1857) 2 H & N 4. The buyer has elected to pay cash and such election is irrevocable: *Schneider v Foster* supra; *Rugg v Weir* (1864) 16 CBNS 471 at 477 per Willes J.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(ii) Time and Mode of Payment/217. Default in paying instalment of price.

217. Default in paying instalment of price.

Where the price of the goods is made payable by instalments at future dates, a provision in the contract that, on the buyer's default in the payment of any instalment, the unpaid balance is to become immediately payable is not a penalty¹.

1 *Sterne v Beck* (1863) 1 De GJ & Sm 595 (mortgage); *Wallingford v Mutual Society* (1880) 5 App Cas 685, HL; *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592, CA; but see CONSUMER CREDIT vol 9(1) (Reissue) PARA 22. See also DAMAGES vol 12(1) (Reissue) PARA 1066. As to the distinction between liquidated damages and a penalty see DAMAGES vol 12(1) (Reissue) PARA 1065 et seq.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(ii) Time and Mode of Payment/218. Effect of repudiation.

218. Effect of repudiation.

Notwithstanding that credit has been given, if the buyer repudiates the contract, the seller may forthwith elect to treat the contract as rescinded, and, if he does so, may, without waiting for the expiration of the credit, recover the value of such of the goods as the buyer has retained¹.

¹ *Mavor v Pyne* (1825) 3 Bing 285; *Bartholomew v Markwick* (1864) 15 CBNS 711. The seller may also recover damages for non-acceptance of the residue: *Foster v Eades* (1860) 2 F & F 103; *Wayne's Merthyr Steam Coal and Iron Co v Morewood & Co* (1877) 46 LJQB 746. Damages for non-acceptance are 'a sum payable not under the contract but due and payable as soon as the contract is broken': *Wayne's Merthyr Steam Coal and Iron Co v Morewood & Co* supra at 749 per Lush J. As to damages for non-acceptance generally see the Sale of Goods Act 1979 s 50; and PARA 287 et seq post. If the seller does not elect to rescind, the provision of credit is binding on him, even though the buyer has been guilty of fraud: *Ferguson v Carrington* (1829) 9 B & C 59; *Strutt v Smith* (1834) 1 Cr M & R 312. A fortiori, he cannot recover the price at once where the buyer has not repudiated: *Wayne's Merthyr Steam Coal and Iron Co v Morewood & Co* supra.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(ii) Time and Mode of Payment/219. Payment of deposit.

219. Payment of deposit.

Part of the price may be payable as a deposit. A part payment is to be distinguished from a deposit or earnest¹.

A deposit is paid primarily as security that the buyer will duly accept and pay for the goods, but, subject to this, forms part of the price². Accordingly, if the buyer is unable or unwilling to accept and pay for the goods, the seller may repudiate the contract and retain the deposit³. If the seller is unable or unwilling to deliver the goods or to pass a good title or the contract is voidable by the buyer for any reason, the buyer may repudiate the contract and recover the deposit⁴. The buyer may also recover it where, without the default of either party, the contract is rescinded by either party pursuant to an express power in the contract to that effect⁵.

¹ Thus, a part payment is not forfeitable on default but is returnable: see *Dies v British and International Mining and Finance Corp'n Ltd* [1939] 1 KB 724; cf *Stockloser v Johnson* [1954] 1 QB 476 at 489-490, [1954] 1 All ER 630 at 637-638, CA. In determining whether a payment in advance is a part payment or a deposit, regard must be had to all the surrounding circumstances: *Elson (Inspector of Taxes) v Prices Tailors Ltd* [1963] 1 All ER 231 at 234, [1963] 1 WLR 287 at 291-292 per Ungood-Thomas J.

² *Ockenden v Henly* (1858) EB & E 485; *Howe v Smith* (1884) 27 ChD 89, CA; *Soper v Arnold* (1889) 14 App Cas 429 at 433-435, HL; *Hall v Burnell* [1911] 2 Ch 551. The fact that the deposit is in the hands of a

stakeholder is immaterial: *Hall v Burnell* supra. See also *Howe v Smith* supra at 101 et seq (where the history of earnest, which is identical with a deposit, is traced by Fry LJ).

3 *Fitt v Cassanet* (1842) 4 Man & G 898 (sale of palm oil scrapings); *Howe v Smith* (1884) 27 ChD 89, CA; *Hall v Burnell* [1911] 2 Ch 551; *Vaswani v Italian Motors (Sales and Services) Ltd* [1996] 1 WLR 270, [1996] RTR 115, PC.

4 *Gosbell v Archer* (1835) 2 Ad & El 500; *Walstab v Spottiswoode* (1846) 15 M & W 501 (shares); *Warren v Moore* (1898) 14 TLR 497, CA (sale of land). Cf *Ashworth v Mounsey* (1853) 9 Exch 175; *Beavan v M'Donnell* (1854) 9 Exch 309; *Alexander v Webber* [1922] 1 KB 642. The buyer is not entitled to interest on the deposit unless interest is expressly reserved or is to be implied from the course of dealing between the parties: *Walker v Constable* (1798) 1 Bos & P 306; *Frühling v Schroeder* (1835) 2 Bing NC 77 at 79 per Tindal CJ.

5 *Whitbread & Co Ltd v Watt* [1902] 1 Ch 835, CA.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(A) Statutory Interest on Qualifying Debts/220. Statutory interest.

(iii) Payment of Interest

A. LATE PAYMENT OF COMMERCIAL DEBTS

(A) STATUTORY INTEREST ON QUALIFYING DEBTS

220. Statutory interest.

It is an implied term in a relevant contract¹ that any qualifying debt² created by the contract carries³ simple interest⁴. Interest carried under that implied term ('statutory interest') is to be treated, for the purposes of any rule of law or enactment, other than the Late Payment of Commercial Debts (Interest) Act 1998, relating to interest on debts, in the same way as interest carried under an express contract term⁵.

In certain circumstances⁶ contract terms are permitted to oust or vary the right to statutory interest which would otherwise be conferred by virtue of the term so implied⁷.

1 I.e. a contract to which the Late Payment of Commercial Debts (Interest) Act 1998 applies: see PARA 221 post.

2 For the meaning of 'qualifying debt' see PARA 225 post. Where the right to be paid part of a debt passes to a person other than the person who is the original creditor when the debt is created, any reference in the Late Payment of Commercial Debts (Interest) Act 1998 to a debt is to be construed as or, if the context so requires, as including, a reference to part of a debt: s 13(3).

3 I.e. subject to and in accordance with *ibid* Pt I (ss 1-6): see *infra*; and PARA 221 et seq post.

4 Ibid s 1(1). As to the period for which statutory interest runs see PARA 227 post; as to the remission of statutory interest see PARA 229 post; and as to the rate of statutory interest see PARA 230 post. See also European Parliament and EC Council Directive 2000/35 on combating late payment in commercial transactions (OJ L200, 8.8.2000, p 35). As to compensation arising out of late payments see PARA 228 post.

5 Late Payment of Commercial Debts (Interest) Act 1998 s 1(2). For these purposes, any reference, however worded, to an agreement or to contract terms includes a reference to both express and implied terms, including terms established by a course of dealing or by such usage as binds the parties: s 16(2). Section 1(2) makes it clear that no distinction is to be drawn between contractual and statutory interest, the courts having regarded some statutory interventions in contract law as statutory rather than contractual, even where the means adopted by the statute is contractual: see 586 HL Official Report (5th series) col 382.

6 In the circumstances set out in the Late Payment of Commercial Debts (Interest) Act 1998 Pt II (ss 7-10): see PARAS 231-232 post.

7 Ibid s 1(3).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(A) Statutory Interest on Qualifying Debts/221. Relevant contracts.

221. Relevant contracts.

The Late Payment of Commercial Debts (Interest) Act 1998 applies to a contract for the supply of goods or services¹ where the purchaser² and the supplier³ are each acting in the course of a business⁴, other than an excepted contract⁵.

The following are excepted contracts:

- 201 (1) a consumer credit agreement⁶; and
- 202 (2) a contract intended to operate by way of mortgage, pledge, charge or other security⁷.

The Late Payment of Commercial Debts (Interest) Act 1998 came into force⁸:

- 203 (a) on 1 November 1998 in relation to certain contracts for the supply of goods or services made on or after that date of either of the following descriptions:

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- 9. (i) contracts made between a small business supplier⁹ and a purchaser who is a United Kingdom public authority; or
- 10. (ii) contracts made between a small business supplier and a large business purchaser¹⁰;

8

- 204 and the question whether a contract falls within either of those descriptions is to be determined by reference to the circumstances when the contract is made and, accordingly, is not affected by any subsequent change in those circumstances¹¹;

- 205 (b) on 1 July 1999 in relation to certain other contracts for the supply of goods or services made on or after that date between a small business supplier¹² and any purchaser who is a United Kingdom public authority¹³; and the question whether a contract falls within that description is to be determined by reference to the circumstances when the contract is made and, accordingly, is not affected by any subsequent change in those circumstances¹⁴;
- 206 (c) on 1 September 2000 in relation to contracts for the supply of goods or services made on or after that date between a small business supplier¹⁵ and the Metropolitan Police Authority¹⁶ or the London Fire and Emergency Planning Authority¹⁷; and the question whether a contract falls within this description is to be determined by reference to the circumstances when the contract is made and, accordingly, is not affected by any subsequent change in those circumstances¹⁸;
- 207 (d) on 1 November 2000 in relation to contracts for the supply of goods or services made on or after that date between a small business supplier¹⁹ and a small business purchaser²⁰; and the question whether a contract falls within this description is to be determined by reference to the circumstances when the contract is made and, accordingly, is not affected by any subsequent change in those circumstances²¹;
- 208 (e) on 7 August 2002, so far as not then in force²².

1 For these purposes, 'contract for the supply of goods or services' means: (1) a contract of sale of goods; or (2) a contract, other than a contract of sale of goods, by which a person does any, or any combination, of the following things: (a) transferring or agreeing to transfer to another the property in goods; (b) bailing or agreeing to bail goods to another by way of hire; and (c) agreeing to carry out a service, for a consideration that is, or includes, a money consideration: Late Payment of Commercial Debts (Interest) Act 1998 ss 2(2), (3), 16(1). For the avoidance of doubt, a contract of service or apprenticeship is not a contract for the supply of goods or services: s 2(4). 'Contract of sale of goods' has the same meaning as in the Sale of Goods Act 1979 (see PARA 29 ante): Late Payment of Commercial Debts (Interest) Act 1998 s 2(7). 'Goods' has the same meaning as in the Sale of Goods Act 1979 (see PARA 30 ante): Late Payment of Commercial Debts (Interest) Act 1998 s 2(7). 'Property in goods' means the general property in them and not merely a special property: s 2(7).

2 For these purposes, 'purchaser' means, subject to *ibid* s 13(2), the buyer in a contract of sale or the person who contracts with the supplier in any other contract for the supply of goods or services: s 16(1). Any reference to the purchaser is a reference to the person who is for the time being the purchaser or, in relation to a time after the debt in question has been created, the person who is for the time being the debtor: s 13(2). For the meaning of 'supplier' see note 3 *infra*.

3 For these purposes, 'supplier' means, subject to *ibid* s 13(2), the seller in a contract of sale of goods or the person who does one or more of the things mentioned in s 2(3) (see note 1 heads (2)(a)-(2)(c) *supra*) in any other contract for the supply of goods or services: s 16(1). Any reference to the supplier is a reference to the person who is for the time being the supplier or, in relation to a time after the debt in question has been created, the person who is for the time being the creditor: s 13(2).

4 For these purposes, 'business' includes a profession and the activities of any government department or local or public authority: *ibid* s 2(7).

5 *Ibid* s 2(1). As to conflict of laws see PARA 222 *post*.

6 For these purposes, 'consumer credit agreement' has the same meaning as in the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 81): Late Payment of Commercial Debts (Interest) Act 1998 s 2(7).

7 *Ibid* s 2(5) (amended by the Late Payment of Commercial Debts Regulations 2002, SI 2002/1674, reg 2).

8 The Late Payment of Commercial Debts (Interest) Act 1998, apart from s 17 (short title, commencement and extent), is specified to come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different descriptions of contract or for other different purposes: s 17(2). Such an order may specify a description of contract by reference to any feature of the contract, including the parties: s 17(2). The Late Payment of Commercial Debts (Interest) Act 1998 does not affect contracts of any description made before that Act comes into force for contracts of that description: s 17(4). In exercise of the power so conferred the Secretary of State has made the Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479 (see *infra*; and PARAS 223-224 *post*); and the Late Payment of

Commercial Debts (Interest) Act 1998 (Commencement No 2) Order 1999, SI 1999/1816 (see *infra*; and PARA 224 post).

The Secretary of State may by regulations make such transitional, supplemental or incidental provision, including provision modifying any provision of the Late Payment of Commercial Debts (Interest) Act 1998, as the Secretary of State may consider necessary or expedient in connection with the operation of that Act while it is not fully in force: s 17(3). Any power to make regulations under that Act, other than an order under s 17(2), is exercisable by statutory instrument (s 15(1)); and any statutory instrument containing such regulations is subject to annulment in pursuance of a resolution of either House of Parliament (s 15(2)). In exercise of the power so conferred the Secretary of State has made the Late Payment of Commercial Debts (Interest) Act 1998 (Transitional Provisions) Regulations 1998, SI 1998/2481, which came into force on 1 November 1998 (reg 1): see PARA 223 note 2 post. As to the Secretary of State see PARA 15 ante.

9 For these purposes, 'small business supplier' means a supplier, not being a United Kingdom public authority, whose business is a small business: Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, art 2(1)(c). For the meaning of 'small business' see PARA 223 post; and for the meaning of 'United Kingdom public authority' for these purposes see PARA 224 heads (1)-(19) post.

10 *Ibid* art 3(1). For these purposes, 'large business purchaser' means a purchaser, not being a United Kingdom public authority, whose business is a large business: art 2(1)(a). For the meaning of 'large business' see PARA 223 post.

11 *Ibid* art 3(2).

12 For these purposes, 'small business supplier' means a supplier, not being a body falling within the Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, art 2(1)(b), Sch 1 (see PARA 224 heads (1)-(19) post) or a United Kingdom public authority, whose business is a small business: Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 2) Order 1999, SI 1999/1816, art 2(1)(a), (c). A business is a small business if the number of full-time employees employed in the business is 50 or fewer when calculated in accordance with the Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, art 2(2), Sch 2 (see PARA 223 post): Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 2) Order 1999, SI 1999/1816, art 2(1)(c), (2).

13 *Ibid* art 3(1). For the meaning of 'United Kingdom public authority' for these purposes see PARA 224 heads (a)-(e) post.

14 *Ibid* art 3(2).

15 For these purposes, 'small business supplier' means a supplier, not being a United Kingdom public authority, whose business is a small business: Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 3) Order 2000, SI 2000/2225, art 2(1)(a). For the meaning of 'small business' see PARA 223 post; and for the meaning of 'United Kingdom public authority' for these purposes see PARA 224 heads (1)-(19), (a)-(e) post.

16 As to the Metropolitan Police Authority see POLICE vol 36(1) (2007 Reissue) PARAS 147-155.

17 Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 3) Order 2000, SI 2000/2225, art 3(1). As to the London Fire and Emergency Planning Authority see FIRE SERVICES vol 18(2) (Reissue) PARA 17; LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

18 *Ibid* art 3(2).

19 For these purposes, 'small business supplier' means a supplier, not being a United Kingdom public authority, whose business is a small business: Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 4) Order 2000, SI 2000/2740, art 2(1)(a)). For the meaning of 'small business' see PARA 223 post; and for the meaning of 'United Kingdom public authority' for these purposes see PARA 224 heads (1)-(19), (a)-(e), (i), (ii) post.

20 *Ibid* art 3(1). For these purposes, 'small business purchaser' means a purchaser, not being a United Kingdom public authority, whose business is a small business: art 2(1)(b).

21 *Ibid* art 3(2).

22 Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 4) Order 2002, SI 2002/1673.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(A) Statutory Interest on Qualifying Debts/222. Conflict of laws.

222. Conflict of laws.

The Late Payment of Commercial Debts (Interest) Act 1998 does not have effect in relation to a contract¹ governed by the law of a part of the United Kingdom by choice of the parties if there is no significant connection between the contract and that part of the United Kingdom and, but for that choice, the applicable law would be a foreign law².

The Late Payment of Commercial Debts (Interest) Act 1998 has effect in relation to a contract governed by a foreign law by choice of the parties if, but for that choice, the applicable law would be the law of a part of the United Kingdom and there is no significant connection between the contract and any country other than that part of the United Kingdom³.

¹ For these purposes, 'contract' means a contract falling within the Late Payment of Commercial Debts (Interest) Act 1998 s 2(1) (see PARA 221 ante): s 12(3).

² Ibid s 12(1). For these purposes, 'foreign law' means the law of a country outside the United Kingdom: s 12(3).

³ Ibid s 12(2).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(A) Statutory Interest on Qualifying Debts/223. Small and large businesses.

223. Small and large businesses.

A business is:

- 209 (1) a small business, if the number of full-time employees¹ employed in the business is 50 or fewer; or

210 (2) a large business, if the number of full-time employees employed in the business is more than 50,

when calculated in accordance with the following provisions².

The number of full-time employees employed in a business of a party to a contract for the supply of goods or services on any day is the average number of full-time employees over the relevant period in relation to that day, calculated in accordance with the following provisions³. Where, however, the contract is made on the first day on which the business is carried on, the number of full-time employees employed in the business is the number of full-time employees at that time at which the contract is made, calculated in accordance with those provisions⁴.

The relevant period is either:

211 (a) the complete period of 1 April to 31 March immediately preceding the date of making the contract; or

212 (b) where the business was not being carried on throughout that period:

9

11. (i) the period of complete months throughout which the business has been carried on ending on that date of 31 March; or

12. (ii) where the business has not been carried on for at least one complete month ending on that date of 31 March, the number of complete months for which the business has been carried on, ending at the end of the month immediately preceding the month in which the contract is made; or

13. (iii) where the business has not been carried on for at least one complete month, the number of days for which the business has been carried on prior to the day on which the contract is made⁵.

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The average number of full-time employees is:

213 (A) the number of full-time employees, calculated by adding the numbers for each month, or, where head (b)(iii) above applies, for each day, comprised in the relevant period as they stood at the end of the final day of each such month or day, as the case may be, and dividing the total by the number of months or days, as the case may be; or

214 (B) where the relevant period is exactly one complete month or one day, the number at the end of the final day of that month or the end of that day, as the case may be⁶.

A business is to be regarded as a large business where the average number of employees employed in that business, when aggregated with the average numbers employed in all other businesses run by the same or any associated employer⁷, is more than 50⁸.

1 For these purposes, 'employee' means: (1) an individual who is employed in the business under a contract of service or apprenticeship or under any other contract, whether express or implied and, if it is express, whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; (2) a partner; and (3) in relation to a business carried on by one individual, that individual: Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, art 2(2), Sch 2 para 2.

For the purpose of counting the number of full-time employees, an employee is to be regarded as full-time if that employee works for 35 hours or more per week and an employee is to be regarded as part-time if that employee works for less than 35 hours per week: Sch 2 para 3(1). A part-time employee is to be counted as a fraction of a full-time employee, the fraction being calculated by dividing the number of hours which the part-

time employee works by the number of full-time hours, where the number of full-time hours is the number of hours which a full-time employee of the same description as the part-time employee works in the business concerned or, where there are no full-time employees of that description, 35 hours per week: Sch 2 para 3(2). A reference to the number of hours which an employee works is a reference to the number of hours which that employee is contractually required to work, or ordinarily works, if greater or where the contract does not provide for the number of hours, in each case excluding any meal break or rest period exceeding 15 minutes: Sch 2 para 3(3).

2 Ibid art 2(2). As to proceedings relating to a contract for the supply of goods and services made between a supplier and purchaser neither of whom was a United Kingdom public authority while the Late Payment of Commercial Debts (Interest) Act 1998 was not fully in force see the Late Payment of Commercial Debts (Interest) Act 1998 (Transitional Provisions) Regulations 1998, SI 1998/2481, reg 2(1), (2). The Late Payment of Commercial Debts (Interest) Act 1998 was brought fully into force on 7 August 2002 by the Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 5) Order 2002, SI 2002/1673. For these purposes, 'United Kingdom public authority' means an authority: (1) which is a United Kingdom public authority for the purposes of the Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479 ('the first commencement order') (see PARA 224 heads (1)-(20) post); or (2) being an authority which was not in existence on the date on which the first commencement order was made, ie 4 October 1998, it is to be regarded by virtue of any later order made under the Late Payment of Commercial Debts (Interest) Act 1998 s 17(2) as a United Kingdom public authority; and 'large business' means a business which is a large business for the purposes of the first commencement order: Late Payment of Commercial Debts (Interest) Act 1998 (Transitional Provisions) Regulations 1998, SI 1998/2481, reg 2(3)(a), (b).

3 Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, Sch 2 para 1(1).

4 Ibid Sch 2 para 1(2).

5 Ibid Sch 2 para 4.

6 Ibid Sch 2 para 5.

7 For these purposes, two employers are to be treated as associated employers if: (1) one is a body of which the other employer, directly or indirectly, has control; or (2) both are bodies of which a third person, directly or indirectly, has control: ibid Sch 2 para 6(3). 'Employer' means the person for whom an employee works; and, for the avoidance of doubt, it is declared that, in the case of Sch 2 para 2(b) (see note 1 head (2) supra), the employer is the partnership, and, in the case of Sch 2 para 2(c) (see note 1 head (3) supra), the employer and the employee are the same person: Sch 2 para 2. 'Body' means a body of persons corporate or unincorporate; and 'control', 'directly', 'indirectly' and 'third person' have the same meanings as in the Employment Rights Act 1996 s 231 (see EMPLOYMENT vol 39 (2009) PARA 3): Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, Sch 2 para 6(4)(a), (b).

8 Ibid Sch 2 para 6(1). For the purposes of the application of Sch 2 para 6, the average number for each business run by the same or any associated employer is to be calculated separately: Sch 2 para 6(2).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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224. Meaning of 'United Kingdom public authority'.

In relation to contracts for the supply of goods or services made on or after 1 November 1998¹, each of the following is a United Kingdom public authority:

- 215 (1) a Minister of the Crown²;
- 216 (2) a department of Her Majesty's government in the United Kingdom or a Northern Ireland department³;
- 217 (3) the House of Commons;
- 218 (4) the House of Lords;
- 219 (5) the New Northern Ireland Assembly;
- 220 (6) a local authority⁴;
- 221 (7) a fire authority constituted by a combination scheme under the Fire Services Act 1947⁵;
- 222 (8) a fire and rescue authority constituted by a scheme under the Fire and Rescue Services Act 2004⁶;
- 223 (9) the Fire Authority for Northern Ireland;
- 224 (10) a police authority established under the Police Act 1996⁷;
- 225 (11) the Receiver for the Metropolitan Police District⁸;
- 226 (12) the Police Authority for Northern Ireland;
- 227 (13) a waste disposal authority⁹;
- 228 (14) a joint authority¹⁰;
- 229 (15) any residuary body¹¹;
- 230 (16) the Broads Authority¹²;
- 231 (17) any joint board the constituent members of which consist of any of the bodies specified in heads (6), (7), (10), (11) and (13) to (16) above;
- 232 (18) a joint or special planning board constituted for a National Park¹³;
- 233 (19) a corporation established, or a group of individuals appointed to act together, being established or appointed, as the case may be, by or under any enactment or under the law of the United Kingdom or any part thereof, for the specific purposes of meeting needs in the general interest, not having an industrial or commercial character, and financed wholly or mainly by another United Kingdom public authority or subject to management supervision by another United Kingdom public authority or more than half of the board of directors or members of which or, in the case of a group of individuals, more than half of those individuals are appointed by another United Kingdom public authority; and
- 234 (20) an association of or formed by one or more of the bodies specified in heads (1) to (19) above¹⁴.

In relation to contracts for the supply of goods and services made on or after 1 July 1999¹⁵, each of the following is a United Kingdom public authority:

- 235 (a) the Scottish Parliamentary Corporate Body constituted under the Scotland Act 1998;
- 236 (b) any part of the Scottish Administration within the meaning of the Scotland Act 1998;
- 237 (c) the Auditor General for Scotland constituted under the Scotland Act 1998;
- 238 (d) the National Assembly for Wales also known as Cynulliad Cenedlaethol Cymru constituted under the Government of Wales Act 1998¹⁶; and
- 239 (e) the Auditor General for Wales also known as Archwilydd Cyffredinol Cymru¹⁷ constituted under the Government of Wales Act 1998¹⁸.

In relation to contracts for the supply of goods and services made on or after 1 September 2000¹⁹, each of the following is a United Kingdom public authority:

- 240 (i) the Metropolitan Police Authority²⁰; and
- 241 (ii) the London Fire and Emergency Planning Authority²¹.

1 Ie the date on which the Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, came into force: see PARA 221 head (a) ante.

2 For these purposes, 'Minister of the Crown' means the holder of an office in Her Majesty's government in the United Kingdom, and includes the Treasury: Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, art 2(1)(b), Sch 1 para 2. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

3 For these purposes, 'Northern Ireland department' includes the head of such department: ibid Sch 1 para 2.

4 For these purposes, 'local authority' is to be construed: (1) in relation to England and Wales, as meaning (a) a county council, a county borough council, a district council, a London borough council, a parish council, a community council or the Council of the Isles of Scilly; (b) the Common Council of the City of London in its capacity as local authority or police authority; (2) in relation to Scotland, as having the same meaning as in the Local Government (Scotland) Act 1973 s 235(1) (as amended) and also as including a joint board or a joint committee within the meaning of s 235(1) (as amended); and (3) in relation to Northern Ireland, as meaning a district council within the meaning of the Local Government Act (Northern Ireland) 1972: Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, Sch 1 para 2. See generally LOCAL GOVERNMENT vol 69 (2009) PARA 1 et seq.

5 See FIRE SERVICES vol 18(2) (Reissue) PARA 17 et seq.

6 Ie a scheme under the Fire and Rescue Services Act 2004 s 2 or a scheme to which s 4 applies: see FIRE SERVICES vol 18(2) (Reissue) PARAS 24-26.

7 Ie under the Police Act 1996 s 3: see POLICE vol 36(1) (2007 Reissue) PARA 139.

8 As to police generally see POLICE.

9 Ie an authority established under the Local Government Act 1985 s 10 (as amended): see LOCAL GOVERNMENT vol 69 (2009) PARA 17.

10 Ie an authority established under ibid Pt IV (ss 23-42) (as amended): see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq.

11 Ie any body established pursuant to an order under ibid s 67: see LOCAL GOVERNMENT vol 69 (2009) PARA 17.

12 As to the Broads Authority see WATER AND WATERWAYS vol 101 (2009) PARA 734.

13 As to the National Parks see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 636 et seq; and as to their planning authorities see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 32.

14 Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, Sch 1 para 1 (amended by SI 2004/3168). Where an authority specified in the Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 1) Order 1998, SI 1998/2479, Sch 1 para 1 (as amended) does not have the capacity to enter into a contract, the person whose function it is to enter into contracts for that authority is to be regarded as a United Kingdom public authority for the purposes of the operation of these provisions: Sch 1 para 3.

15 Ie the date on which the Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 2) Order 1999, SI 1999/1816, came into force: see PARA 221 head (b) ante.

16 See CONSTITUTIONAL LAW AND HUMAN RIGHTS.

17 See CONSTITUTIONAL LAW AND HUMAN RIGHTS.

18 Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 2) Order 1999, SI 1999/1816, art 2(1)(b), Schedule.

19 Ie the date on which the Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 3) Order 2000, SI 2000/2225, came into force: see PARA 221 head (c) ante.

20 As to the Metropolitan Police Authority see POLICE vol 36(1) (2007 Reissue) PARAS 147-155.

21 Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No 3) Order 2000, SI 2000/2225, art 3(1), Schedule. As to the London Fire and Emergency Planning Authority see FIRE SERVICES vol 18(2) (Reissue) PARA 17; LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

224 Meaning of 'United Kingdom public authority'

NOTE 14--SI 1998/2479 Sch 1 para 1 further amended: SI 2005/2929 (Wales).

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225. Qualifying debts.

A debt¹ created by virtue of an obligation under a relevant contract² to pay the whole or any part of the contract price³ is a 'qualifying debt'⁴, unless, when created, the whole of the debt is prevented from carrying statutory interest⁵ by the following provisions⁶. A debt:

- 242 (1) does not carry statutory interest if, or to the extent that, it consists of a sum to which a right to interest or to charge interest applies by virtue of any enactment other than the implied term as to statutory interest⁷; but this provision does not prevent a sum from carrying statutory interest by reason of the fact that a court or arbitrator would otherwise⁸ have power to award interest on it⁹;
- 243 (2) does not carry, and is to be treated as never having carried, statutory interest if, or to the extent that, a right to demand interest on it, which exists by virtue of any rule of law, is exercised¹⁰.

The operation of the Late Payment of Commercial Debts (Interest) Act 1998 in relation to a qualifying debt is not affected by any change in the identity of the parties to the contract creating the debt, or the passing of the right¹¹ to be paid the debt, or the duty to pay it, in whole or in part, to a person other than the person who is the original creditor or the original debtor when the debt is created¹².

1 As to references to a debt see PARA 220 note 2 ante.

2 Ie a contract to which the Late Payment of Commercial Debts (Interest) Act 1998 applies: see PARA 221 ante.

3 For these purposes, 'contract price' means the price in a contract of sale of goods or the money consideration referred to in ibid s 2(2)(b) (see PARA 221 note 1 head (2) ante) in any other contract for the supply of goods or services: s 16(1). For the meaning of 'contract of sale of goods' see PARA 221 note 1 ante; and for the meaning of 'contract for the supply of goods or services' see PARA 221 note 1 ante.

4 le for the purposes of the Late Payment of Commercial Debts (Interest) Act 1998.

5 For the meaning of 'statutory interest' see PARA 220 ante.

6 Late Payment of Commercial Debts (Interest) Act 1998 ss 3(1), 16(1).

7 le ibid s 1: see PARA 220 ante.

8 le apart from the Late Payment of Commercial Debts (Interest) Act 1998.

9 Ibid s 3(2).

10 Ibid s 3(3).

11 For these purposes, a reference to the identity of the parties to a contract changing, or to a right or duty passing, is a reference to it changing or passing by assignment, by operation of law or otherwise: ibid s 13(4).

12 Ibid s 13(1).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(A) Statutory Interest on Qualifying Debts/226. Treatment of advance payments of the contract price.

226. Treatment of advance payments of the contract price.

A qualifying debt¹ created by virtue of an obligation to make an advance payment² is to be treated as if it were created:

244 (1) where the advance payment is the whole contract price, on the day on which the supplier's obligation is performed³;

245 (2) where the advance payment is part of the contract price, but the sum is not due in respect of any part performance of the supplier's obligation, on the day on which the supplier's obligation is performed⁴;

246 (3) where the advance payment is a part of the contract price due in respect of any part performance of the supplier's obligation, but is payable before that part performance is completed, on the day on which the relevant part performance is completed⁵.

For these purposes, an obligation to pay the whole outstanding balance of the contract price is to be regarded as an obligation to pay the whole contract price and not as an obligation to pay a part of the contract price⁶.

1 For the meaning of 'qualifying debt' see PARA 225 ante; and as to references to a debt see PARA 220 note 2 ante.

2 For these purposes, 'advance payment' means a payment falling due before the obligation of the supplier to which the whole contract price relates ('the supplier's obligation') is performed, other than a payment of a part of the contract price that is due in respect of any part performance of that obligation and payable on or after the day on which that part performance is completed: Late Payment of Commercial Debts (Interest) Act 1998 s 11(2). For the meaning of 'supplier' see PARA 221 note 3 ante.

3 Ibid s 11(1), (3). Where the debt is created by virtue of an obligation to pay a sum due in respect of a period of hire of goods, s 11 has effect as if: (1) references to the day on which the supplier's obligation is performed were references to the last day of that period; and (2) references to part performance of that obligation were references to part of that period: s 11(6).

4 Ibid s 11(1), (4).

5 Ibid s 11(1), (5).

6 Ibid s 11(7).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(A) Statutory Interest on Qualifying Debts/227. Period for which statutory interest runs.

227. Period for which statutory interest runs.

Statutory interest¹ runs in relation to a qualifying debt² in accordance with the following provisions, unless the provisions relating to the remission of statutory interest³ apply⁴.

Statutory interest starts to run on the day after the relevant day for the debt, at the prevailing rate⁵ at the end of the relevant day⁶.

Where the supplier⁷ and the purchaser⁸ agree⁹ a date for payment of the debt, that is, the day on which the debt is to be created by the contract, that is the relevant day unless the debt relates to an obligation to make an advance payment¹⁰. A date so agreed may be a fixed one or may depend on the happening of an event or the failure of an event to happen¹¹.

Where the debt relates to an obligation to make an advance payment, the relevant day is the day on which the debt is treated¹² as having been created¹³.

In any other case, the relevant day is the last day of the period of 30 days beginning with:

- 247 (1) the day on which the obligation of the supplier to which the debt relates is performed; or
- 248 (2) the day on which the purchaser has notice of the amount of the debt or, where that amount is unascertained, the sum which the supplier claims is the amount of the debt,

whichever is the later¹⁴.

Where the debt is created by virtue of an obligation to pay a sum due in respect of a period of hire of goods, head (1) above has effect as if it referred to the last day of that period¹⁵.

Statutory interest ceases to run when the interest would cease to run if it were carried under an express contract term¹⁶.

- 1 For the meaning of 'statutory interest' see PARA 220 ante.
- 2 For the meaning of 'qualifying debt' see PARA 225 ante; and as to references to a debt see PARA 220 note 2 ante.
- 3 Ie the Late Payment of Commercial Debts (Interest) Act 1998 s 5: see PARA 229 post.
- 4 Ibid s 4(1).
- 5 Ie the rate prevailing under ibid s 6: see PARA 230 post.
- 6 Ibid s 4(2).
- 7 For the meaning of 'supplier' see PARA 221 note 3 ante.
- 8 For the meaning of 'purchaser' see PARA 221 note 2 ante.
- 9 As to references to an agreement see PARA 220 note 5 ante.
- 10 Late Payment of Commercial Debts (Interest) Act 1998 s 4(3). For the meaning of 'advance payment' see PARA 226 note 2 ante; definition applied by s 4(8).
- 11 Ibid s 4(3).
- 12 Ie by ibid s 11.
- 13 Ibid s 4(4).
- 14 Ibid s 4(5).
- 15 Ibid s 4(6).
- 16 Ibid s 4(7). As to references to contract terms see PARA 220 note 5 ante.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

227 Period for which statutory interest runs

NOTE 14--See *Ruttle Plant Hire Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWCA Civ 97, [2009] BLR 301, [2009] All ER (D) 01 (Mar).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(A) Statutory Interest on Qualifying Debts/228. Compensation arising out of late payment.

228. Compensation arising out of late payment.

Once statutory interest¹ begins to run in relation to a qualifying debt² arising from a relevant contract³ the supplier⁴ is entitled to a fixed sum in addition to the statutory interest on the debt⁵. That sum is:

- 249 (1) for a debt less than £1,000, the sum of £40;
- 250 (2) for a debt of £1,000 or more, but less than £10,000, the sum of £70; and
- 251 (3) for a debt of £10,000 or more, the sum of £100⁶.

The obligation to pay an additional fixed sum under these provisions is to be treated as part of the term implied⁷ in the contract creating the debt⁸.

- 1 For the meaning of 'statutory interest' see PARA 220 ante.
- 2 For the meaning of 'qualifying debt' see PARA 225 ante.
- 3 As to relevant contracts see PARA 221 ante.
- 4 For the meaning of 'supplier' see PARA 221 note 3 ante.
- 5 Late Payment of Commercial Debts (Interest) Act 1998 s 5A(1) (s 5A added by the Late Payment of Commercial Debts Regulations 2002, SI 2002/1674).
- 6 Late Payment of Commercial Debts (Interest) Act 1998 s 5A(2) (as added: see note 5 supra).
- 7 Ie by *ibid* s 1(1): see PARA 220 ante.
- 8 *Ibid* s 5A(3) (as added: see note 5 supra).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(A) Statutory Interest on Qualifying Debts/229. Remission of statutory interest.

229. Remission of statutory interest.

Where, by reason of any conduct¹ of the supplier², the interests of justice require that statutory interest³ should be remitted in whole or in part in respect of a period for which it would otherwise run⁴ in relation to a qualifying debt⁵:

- 252 (1) if the interests of justice require that the supplier should receive no statutory interest for a period, statutory interest does not run for that period⁶;

253 (2) if the interests of justice require that the supplier should receive statutory interest at a reduced rate for a period, statutory interest runs at such rate as meets the justice of the case for that period⁷.

Remission of statutory interest may be so required:

254 (a) by reason of conduct at any time, whether before or after the time at which the debt is created; and

255 (b) for the whole period for which statutory interest would otherwise run or for one or more parts of that period⁸.

1 For these purposes, 'conduct' includes any act or omission: Late Payment of Commercial Debts (Interest) Act 1998 s 5(5).

2 For the meaning of 'supplier' see PARA 221 note 3 ante.

3 For the meaning of 'statutory interest' see PARA 220 ante.

4 See under the Late Payment of Commercial Debts (Interest) Act 1998 s 4: see PARA 227 ante.

5 For the meaning of 'qualifying debt' see PARA 225 ante; and as to references to a debt see PARA 220 note 2 ante.

6 Late Payment of Commercial Debts (Interest) Act 1998 s 5(1), (2). Section 5 is designed to provide remission of interest where the creditor's conduct makes it unjust to require interest. That will cover circumstances of incorrect invoices, tardy responses to queries, being unavailable to receive payment and so on: see 582 HL Official Report (5th series) col 885.

7 Late Payment of Commercial Debts (Interest) Act 1998 s 5(1), (3).

8 Ibid s 5(4).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(A) Statutory Interest on Qualifying Debts/230. Rate of statutory interest.

230. Rate of statutory interest.

The Secretary of State¹ must by order made with the consent of the Treasury² set the rate of statutory interest³ by prescribing a formula for calculating the rate of statutory interest or the rate of statutory interest⁴.

Before making such an order, the Secretary of State must, among other things, consider the extent to which it may be desirable to set the rate:

- 256 (1) so as to protect suppliers⁵ whose financial position makes them particularly vulnerable if their qualifying debts⁶ are paid late; and
 257 (2) so as to deter generally the late payment of qualifying debts⁷.

The rate of statutory interest so prescribed is 8 per cent per annum over the official dealing rate⁸ in force on the 30 June (in respect of interest which starts to run between 1 July and 31 December) or the 31 December (in respect of interest which starts to run between 1 January and 30 June) immediately before the day on which statutory interest starts to run⁹.

- 1 As to the Secretary of State see PARA 15 ante.
- 2 As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.
- 3 For the meaning of 'statutory interest' see PARA 220 ante.
- 4 Late Payment of Commercial Debts (Interest) Act 1998 s 6(1). As to the making of orders generally see PARA 221 note 7 ante.
- 5 For the meaning of 'supplier' see PARA 221 note 3 ante.
- 6 For the meaning of 'qualifying debt' see PARA 225 ante; and as to references to a debt see PARA 220 note 2 ante.
- 7 Late Payment of Commercial Debts (Interest) Act 1998 s 6(2).
- 8 For these purposes, 'the official dealing rate' means the rate announced from time to time by the Monetary Policy Committee of the Bank of England ('the Bank') and for the time being in force as the official dealing rate, being the rate at which the Bank is willing to enter into transactions for providing short-term liquidity in the money markets: Late Payments of Commercial Debts (Rate of Interest) (No 3) Order 2002, SI 2002/1675, art 3. The Monetary Policy Committee was constituted by the Bank of England Act 1998 s 13: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 801.
- 9 Late Payments of Commercial Debts (Rate of Interest) (No 3) Order 2002, SI 2002/1675, art 4.

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(B) Contract Terms relating to Late Payment of Qualifying Debts/231. Circumstances where statutory interest may be ousted or varied.

(B) CONTRACT TERMS RELATING TO LATE PAYMENT OF QUALIFYING DEBTS

231. Circumstances where statutory interest may be ousted or varied.

The following provisions¹:

- 258 (1) deal with the extent to which the parties to a relevant contract² may by reference to contract terms³ oust or vary the right to statutory interest⁴ that would

otherwise apply when a qualifying debt⁵ created by the contract ('the debt') is not paid⁶;

259 (2) apply to contract terms agreed before the debt is created, the parties after that time being free to agree⁷ terms dealing with the debt⁸;

260 (3) have effect without prejudice to any other ground which may affect the validity of a contract term⁹.

Any contract terms are void to the extent that they purport to exclude the right to statutory interest in relation to the debt, unless there is a substantial contractual remedy¹⁰ for late payment of the debt¹¹. Where the parties agree a contractual remedy for late payment of the debt that is a substantial remedy, statutory interest is not carried by the debt, unless they agree otherwise¹².

The parties may not agree to vary the right to statutory interest in relation to the debt unless either the right to statutory interest as varied or the overall remedy¹³ for late payment of the debt is a substantial remedy¹⁴.

Any contract terms are void to the extent that they purport to confer a contractual right to interest that is not a substantial remedy for late payment of the debt or vary the right to statutory interest so as to provide for a right to statutory interest that is not a substantial remedy for late payment of the debt, unless the overall remedy for late payment of the debt is a substantial remedy¹⁵.

Subject to the above provisions, the parties are free to agree contract terms which deal with the consequences of late payment of the debt¹⁶.

Where a person acting in the course of a business has written standard terms on which he enters (or intends to enter) as purchaser into contracts to which the Late Payment of Commercial Debts (Interest) Act 1998 applies which include a term purporting to oust or vary the right to statutory interest in relation to qualifying debts created by those contracts, if it appears to the High Court that in all or any circumstances the purported use of such a term in a relevant contract would be void under that Act, the court on the application of a representative body¹⁷ may grant an injunction against that person restraining him in those circumstances from using the offending term, on such terms as the court may think fit¹⁸.

1 Ie the Late Payment of Commercial Debts (Interest) Act 1998 Pt II (ss 7-10): see the text and notes 2-18 *infra*; and PARA 232 *post*.

2 Ie a contract to which the Late Payment of Commercial Debts (Interest) Act 1998 applies: see PARA 221 *ante*.

3 For these purposes, 'contract term' means a term of the contract creating the debt or any other contract term binding the parties, or either of them: *ibid* s 10(1). As to references to contract terms see PARA 220 note 5 *ante*.

4 For these purposes, a reference, however worded, to contract terms which vary the right to statutory interest is a reference to terms altering in any way the effect of *ibid* Pt I (ss 1-6) (see PARA 220 *et seq ante*) in relation to the debt, eg by postponing the time at which interest starts to run or by imposing conditions on the right to interest: s 10(2). For the meaning of 'statutory interest' see PARA 220 *ante*.

5 For the meaning of 'qualifying debt' see PARA 225 *ante*.

6 Late Payment of Commercial Debts (Interest) Act 1998 s 7(1).

7 As to references to an agreement see PARA 220 note 5 *ante*.

8 Late Payment of Commercial Debts (Interest) Act 1998 s 7(2).

9 *Ibid* s 7(3).

10 For these purposes, 'contractual remedy' means a contractual right to interest or any contractual remedy other than interest: *ibid* s 10(1). 'Contractual right to interest' includes a reference to a contractual right to charge interest: s 10(1). For the meaning of 'substantial remedy' see PARA 232 post.

11 *Ibid* s 8(1). For these purposes, a reference to late payment of the debt is a reference to late payment of the sum due when the debt is created, excluding any part of that sum which is prevented from carrying statutory interest by s 3 (see PARA 225 ante): s 10(3).

12 *Ibid* s 8(2).

13 For these purposes, 'overall remedy', in relation to the late payment of the debt, means any combination of a contractual right to interest, a varied right to statutory interest or a contractual remedy other than interest: *ibid* s 10(1).

14 *Ibid* s 8(3).

15 *Ibid* s 8(4).

16 *Ibid* s 8(5).

17 'Representative body' means an organisation established to represent the collective interests of small and medium-sized enterprises in general or in a particular sector or area: Late Payment of Commercial Debts Regulations 2002, SI 2002/1674, reg 3(1)(b). 'Small and medium-sized enterprises' means those enterprises defined in EC Commission Regulation 70/2001 on the application of EC Treaty arts 87, 88 to state aid to small and medium-sized enterprises (L10, 13.1.2001, p 33): Late Payment of Commercial Debts Regulations 2002, SI 2002/1674, reg 3(1)(a).

18 *Ibid* reg 3(2), (3). Only a representative body may apply to the High Court under reg 3: reg 3(4).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(B) Contract Terms relating to Late Payment of Qualifying Debts/232. Meaning of 'substantial remedy'.

232. Meaning of 'substantial remedy'.

A remedy for the late payment of the debt¹ is to be regarded as a substantial remedy unless:

- 261 (1) the remedy is insufficient either for the purpose of compensating the supplier² for late payment or for deterring late payment; and
- 262 (2) it would not be fair or reasonable to allow the remedy to be relied on to oust or, as the case may be, to vary the right to statutory interest³ that would otherwise apply in relation to the debt⁴.

In determining whether a remedy is not a substantial remedy, regard is to be had to all the relevant circumstances at the time the terms in question are agreed⁵; and, in determining whether head (2) above applies, regard is to be had⁶ to the following matters:

- 263 (a) the benefits of commercial certainty;

- 264 (b) the strength of the bargaining positions of the parties relative to each other;
- 265 (c) whether the term was imposed by one party to the detriment of the other, whether by the use of standard terms or otherwise; and
- 266 (d) whether the supplier received an inducement to agree to the term⁷.

1 As to references to late payment of the debt see PARA 231 note 11 ante; and for the meaning of 'the debt' see PARA 231 ante.

2 For the meaning of 'supplier' see PARA 221 note 3 ante.

3 For the meaning of 'statutory interest' see PARA 220 ante.

4 Late Payment of Commercial Debts (Interest) Act 1998 ss 9(1), 10(1).

5 Ibid ss 9(2), 10(1). As to references to an agreement see PARA 220 note 5 ante.

6 Ie without prejudice to the generality of ibid s 9(2): see the text to note 5 supra.

7 Ibid ss 9(3), 10(1).

UPDATE

161-234 Performance of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/A. LATE PAYMENT OF COMMERCIAL DEBTS/(B) Contract Terms relating to Late Payment of Qualifying Debts/233. Contract terms relating to the date for payment of the contract price.

233. Contract terms relating to the date for payment of the contract price.

Where any contract term¹ purports to have the effect of postponing the time at which a qualifying debt² would otherwise be created by a relevant contract³, the provisions of the Unfair Contract Terms Act 1977 whereby no reliance is to be placed on certain contract terms⁴ apply in cases where such a contract term is not contained in written standard terms of the purchaser⁵ as well as in cases where the term is contained in such standard terms⁶.

1 For the meaning of 'contract term' see PARA 231 note 3 ante; definition applied by the Late Payment of Commercial Debts (Interest) Act 1998 s 10(1) s 14(3).

2 For the meaning of 'qualifying debt' see PARA 225 ante; and as to references to a debt see PARA 220 note 2 ante.

3 Ie a contract to which the Late Payment of Commercial Debts (Interest) Act 1998 applies: see PARA 221 ante.

4 Ie the Unfair Contract Terms Act 1977 s 3(2)(b): see PARA 450 post.

5 For the meaning of 'purchaser' see PARA 221 note 2 ante.

6 Late Payment of Commercial Debts (Interest) Act 1998 s 14(1), (2).

UPDATE**161-234 Performance of the Contract**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/B. LATE PAYMENT OF NON-COMMERCIAL DEBTS/234. Non-statutory interest.

B. LATE PAYMENT OF NON-COMMERCIAL DEBTS**234. Non-statutory interest.**

Where one or both parties to a contract for the sale of goods is not or are not acting in the course of a business¹, or where the contract is one for the supply of goods but is excepted from the provisions relating to statutory interest², interest on the price of the goods is not payable as a contractual obligation³ unless there is an agreement to that effect⁴.

An agreement by the buyer to pay interest on the price may be inferred from the course of dealing between the parties or from usage of trade⁵; and in an action for the price of goods, interest on the price may (and as a general rule will) be awarded by the court⁶.

1 For the meaning of 'business' see the Late Payment of Commercial Debts (Interest) Act 1998 s 2(7); and PARA 221 note 1 ante.

2 Ie by virtue of *ibid* s 2(5): see PARA 221 heads (1)-(3) ante.

3 *Gordon v Swan* (1810) 2 Camp 429n, 12 East 419; *Calton v Bragg* (1812) 15 East 223 (money lent); *Higgins v Sargent* (1823) 2 B & C 348 (policy of insurance). The rule is the same even where a balance is struck: *Chalie v Duke of York* (1806) 6 Esp 45. See generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1276 et seq.

4 *Harrison v Allen* (1824) 2 Bing 4.

5 *Re Marquis of Anglesey, Willmot v Gardner* [1901] 2 Ch 548, CA, overruling *Re Lloyd Edwards, Williams v Trench* (1891) 61 LJ Ch 22. See also *De Havilland v Bowerbank* (1807) 1 Camp 50 per Lord Ellenborough CJ; *Bruce v Hunter* (1813) 3 Camp 467; *Ikin v Bradley* (1818) 2 Moore CP 206, Ex Ch (bank deposit); *Eaton v Bell* (1821) 5 B & Ald 34; *Rhodes v Rhodes* (1860) John 653.

6 See the Sale of Goods Act 1979 s 54 (cited in PARA 320 post); the Supreme Court Act 1981 s 35A (added by the Administration of Justice Act 1982 s 15(1), Sch 1); the County Courts Act 1981 s 69 (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 46; and the Civil Procedure Act 1997 s 10, Sch 2 para 2(2)); CPR 12.6, 14.14, 16.4(1)(b); *President of India v La Pintada Cia Navegacion SA* [1985] AC 104, [1984] 2 All ER 773, HL; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307; CIVIL PROCEDURE. As to the power of arbitral tribunals to award interest see the Arbitration Act 1996 ss 49, 57; and ARBITRATION vol 2 (2008) PARAS 1260, 1267.

UPDATE**161-234 Performance of the Contract**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

234 Non-statutory interest

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/4. PERFORMANCE OF THE CONTRACT/(4) PAYMENT/(iii) Payment of Interest/C. GOODS PAID FOR BY BILL OF EXCHANGE OR PROMISSORY NOTE/235. Interest where bill or note to be given.

C. GOODS PAID FOR BY BILL OF EXCHANGE OR PROMISSORY NOTE

235. Interest where bill or note to be given.

When the goods are to be paid for by a bill of exchange or promissory note and the bill or note is not given or made, an agreement on the part of the buyer is inferred to pay interest on the price from the time when the bill or note would have matured¹.

¹ *Becher v Jones* (1810) 2 Camp 428n, Ex Ch; *Porter v Palsgrave* (1810) 2 Camp 472; *Slack v Lowell* (1810) 3 Taunt 157; *Marshall v Poole* (1810) 13 East 98; *Farr v Ward* (1837) 3 M & W 25; *Davis v Smyth* (1841) 8 M & W 399. Cf FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1602; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1305.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(1) IN GENERAL/236. Implied rights of unpaid seller.

5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS

(1) IN GENERAL

236. Implied rights of unpaid seller.

Subject to the Sale of Goods Act 1979¹ and any other Act², notwithstanding that the property³ in the goods⁴ may have passed to the buyer⁵, the unpaid seller⁶ of goods, as such, has, by implication of law:

- 267 (1) a lien on the goods or right to retain them for the price while he is in possession⁷ of them;
- 268 (2) in case of the insolvency⁸ of the buyer, a right of stopping the goods in transit after he has parted with the possession⁹ of them; and
- 269 (3) subject to certain statutory limitations¹⁰, a right of resale¹¹.

¹ See the Sale of Goods Act 1979 ss 41-43 (unpaid seller's lien: see PARA 242 et seq post), ss 44-46 (stoppage in transit: see PARA 256 et seq post), s 47 (dispositions by buyer: see PARA 251 et seq post), s 48

(resale by seller: see PARA 281 et seq post) and s 55 (as amended) (exclusion of implied terms: see PARAS 12, 100 ante).

2 See the Factors Act 1889 s 8 (disposition by seller in possession: see PARA 157 ante), s 9 (as amended) (disposition by buyer in possession: see PARA 158 et seq ante) and s 10 (disposition by buyer being transferee of document of title: see PARA 253 post). These provisions are substantially identical with the Sale of Goods Act 1979 ss 24, 25(1), 47(2) respectively: see PARAS 8, 157-158 ante, 253-254 post.

3 For the meaning of 'property', in relation to goods see PARA 27 ante.

4 For the meaning of 'goods' see PARA 30 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 For the meaning of 'unpaid seller' see PARA 238 post. As to the meaning of 'seller' for these purposes see PARA 241 post.

7 In this case the buyer has no possession, actual or constructive. As to the seller's lien see PARA 242 et seq post.

8 For the meaning of 'insolvent' see PARA 206 ante.

9 In this case the seller, by delivering the goods to a carrier, has given the buyer constructive, but not actual, possession. As to stoppage in transit see PARA 256 et seq post.

10 See the Sale of Goods Act 1979 s 48; and PARA 281 et seq post.

11 Ibid s 39(1).

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(1) IN GENERAL/237. Where property in goods has not passed to buyer.

237. Where property in goods has not passed to buyer.

The expressions 'lien' and 'stoppage in transit' are inappropriate to describe the rights of the seller before the general property in goods has passed to the buyer. However, it is specifically enacted that, where the property¹ in goods² has not passed to the buyer³, the unpaid seller⁴ has, in addition to his other remedies, a right of withholding delivery similar to, and co-extensive with, his rights of lien⁵ and stoppage in transit⁶ where the property has passed to the buyer⁷.

1 For the meaning of 'property', in relation to goods see PARA 27 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 For the meaning of 'unpaid seller' see PARA 238 post.

- 5 As to the seller's lien see PARA 242 et seq post.
- 6 As to stoppage in transit see PARA 256 et seq post.
- 7 Sale of Goods Act 1979 s 39(2). See also PARAS 279-280 post.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(1) IN GENERAL/238. Meaning of 'unpaid seller'.

238. Meaning of 'unpaid seller'.

The seller¹ of goods² is an unpaid seller within the meaning of the Sale of Goods Act 1979:

- 270 (1) when the whole of the price³ has not been paid or tendered⁴;
- 271 (2) when a bill of exchange or other negotiable instrument has been received as conditional payment⁵, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument⁶ or otherwise⁷.

If the buyer becomes insolvent, the fact that the buyer had originally agreed to pay for the goods at a future date, and that the instrument under or by which he would have paid at that future date is still outstanding, does not prevent the seller from being an unpaid seller⁸.

1 As to the meaning of 'seller' for these purposes see PARA 241 post. An alien enemy trading with a British subject who has a licence from the Crown which legalises the sale has been held to be entitled to stop the goods in transit after arrival at a port in Great Britain on the insolvency of the purchaser: see *Fenton v Pearson* (1812) 15 East 419. As to trading with the enemy see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 576 et seq.

2 For the meaning of 'goods' see PARA 30 ante.

3 'The whole of the price' is the price of all the goods where the contract is entire; in severable contracts it would, as a rule, be only the apportioned price of such part of the goods as is retained: see *H Longbottom & Co Ltd v Bass, Walker & Co* [1922] WN 245, CA (where the contract was held to be indivisible). As to severable contracts see PARA 240 post.

4 Sale of Goods Act 1979 s 38(1)(a). See also *Hodgson v Loy* (1797) 7 Term Rep 440; *Feise v Wray* (1802) 3 East 93; *Nichols v Hart* (1831) 5 C & P 179; *Milgate v Kebble* (1841) 3 Man & G 100. The price must be due; 'there can be no lien without an immediate right of action for the debt': *Raitt v Mitchell* (1815) 4 Camp 146 at 150 per Lord Ellenborough CJ. The existence of a set-off without an agreement to set off is not a payment of the debt (*Pinnock v Harrison* (1838) 3 M & W 532); and an offer by the creditor to set off a debt due from the person having a lien does not amount to a tender so as to discharge the lien (*Clarke v Fell* (1833) 4 B & Ad 404). As to tender see CONTRACT vol 9(1) (Reissue) PARA 971 et seq.

5 As to payment by negotiable instrument see PARA 212 ante; and CONTRACT vol 9(1) (Reissue) PARA 951 et seq.

6 *Feise v Wray* (1802) 3 East 93; *Griffiths v Perry* (1859) 1 E & E 680; *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491 at 501 per Mellish LJ; *Re Nathan, ex p Stapleton* (1879) 10 ChD 586, CA.

7 Sale of Goods Act 1979 s 38(1)(b). Where the bill is running, there is no debt and so the seller is paid; similarly, where the bill, although it may be overdue, is outstanding in the hands of an indorsee or holder; but the words 'or otherwise' seem to contemplate the case of the insolvency of the buyer during the period of credit, as in *Valpy v Oakeley* (1851) 16 QB 941; *Griffiths v Perry* (1859) 1 E & E 680. See further the cases cited in note 8 infra. For the meaning of 'insolvent' see PARA 206 ante.

8 *Miles v Gorton* (1834) 2 Cr & M 504 at 512; *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491 (overruling on this point *Bunney v Poyntz* (1833) 4 B & Ad 568); *Re J Defries & Sons Ltd, Eichholz v J Defries & Sons Ltd* [1909] 2 Ch 423.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(1) IN GENERAL/239. Seller unpaid on account current.

239. Seller unpaid on account current.

Where there is an unsettled account current between the parties:

- 272 (1) if the seller appropriates goods to the buyer specifically on account of a debit balance then existing against him, he may not exercise any rights of an unpaid seller against those goods by reason that the balance of the account may subsequently be reversed in his favour¹;
- 273 (2) if the seller draws on the buyer specifically against particular goods, he does not lose his rights as unpaid seller in respect of such goods merely because it is uncertain at the time when he exercises such rights whether the balance of the account is or is not in his favour²; it lies on the buyer to prove the negative³.

1 It is considered that this proposition may be gathered from *Vertue v Jewell* (1814) 4 Camp 31, as explained in *Patten v Thompson* (1816) 5 M & S 350 at 360 per Lord Ellenborough CJ. *Vertue v Jewell* supra was a case of stoppage in transit, but the same principle should apply generally. See also *Smith v Bowles* (1797) 2 Esp 578 (remittance of money in payment of debt). For the meaning of 'unpaid seller' in the Sale of Goods Act 1979 see PARA 238 ante.

2 *Wood v Jones* (1825) 7 Dow & Ry KB 126 (stoppage in transit). See also *The Tigress* (1863) Brown & Lush 38.

3 *Wood v Jones* (1825) 7 Dow & Ry KB 126 at 129 per Abbott CJ.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(1) IN GENERAL/240. Seller's rights ordinarily indivisible.

240. Seller's rights ordinarily indivisible.

The unpaid seller's¹ rights extend over every part of the goods for the price of all of them², except where, by the terms of the contract or otherwise, the price has been apportioned³. If, however, the buyer becomes insolvent⁴, the unpaid seller's rights are, by implication of law and notwithstanding the apportionment of the price, exercisable over every portion of the goods not paid for in respect of any part of the price of the goods due under the contract⁵.

1 For the meaning of 'unpaid seller' in the Sale of Goods Act 1979 see PARA 238 ante.

2 *Wentworth v Outhwaite* (1842) 10 M & W 436 at 452. See also *Payne v Shadbolt* (1808) 1 Camp 427; *Marks v Laheè* (1837) 3 Bing NC 408; *Coombs v Noad* (1842) 10 M & W 127. In the case of entire contracts, 'the whole of the price' in the Sale of Goods Act 1979 s 38(1)(a) means the price of all the goods: see PARA 238 note 3 ante.

3 For the meaning of 'insolvent' in the Sale of Goods Act 1979 see PARA 206 ante.

4 Eg in the case of instalment contracts, where the instalments are to be separately paid for. In such cases the seller's rights are apportioned: *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289 at 293; *Morgan v Bain* (1874) LR 10 CP 15 at 25 per Brett J.

5 *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289. If any portion of the goods is paid for, the seller's rights over that portion of them are gone: *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 ChD 205.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(1) IN GENERAL/241. Persons in position of seller.

241. Persons in position of seller.

For the purposes of the provisions of the Sale of Goods Act 1979 relating to the rights of an unpaid seller against the goods¹, 'seller' includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed², or a consignor or agent³ who has himself paid, or is directly responsible for, the price⁴. These instances of persons in the position of a seller are, however, by way of example only and do not purport to be exhaustive. Thus, the same rights are possessed⁵ by a principal consigning goods to his factor on a joint account where the factor is a debtor to the principal for a proportion of the goods⁶, by a person who has agreed to buy goods and who resells the goods, not having at the time of the resale the property in them⁷, and by a surety for the buyer who has paid the

price to the seller⁸. Nevertheless, a buyer who, after payment for goods, exercises his right to reject them is not in the position of an unpaid seller⁹.

1 le the Sale of Goods Act 1979 Pt V (ss 38-48) (as amended): see PARA 236 et seq ante; and PARA 242 et seq post. For the meaning of 'unpaid seller' see PARA 238 ante.

2 See *Morison v Gray* (1824) 2 Bing 260 (stoppage in transit). Although in *Morison v Gray* supra at 261 Best CJ said that the transfer of the bill of lading conferred on the agent a sufficient right of property to enable him to bring trover, the real point decided was that the agent had conferred on him a right to the possession of the goods: *Burgos v Nascimento (McKeand, Claimant)* (1908) 100 LT 71. It was not intended to overrule *Waring v Cox* (1808) 1 Camp 369 or *Coxe v Harden* (1803) 4 East 211 (where it was held that the agent could not bring trover or assumpsit).

3 See *Feise v Wray* (1802) 3 East 93; *Tucker v Humphrey* (1828) 4 Bing 516; *Van Casteel v Booker* (1848) 2 Exch 691; *Mercantile Bank v Gladstone* (1868) LR 3 Exch 233 (all cases of stoppage in transit); *Hawkes v Dunn* (1831) 1 Tyr 413 (lien); *Falk v Fletcher* (1865) 18 CBNS 403 (right of property in agent).

4 Sale of Goods Act 1979 s 38(2). For the general meaning of 'seller' for the purposes of the Sale of Goods Act 1979 see PARA 27 ante. A partnership selling goods to a member of the firm is a real seller: *Re McLaren, ex p Cooper* (1879) 11 ChD 68, CA. See further AGENCY vol 1 (2008) PARA 119.

5 It may be that these persons fall within the Sale of Goods Act 1979 s 38(2), as being persons 'in the position of a seller'.

6 *Newsom v Thornton* (1805) 6 East 17. See also *Kinloch v Craig* (1790) 3 Term Rep 783, HL (not a case of stoppage in transit or of lien as against a buyer, but one in which a principal prevented the goods from coming into his agent's possession so as to establish a lien of a factor).

7 *Jenkyns v Osborne* (1844) 7 Man & G 678. It is questionable, however, whether this particular case does not rather fall under the provisions of the Sale of Goods Act 1979 s 39(2): see PARAS 237 ante, 279 post. Cf the general meaning of 'seller' under s 61(1): see PARA 27 ante.

8 A surety had no right of stoppage in transit at common law (*Siffken v Wray* (1805) 6 East 371); but it was decided in *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195 that, having paid the price, an agent of the buyer who was in the position of a surety for his principal could exercise against him the seller's right of lien by virtue of the Mercantile Law Amendment Act 1856 s 5 (repealed), as the seller's lien was a 'security'. Cf *Re Russell, Russell v Shoolbred* (1885) 29 ChD 254, CA. See also *Re M'Myn, Lightbown v M'Myn* (1886) 33 ChD 575; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1140-1141.

9 *JL Lyons & Co Ltd v May and Baker Ltd* [1923] 1 KB 685.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(2) SELLER'S LIEN/(i) The Seller's Right of Lien/242. Right of lien.

(2) SELLER'S LIEN

(i) The Seller's Right of Lien

242. Right of lien.

Subject to the Sale of Goods Act 1979¹, the unpaid seller² of goods³ who is in possession⁴ of them is entitled to retain possession of them until payment or tender⁵ of the price⁶:

- 274 (1) where the goods have been sold without any stipulation as to credit⁷;
- 275 (2) where the goods have been sold on credit but the term of credit has expired⁸;
- 276 (3) where the buyer becomes insolvent⁹.

The seller may exercise his lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer¹⁰.

1 See the Sale of Goods Act 1979 s 42 (part delivery intended as full delivery: see PARA 243 post), s 43(1) (termination of lien: see PARA 244 post), s 47 (effect of sub-sale etc by buyer: see PARA 251 et seq post) and s 55 (as amended) (exclusion of implied terms: see PARAS 12, 100 ante).

2 For the meaning of 'unpaid seller' see PARA 238 ante.

3 For the meaning of 'goods' see PARA 30 ante.

4 The entitlement to a lien also exists where the goods are in the possession of the seller's employee or bailee: see *Owenson v Morse* (1796) 7 Term Rep 64; and the text and note 10 infra. The Sale of Goods Act 1979 does not define 'possession'. The fact that the buyer is able under the contract to exercise some degree of possession or control is not inconsistent with the seller's possession under a lien. The test of the loss of lien is whether the buyer has uncontrolled possession or not: *Lord's Trustee v Great Eastern Rly Co* [1908] 2 KB 54 at 69, CA, per Fletcher Moulton LJ. See also *Milgate v Kebble* (1841) 3 Man & G 100 (seller gives inner, but retains outer, key); *Re Westlake, ex p Willoughby* (1881) 16 ChD 604 (barge; some control by debtor); *Hilton v Tucker* (1888) 39 ChD 669 (pledge; delivery of key); *Great Eastern Rly Co v Lord's Trustee* [1909] AC 109, HL (carrier's lien; goods on creditor's land leased to debtor); and LIEN vol 68 (2008) PARAS 820-827.

5 Tender of the price duly made divests the seller's lien: *Martindale v Smith* (1841) 1 QB 389. See LIEN vol 68 (2008) PARA 851.

6 'Price' includes sums, such as customs duties, treated by the contract as part of the price (*Winks v Hassall* (1829) 9 B & C 372), but not the expenses of custody in the exercise of the seller's lien (*British Empire Shipping Co v Somerset* (1858) EB & E 353 at 367, Ex Ch; affd (1860) 8 HL Cas 338). It seems that a lien may exist even in the case of an illegal contract (*Scarfe v Morgan* (1838) 4 M & W 270), or where the debt is barred by limitation Acts (*Spears v Hartly* (1800) 3 Esp 81; *Re Broomhead* (1847) 5 Dow & L 52), the maxim being melior est conditio possidentis (ie the position of the possessor is the better) (*Taylor v Chester* (1869) LR 4 QB 309). See LIMITATION PERIODS vol 68 (2008) PARA 942. As to lien generally see LIEN.

7 Sale of Goods Act 1979 s 41(1)(a). Here the price is payable on delivery, for, where nothing is said, payment and delivery are concurrent: see s 28; and PARA 162 ante.

8 Ibid s 41(1)(b). See *H Longbottom & Co Ltd v Bass, Walker & Co* [1922] WN 245, CA. In this case the price has become payable on delivery: *New v Swain* (1828) Dan & L 193.

9 Sale of Goods Act 1979 s 41(1)(c). For the meaning of 'insolvent' see PARA 206 ante. The rule is the same whether or not credit has been given and whether or not insolvency occurs during the period of credit: *Bloxam v Sanders* (1825) 4 B & C 941; *Griffiths v Perry* (1859) 1 E & E 680; *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491; *Grice v Richardson* (1877) 3 App Cas 319, PC; *Re Westlake, ex p Willoughby* (1881) 16 ChD 604. The insolvent buyer is entitled to delivery if he pays or tenders the price of the goods in cash, whether cash was payable or not (*Re Nathan, ex p Stapleton* (1879) 10 ChD 586, CA), for, in the case of insolvency amounting to a declaration of intention not to pay for the goods, the law allows the seller to alter the terms of the contract, but only to that extent (*Re Phoenix Bessemer Steel Co, ex p Carnforth Haematite Iron Co* (1876) 4 ChD 108 at 113, CA, per Jessel MR). The price of previous deliveries unpaid for must be included: *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289. Default in that behalf by the buyer or his trustee in bankruptcy entitles the seller, after the lapse of a reasonable time, to repudiate the contract altogether: *Re Nathan, ex p Stapleton* supra.

10 Sale of Goods Act 1979 s 41(2). See *Miles v Gorton* (1834) 2 Cr & M 504; *Townley v Crump* (1835) 4 Ad & El 58; *Grice v Richardson* (1877) 3 App Cas 319, PC (all cases of insolvency). Cf AGENCY vol 1 (2008) PARAS 114-118; BAILMENT vol 3(1) (Reissue) PARAS 77-79; LIEN vol 68 (2008) PARA 829. At common law the lien was not exercisable after an attornment by the seller to the buyer if the buyer, being solvent, was merely in default: *Cusack v Robinson* (1861) 1 B & S 299 at 308. However, on the buyer's insolvency, the lien revived: *Grice v*

Richardson supra. The rule has now been made a general one. The Sale of Goods Act 1979 s 41(2) is not applicable where the goods are sold on credit, there being during the credit no 'right of lien', and it must also be read subject to s 43(1) (see PARA 244 post), so that, if the lien is lost and the goods are afterwards redelivered to the seller as bailee, the seller's right does not revive. As to loss of lien see LIEN vol 68 (2008) PARAS 850-854, 882-886. The right may also be excluded under s 55(1): see PARAS 12, 100 ante.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(2) SELLER'S LIEN/(i) The Seller's Right of Lien/243. Lien on goods remaining after part delivery.

243. Lien on goods remaining after part delivery.

Where an unpaid seller¹ has made part delivery² of the goods³, he may exercise his lien on the remainder, unless the part delivery has been made under such circumstances as to show an agreement to waive the lien⁴.

The circumstances in which such an agreement may be inferred are not easy to classify. It has been suggested in cases decided before the passing of the Sale of Goods Act 1893 that an agreement to waive the lien may be inferred where the delivery is of an essential part of the goods sold, for example, an essential part of a machine⁵; or where the character of the person taking delivery, or the object for which it is taken, is such as to show a common intention to treat the part delivery as a delivery of all the goods⁶; or where the part delivery takes place in circumstances showing that the seller's agent in possession of the goods has acknowledged to the buyer that he holds the goods on his behalf⁷.

1 For the meaning of 'unpaid seller' see PARA 238 ante.

2 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

3 For the meaning of 'goods' see PARA 30 ante.

4 Sale of Goods Act 1979 s 42. See also *Bunney v Poyntz* (1833) 4 B & Ad 568 (seller's own possession); *Dixon v Yates* (1833) 5 B & Ad 313 (part delivery to satisfy sub-contract); *Tanner v Scovell* (1845) 14 M & W 28; *Re McLaren, ex p Cooper* (1879) 11 ChD 68, CA (carrier retains lien for freight). The fact that the goods are in the seller's own possession is important to show that a part delivery is not intended as a complete delivery: *Miles v Gorton* (1834) 2 Cr & M 504 at 510 per Bayley B. The 'lien' must exist in the first instance. Thus, if the goods are deliverable by instalments which are not to be separately paid for, as the price is not payable until after complete delivery, no lien exists, and the Sale of Goods Act 1979 s 42 has no application; if the instalments are to be separately paid for, the lien is ordinarily severable: see *Steinberger v Atkinson & Co Ltd* (1914) 31 TLR 110; and generally para 240 ante.

5 *Re McLaren, ex p Cooper* (1879) 11 ChD 68 at 75, CA, per Cotton LJ.

6 *Jones v Jones* (1841) 8 M & W 431 (stoppage in transit; part delivery to assignee of buyer under deed for benefit of creditors), explained in *Re McLaren, ex p Cooper* (1879) 11 ChD 68, CA.

7 *Hammond v Anderson* (1803) 1 Bos & PNR 69, as explained by Bramwell LJ in *Re Kiell, ex p Falk* (1880) 14 ChD 446 at 456, CA (on appeal sub nom *Kemp v Falk* (1882) 7 App Cas 573, HL), and by Brett LJ in *Re McLaren, ex p Cooper* (1879) 11 ChD 68 at 74, CA. *Hammond v Anderson* supra has also been explained as a case where

the buyer had, by weighing all the goods sold for an entire price, taken actual possession of all of them and then separated part: *Hammond v Anderson* supra at 72 per Chambre J; *Bunney v Poyntz* (1833) 4 B & Ad 568 at 571 per Parke J; *Re McLaren, ex p Cooper* supra at 77 per Cotton LJ. See also *Wood v Tassell* (1844) 6 QB 234. It is, however, arguable whether the proposition in the text is not affected by the Sale of Goods Act 1979 s 41(2) (see PARA 242 ante), and whether the inferences drawn in some of the older cases would now be drawn, having regard to the tendency of the courts to lean towards protection of the unpaid seller.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(2) SELLER'S LIEN/(i) The Seller's Right of Lien/244. When the lien is lost.

244. When the lien is lost.

The unpaid seller¹ of goods² loses his lien in respect of them:

- 277 (1) when he delivers the goods to a carrier or other bailee³ for the purpose of transmission to the buyer⁴ without reserving⁵ the right of disposal⁶ of the goods⁷;
- 278 (2) when the buyer or his agent lawfully obtains possession of the goods⁸;
- 279 (3) by waiver of the lien⁹.

Where, at the time of the contract:

- 280 (a) the goods are in the possession of the seller's agent¹⁰, the lien is lost where the agent, with the seller's consent, acknowledges to the buyer that he holds the goods on his behalf¹¹;
- 281 (b) the goods are in the possession of a third person, not being the seller's agent, the lien is lost where the seller puts the goods at the disposal of the buyer, who is able, without interference¹² by that third person, to take actual or constructive possession of the goods¹³;
- 282 (c) the goods are in the possession of the buyer himself as the seller's bailee, the lien is lost where the contract of sale is complete¹⁴.

1 For the meaning of 'unpaid seller' see PARA 238 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 Eg a forwarding agent of the buyer.

4 For the meaning of 'buyer' see PARA 29 ante.

5 Ie under the Sale of Goods Act 1979 s 19(1): see note 6 infra; and PARA 137 ante.

6 Ie without constituting the carrier the seller's own agent, instead (as is generally the case) of the agent of the buyer, as under *ibid* s 32(1) (see PARA 188 ante): see *Craven v Ryder* (1816) 6 Taunt 433; *Ruck v Hatfield* (1822) 5 B & Ald 632; *Thompson v Trail* (1826) 6 B & C 36 (all cases where the seller retained the mate's receipt for the goods). The wording of the Sale of Goods Act 1979 is not strictly logical, in so far as it refers to reservation of the right of disposal. By s 19(1) where a seller, when delivering goods to a carrier or other bailee,

reserves the right of disposal, the property in the goods does not pass, and thus the lien of the seller cannot arise, until the conditions imposed by the seller are fulfilled. The reservation of the right of disposal preserves not the lien itself but the equivalent right to withhold delivery conferred by s 39(2) (see PARA 279 post) on an unpaid seller of goods where the property has not yet passed.

7 Ibid s 43(1)(a). Where the seller delivers the goods to a carrier for transmission to the buyer without reserving his right of disposal, his rights become limited to a right of stoppage in transit on the insolvency of the buyer: see PARA 256 et seq post.

8 Ibid s 43(1)(b). See also *Re McLaren, ex p Cooper* (1879) 11 ChD 68 at 71, CA, per Brett LJ. The lien exists only while the seller is in possession: see the Sale of Goods Act 1979 s 39(1)(a); and PARA 236 head (1) ante. As to the effect of marking or setting aside the goods see *Holderness v Shackels* (1828) 8 B & C 612; *Dixon v Yates* (1833) 5 B & Ad 313; *Townley v Crump* (1835) 4 Ad & El 58. A special interest may by agreement be reserved to the seller notwithstanding delivery (*Dodsley v Varley* (1840) 12 Ad & El 632) or the seller may by agreement be authorised to retake the goods (*Richards v Symons* (1845) 8 QB 90). See also *London Scottish Transport Ltd v Tyres (Scotland) Ltd* 1957 SLT (Sh Ct) 48. To divest the lien possession must be taken in the capacity of buyer or buyer's agent, not as the seller's special bailee: see the text and notes 10-14 infra; and PARA 248 note 3 post. It must also be noted that under the Sale of Goods Act 1979 s 43(1)(b) the buyer must take lawful possession, whereas the word 'lawful' does not appear in s 45(1), (2): see PARAS 259, 262 post.

9 Ibid s 43(1)(c).

10 Attornment by a seller himself in possession does not divest the lien: see ibid s 41(2); and PARA 242 ante.

11 See the cases cited in regard to ibid s 29(4) in PARA 170 note 8 ante. See also *Castle v Sworder* (1861) 6 H & N 828 at 838, Ex Ch, per Crompton J; *Pooley v Great Eastern Rly Co* (1876) 34 LT 537; *Grigg v National Guardian Assurance Co* [1891] 3 Ch 206; *Poulton & Son v Anglo-American Oil Co* (1910) 27 TLR 38 (affd (1911) 27 TLR 216, CA). Cf *Slubey v Heyward* (1795) 2 Hy Bl 504; *Hammond v Anderson* (1803) 1 Bos & PNR 69, as explained in *Re McLaren, ex p Cooper* (1879) 11 ChD 68 at 74, CA, per Brett LJ. If the sale is made through the seller's warehouseman or other bailee, the completion of the contract is ipso facto an attornment: *Simmonds v Humble* (1862) 13 CBNS 258.

12 *Smith v Chance* (1819) 2 B & Ald 753.

13 *Tansley v Turner* (1835) 2 Bing NC 151; *Cooper v Bill* (1865) 3 H & C 722; *Marshall v Green* (1875) 1 CPD 35. Marking the goods by the buyer, when coupled with other circumstances, is evidence in such cases of a constructive delivery: see *Tansley v Turner* supra; *Cooper v Bill* supra. Such a marking by a sub-buyer is evidence of the seller's assent to the sub-sale under the Sale of Goods Act 1979 s 47: see *Stoveld v Hughes* (1811) 14 East 308; and PARA 251 post.

14 See Pollock and Wright on Possession in the Common Law 74. The completion of the contract gives the buyer the right to possess the goods as owner and, as he is already in actual possession, his previous possession as a bailee is turned into possession as owner: *Kilpin v Ratley* [1892] 1 QB 582, DC; *Cain v Moon* [1896] 2 QB 283, DC. See also PERSONAL PROPERTY vol 35 (Reissue) PARA 1211 et seq.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(2) SELLER'S LIEN/(i) The Seller's Right of Lien/245. Effect of judgment on seller's lien.

245. Effect of judgment on seller's lien.

An unpaid seller¹ of goods² who has a lien or right of retention in respect of them does not lose that lien or right by reason only that he has obtained judgment for the price of the goods³.

1 For the meaning of 'unpaid seller' see PARA 238 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 Sale of Goods Act 1979 s 43(2). See also *Houlditch v Desanges* (1818) 2 Stark 337; *Scrivener v Great Northern Rly Co* (1871) 19 WR 388. See generally CIVIL PROCEDURE vol 12 (2009) PARA 1136 et seq. Cf LIEN vol 68 (2008) PARAS 850 et seq, 882 et seq. However, the seller loses his lien if he causes the goods to be taken in execution at his own suit, for the sheriff then acquires possession: *Jacobs v Latour* (1828) 5 Bing 130. See LIEN vol 68 (2008) PARA 826. Cf CIVIL PROCEDURE vol 12 (2009) PARA 1346 et seq.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(2) SELLER'S LIEN/(i) The Seller's Right of Lien/246. Quasi-lien.

246. Quasi-lien.

Notwithstanding that the goods are in the possession of the buyer, there may, by express agreement, course of dealing or usage of trade¹, be reserved to the seller, as between him and the buyer², a special property or interest in the goods analogous to a lien until the price is paid³. This property or interest is not a right in security over the goods, unless the seller obtains possession of them, but is a merely personal right enforceable by action⁴.

1 Ie under the Sale of Goods Act 1979 s 55(1): see PARAS 12, 100 ante.

2 As between the seller and a sub-buyer etc, the special right of the seller may be divested by a disposition by the buyer, the buyer being in possession with the consent of the seller under the Factors Act 1889 s 9 (as amended): see PARAS 158 et seq ante, 279-280 post.

3 *Dodsley v Varley* (1840) 12 Ad & El 632. See also *Howes v Ball* (1827) 7 B & C 481, explained by Lord Blackburn in *Sewell v Burdick* (1884) 10 App Cas 74 at 96, HL. As to rights over the goods independent of the possession see *Reeves v Capper* (1838) 5 Bing NC 136 (delivery to pledgor of chattel pledged); *Richards v Symons* (1845) 8 QB 90 (right by agreement of persons having lien to retake goods); *Nyberg v Handelaar* [1892] 2 QB 202, CA (delivery for special purpose by one co-owner to the other); *North Western Bank v Poynter, Son and Macdonalds* [1895] AC 56, HL (delivery of bill of lading to pledgor for special purpose); *Re Hamilton, Young & Co, ex p Carter* [1905] 2 KB 772, CA (letter of lien or charge). As to retention of title clauses see PARA 110 ante.

4 *Sewell v Burdick* (1884) 10 App Cas 74 at 96, HL, per Lord Blackburn. See also Blackburn's Contract of Sale (3rd Edn) 37.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(2) SELLER'S LIEN/(i) The Seller's Right of Lien/247. Waiver of lien.

247. Waiver of lien.

A right of lien may be waived¹ expressly or by implication. It is waived by implication where the seller takes security for the price, the terms of which are inconsistent with the existence of the lien implied by law²; or where, by his words or conduct, he dispenses with payment or tender of the price, as where he repudiates the contract by refusing³ or rendering himself unable⁴ to deliver the goods, or by otherwise conducting himself in relation to them in a manner inconsistent with the buyer's right to receive them on payment or tender⁵; or where, without relying on his right of lien, he claims to retain the goods on some other ground⁶; or where his conduct is such that he is deemed by law to have waived his lien as against a sub-buyer or other disponee of the buyer⁷.

1 As the Sale of Goods Act 1979 s 43 speaks of the unpaid seller 'losing' the lien, s 43(1)(c) (see PARA 244 head (3) ante) seems to apply only where a lien originally exists, not eg where the giving of credit is one of the terms of the contract: see s 41(1)(a); and PARA 242 head (1) ante. As to waiver generally see CONTRACT vol 9(1) (Reissue) PARA 1025 et seq; LIEN vol 68 (2008) PARA 850 et seq.

2 *Re Leith's Estate, Chambers v Davidson* (1866) LR 1 PC 296; *Angus v McLachlan* (1883) 23 ChD 330; *Bank of Africa v Salisbury Gold Mining Co* [1892] AC 281, PC.

3 Eg where he refuses to deliver except on payment of sums the payment of which is not a condition precedent to delivery (*Jones v Tarleton* (1842) 9 M & W 675; *Kerford v Mondel* (1859) 28 LJ Ex 303; *Norway (Owners) v Ashburner, The Norway* (1865) 3 Moo PCCNS 245 (carrier's lien)), for the imposition of such a condition is an absolute refusal (*Davies v Vernon* (1844) 6 QB 443). It is otherwise when it is merely an excessive claim: *Scarfe v Morgan* (1838) 4 M & W 270; *Allen v Smith* (1862) 12 CBNS 638 (innkeeper's lien) (affd (1863) 1 New Rep 404, Ex Ch).

4 *Jacobs v Latour* (1828) 5 Bing 130 (goods taken in execution at suit of creditor); *Jones v Cliff* (1833) 1 Cr & M 540 (goods bailed parted with); *Gurr v Cuthbert* (1843) 12 LJ Ex 309 (seller consumes goods); *Mulliner v Florence* (1878) 3 QBD 484, CA (sale by party having lien).

5 *Gurr v Cuthbert* (1843) 12 LJ Ex 309 per Parke B.

6 *Boardman v Sill* (1808) 1 Camp 410n (recognised in *Yungmann v Briesemann* (1892) 67 LT 642, CA); *White v Gainer* (1824) 2 Bing 23 (no mention of lien but no inconsistent claim set up); *Morley v Hay* (1828) 3 Man & Ry KB 396 (carrier entitled to general lien claiming only particular lien); *Cannee v Spanton* (1844) 8 Scott NR 714; *Weeks v Goode* (1859) 6 CBNS 367.

7 Ie under the Factors Act 1889 s 9 (as amended) (see PARA 158 et seq ante) and s 10 (see PARA 253 et seq post).

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(2) SELLER'S LIEN/(i) The Seller's Right of Lien/248. Redelivery of goods to seller.

248. Redelivery of goods to seller.

The seller's right of lien is revested by a redelivery to him of the goods by or on behalf of the buyer¹ if the delivery is made with the intention of revesting the right of lien². The seller cannot, however, revest in himself a right of lien once lost by the mere fact of his subsequently acquiring the possession of the goods³.

1 A redelivery to the seller without the privity of the buyer does not revest the lien: *Sweet v Pym* (1800) 1 East 4. Cf LIEN vol 68 (2008) PARA 854.

2 *Jones v Pearle* (1723) 1 Stra 557, sub nom *Jones v Thurlow* 8 Mod Rep 172 (innkeeper's lien); *Hartley v Hitchcock* (1816) 1 Stark 408 (coachmaker's lien); *Valpy v Gibson* (1847) 4 CB 837 (redelivery of goods for packing); *United Plastics Ltd (in liquidation) v Reliance Electric (NZ) Ltd* [1977] 2 NZLR 125 (redelivery to remedy defects under warranty). See also *Re O'Sullivan, ex p Ferd Baller & Co* (1892) 67 LT 464, CA; LIEN vol 68 (2008) PARA 854.

3 *Jacobs v Latour* (1828) 5 Bing 130 (goods sold by sheriff to creditor after execution at his suit against debtor). See also *Sweet v Pym* (1800) 1 East 4. *Allen v Smith* (1863) 11 WR 440, Ex Ch, by analogy, shows that the lien would not be lost by the delivery of the goods by the seller to the buyer for a mere temporary purpose. Further, the seller may revest his lien by peaceably retaking goods fraudulently removed by the buyer: *Wallace v Woodgate* (1824) Ry & M 193. Probably, however, in such a case the lien is not lost, the buyer not having obtained 'lawful' possession: see the Sale of Goods Act 1979 s 43(1)(b); and PARA 244 head (2) ante. See also LIEN vol 68 (2008) PARA 854.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(2) SELLER'S LIEN/(ii) Effect of Exercise by Seller of his Right of Lien/249. Continuance of contract.

(ii) Effect of Exercise by Seller of his Right of Lien

249. Continuance of contract.

Subject to certain statutory provisions¹, a contract of sale² is not rescinded³ by the mere exercise⁴ by an unpaid seller⁵ of his right of lien⁶.

1 Ie subject to the Sale of Goods Act 1979 s 48(3), (4) (resale): see PARAS 282-283 post.

2 For the meaning of 'contract of sale' see PARA 29 ante.

3 le cannot be treated by the seller as rescinded, for the buyer could not so treat it and so take advantage of his own wrong: *Roberts v Wyatt* (1810) 2 Taunt 268; *Malins v Freeman* (1838) 4 Bing NC 395.

4 le by the mere fact, as regards lien, that the buyer is in default or insolvent (see the Sale of Goods Act 1979 s 41(1); and PARA 242 ante). 'It is only after the breach of the obligation to pay that the lien attaches': *The Eider* [1893] P 119 at 132, CA, per Lord Esher MR. See also *Boorman v Nash* (1829) 9 B & C 145; *Martindale v Smith* (1841) 1 QB 389; *Gibson v Carruthers* (1841) 8 M & W 321; *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289 at 293-294; *Re Nathan, ex p Stapleton* (1879) 10 ChD 586, CA; *Kemp v Falk* (1882) 7 App Cas 573 at 581, HL, per Lord Blackburn; *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 444, HL, per Lord Blackburn.

5 For the meaning of 'unpaid seller' see PARA 238 ante.

6 As to the seller's lien see PARA 242 et seq ante.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(2) SELLER'S LIEN/(ii) Effect of Exercise by Seller of his Right of Lien/250. Buyer's title on resale.

250. Buyer's title on resale.

When an unpaid seller¹ who has exercised his right of lien² resells the goods³, the buyer⁴ acquires a good title to them as against the original buyer⁵.

1 For the meaning of 'unpaid seller' see PARA 238 ante.

2 As to the seller's lien see PARA 242 et seq ante.

3 For the meaning of 'goods' see PARA 30 ante.

4 For the meaning of 'buyer' see PARA 29 ante.

5 Sale of Goods Act 1979 s 48(2). See also *Milgate v Kebble* (1841) 3 Man & G 100; *Lord v Price* (1874) LR 9 Exch 54. The reason is that the original buyer, being in default, is not entitled to possession and so may not sue in conversion. See *Adelphi Bank Ltd v Halifax Sugar Refining Co Ltd* (1887) 4 TLR 21, CA (pledge of bill of lading by unpaid seller). The rule applies irrespective of whether, as between buyer and seller, the seller is entitled to resell the goods. Resale by the seller would be a repudiation of the contract or an acceptance of the buyer's repudiation. It is noticeable that the Sale of Goods Act 1979 s 48(2) does not in terms require good faith and absence of notice on the part of the second buyer, both of which are necessary if the seller resells under the Factors Act 1889 s 8: see PARA 157 ante. Section 8 does not, however, require the first buyer to be in default.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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(iii) Effect of Dispositions by Buyer on Seller's Right of Lien

A. IN GENERAL

251. Seller's assent to buyer's disposition.

Subject to the Sale of Goods Act 1979¹, the unpaid seller's² right of lien³ is not affected by any sale or other disposition of the goods⁴ which the buyer⁵ may have made⁶, unless the seller has assented to it⁷.

A mere acknowledgment of the fact of the disposition is not enough to constitute an assent to a disposition by the buyer. The seller is said to assent where, by his words or conduct, he expressly or by implication represents to the buyer's disponent that the goods will be deliverable to him free from the seller's rights as unpaid seller⁸.

Such an assent may be given by the seller prospectively, as, for example, where, before the buyer's disposition, the seller issues to the buyer a document, intended to pass from hand to hand and to be acted on, which, by its terms or by usage of trade or otherwise, contains a representation such as is mentioned above⁹.

1 Subject to the Sale of Goods Act 1979 s 25 (see PARA 158 ante), s 47(2) (see PARA 253 post) and s 55 (as amended) (see PARAS 12, 100 ante).

2 For the meaning of 'unpaid seller' see PARA 238 ante.

3 As to the seller's lien see PARA 242 et seq ante.

4 For the meaning of 'goods' see PARA 30 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 *Craven v Ryder* (1816) 6 Taunt 433; *Dixon v Yates* (1833) 5 B & Ad 313; *William M'Ewan & Sons v Smith* (1849) 2 HL Cas 309.

7 Sale of Goods Act 1979 s 47(1).

8 *Mordaunt Bros v British Oil and Cake Mills Ltd* [1910] 2 KB 502; *DF Mount Ltd v Jay and Jay (Provisions) Co Ltd* [1960] 1 QB 159, [1959] 3 All ER 307. See also *Stoveld v Hughes* (1811) 14 East 308 (express assent; also marking of goods by sub-buyer); *Green v Haythorne* (1816) 1 Stark 447 (seller's unreasonable delay in dissenting from sub-buyer's request for delivery); *Dixon v Yates* (1833) 5 B & Ad 313 (gauging and cooping casks); *Dixon v Bovill* (1856) 3 Macq 1, HL (express promise to deliver to sub-buyer); *Pearson v Dawson* (1858) EB & E 448 (entry of sub-buyer's name in seller's books); *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 ChD 205 (issue by seller of transferable warrant); *Re Knight, ex p Golding Davis & Co Ltd* (1880) 13 ChD 628, CA; *Bellamy v Davey* [1891] 3 Ch 540 (mere acknowledgment of sub-sale); *Poulton & Son v Anglo-American Oil Co Ltd* (1910) 27 TLR 38 (affd (1911) 27 TLR 216, CA) (mere acknowledgment of sub-sale). An assent is immaterial, save in so far as it affects some matter with regard to which the seller has power to dissent. A seller can dissent to the waiver of his rights but not to the mere fact of the buyer's disposition. Where the goods are specific, the presentation by the sub-buyer to the original seller of a delivery order and the seller's entry in his books of the sub-buyer's name may justify the inference that the seller has attorned to the sub-buyer. It is otherwise where the goods are unascertained: *Mordaunt Bros v British Oil and Cake Mills Ltd* supra. See also *DF Mount Ltd v Jay and Jay (Provisions) Co Ltd* supra (where the seller, who was to be paid out of cash received from the buyer's customers, gave the buyer a delivery order and the buyer gave fresh delivery orders to his sub-purchasers, and it was held that the seller had assented).

9 *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 ChD 205 (decided before the Factors Acts Amendment Act 1877 (repealed) which by s 5 (repealed) included under documents of title such documents as those mentioned in the case). Cf *Dixon v Bovill* (1856) 3 Macq 1, HL; *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491; and *Farmeloe v Bain* (1876) 1 CPD 445 (in all of which cases there were mere engagements to deliver and no representation of any fact by the unpaid seller).

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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252. Protection of buyer's disponent.

An assent given to the buyer's disponent at a time when the buyer is entitled to the possession of the goods is not revocable as against the disponent by reason of the buyer's subsequent default in payment or insolvency¹.

1 *Pearson v Dawson* (1858) EB & E 448.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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B. TRANSFER OF DOCUMENTS OF TITLE

253. Transfer by buyer or owner of documents of title.

Where a document of title¹ to goods² has been lawfully transferred³ to any person⁴ as buyer or owner⁵ of the goods, and that person transfers the document⁶ to a person who takes the document in good faith⁷ and for valuable consideration⁸, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien⁹ or stoppage in transit¹⁰ is defeated, and, if

such last-mentioned transfer was made by way of pledge¹¹ or other disposition¹² for value, the unpaid seller's right of lien can only be exercised subject to the rights of the transferee¹³.

A document of title is lawfully transferred when it is transferred according to its tenor and with the consent in fact of a transferor entitled to transfer it¹⁴.

1 For these purposes, 'document of title to goods' has the same wide statutory meaning given to it in the Factors Act 1889 (see PARA 157 ante): see the Sale of Goods Act 1979 s 61(1); and AGENCY vol 1 (2008) PARA 148. It includes a delivery order issued by the seller of the goods: *Ant Jurgens Margarinefabrieken v Louis Dreyfus & Co* [1914] 3 KB 40. For the more limited concept of document of title at common law, meaning bills of lading and other documents which by statute or custom symbolise possession of the goods to which they relate, see PARAS 139, 163 ante. In cases of lien, the Sale of Goods Act 1979 s 47(2) has no application where a bill of lading (which divests lien: see note 13 infra) is transferred to the buyer or owner.

2 For the meaning of 'goods' see PARA 30 ante. By the Factors Act 1889 s 1(3), 'goods' expressly includes wares and merchandise.

3 To give the buyer or owner power to deal with the document of title, it must be 'lawfully' transferred to him: see the Sale of Goods Act 1979 s 47(2); the Factors Act 1889 s 10; and the text and note 14 infra. In *Nix v Olive* (1805) cited in Abbott's Merchant Shipping (14th Edn) 851, a bill of lading was sent but not transferred to the buyer and it was held that the sub-buyer acquired no title. However, in *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA, the buyer received an indorsed bill of lading accompanied by a draft which he failed to accept, and it was held that the bill had been 'lawfully transferred' to him. The issue of a delivery order by the seller constitutes the 'transfer' of a document of title: *Ant Jurgens Margarinefabrieken v Louis Dreyfus & Co* [1914] 3 KB 40; *DF Mount Ltd v Jay and Jay (Provisions) Co Ltd* [1960] 1 QB 159, [1959] 3 All ER 307.

4 As to the meaning of 'person' see PARA 157 note 1 ante.

5 For these purposes, 'buyer' includes a person who agrees to buy: see the Sale of Goods Act 1979 s 61(1); and PARA 29 ante. See also *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA. Where, however, the property has not passed to the buyer, the seller exercises not a lien or right of stoppage in the strict sense but a right of withholding delivery under the Sale of Goods Act 1979 s 39(2): see PARAS 279-280 post. 'Owner' may be intended to cover a case where an agent, being a person 'in the position of a seller' under s 38(2) (see PARA 241 ante), transfers a document of title to his principal.

6 The document transferred by the buyer must be the same as that transferred to him: *DF Mount Ltd v Jay and Jay (Provisions) Co Ltd* [1960] 1 QB 159, [1959] 3 All ER 307. This is in contrast with the probable position under the Sale of Goods Act 1979 s 25(1): see PARA 254 note 3 post.

7 As to the question of good faith see PARA 154 ante. The rule protects an ultimate indorsee in good faith after several intermediate transfers: *Gurney v Behrend* (1854) 3 E & B 622.

8 At common law valuable consideration includes in this context an antecedent debt in circumstances where the transfer is made on the understanding that there will be, or where it in fact gives rise to, some forbearance by the creditor from pursuing recovery of the debt: see *Leask v Scott Bros* (1877) 2 QBD 376, CA (dissenting from *Rodger v Comptoir d'Escompte de Paris* (1869) LR 2 PC 393; *The Emilien Marie* (1875) 2 Asp MLC 514); *Glegg v Bromley* [1912] 3 KB 474, CA (where the law as to assignments for antecedent debts is considered). However, no valuable consideration exists if the facts negative any such understanding or causal connection: *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 (where the transferee was not aware of the transfer). See generally CONTRACT vol 9(1) (Reissue) PARA 727 et seq. See also the Factors Act 1889 s 5, which defines the consideration for a disposition 'in pursuance of the Act' and includes 'any valuable consideration': see AGENCY vol 1 (2008) PARAS 148-149.

9 As to the seller's lien see PARA 242 et seq ante.

10 As to stoppage in transit see PARA 256 et seq post.

11 *Re Westzinthus* (1833) 5 B & Ad 817; *Spalding v Ruding* (1843) 6 Beav 376 (affd on appeal (1846) 15 LJ Ch 374); *Coventry v Gladstone* (1868) LR 6 Eq 44; *Kemp v Falk* (1882) 7 App Cas 573, HL. As to the meaning of 'pledge' in the Factors Act 1889 s 1(5) see AGENCY vol 1 (2008) PARA 148. See also PARA 158 note 12 ante. In the case of a pledge in exchange for other goods, documents of title or negotiable securities, the right of the pledgee is limited to the value of the goods given in exchange: see s 5; and AGENCY vol 1 (2008) PARA 148.

12 As to such disposition see PARA 158 note 12 ante. By *ibid* s 5, the consideration for a sale, pledge or other disposition 'in pursuance of the Act' may be an exchange: see AGENCY vol 1 (2008) PARA 148. A transfer by the

buyer to his factor merely to enable him to receive a cargo was held in *Patten v Thompson* (1816) 5 M & S 350 not to be a disposition for value.

13 Sale of Goods Act 1979 s 47(2). This provision is substantially the same as the Factors Act 1889 s 10. With regard to stoppage in transit, it adopts the rule of the common law declared in relation to bills of lading in *Lickbarrow v Mason* (1787) 6 East 20n, 1 Smith LC (13th Edn) 703, HL (and see *Pease v Gloahec, The Marie Joseph* (1866) LR 1 PC 219; *The Argentina* (1867) LR 1 A & E 370), and extends it so as to make it applicable to the transfer by the buyer of other documents of title in the wide statutory sense mentioned in note 1 supra. With regard to lien, it applies the same extended rule, a lien not being lost at common law, as against a buyer or sub-buyer or other transferee, by the issue or transfer of any document but a bill of lading, that being the only document which at common law (and apart from proof of a specific custom) per se transferred possession.

14 *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA; and see *The Argentina* (1867) LR 1 A & E 370. See generally note 3 supra. As to the mode of transfer 'for the purposes of the Act' see the Factors Act 1889 s 11; and PARA 158 note 8 ante. As to consent see PARA 159 ante.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

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254. Transfer in good faith and without notice.

A further basis on which the unpaid seller's right of lien may¹ be wholly or, as the case may be, partially defeated exists where a person, having bought or agreed to buy goods, obtains possession of the documents of title² and thereafter delivers or transfers documents of title to the goods³ with the seller's consent under a sale, pledge or other disposition⁴ to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods⁵.

The mere fact that a disponent of the goods knows that the goods have not been paid for is not inconsistent with good faith on his part⁶; nor does it of itself show that the disponent had notice of a right of lien of the original seller⁷.

1 It is not easy to define the precise relationship between the Factors Act 1889 s 10 and the Sale of Goods Act 1979 s 47(2) (see PARA 253 ante), on the one hand, and the Factors Act 1889 s 9 (as amended) and the Sale of Goods Act 1979 s 25(1) (see the text and note 5 infra), on the other. It may be that the former provisions were enacted because of doubt as to whether the latter provisions would cover the unpaid vendor's lien. In *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA, the two sets of provisions were dealt with very much together. There are, however, differences in wording.

2 As to the meaning of 'document of title to goods' see PARA 253 note 1 ante.

3 It would seem that these need not necessarily be the same documents of title as those of which he obtains possession: see *DF Mount Ltd v Jay and Jay (Provisions) Co Ltd* [1960] 1 QB 159 at 169, [1959] 3 All ER 307 at 311.

4 The Factors Act 1889 s 9 (as amended) adds 'or under any agreement for sale, pledge or other disposition thereof'.

5 See *ibid* s 9 (as amended) (re-enacted with modifications in the Sale of Goods Act 1979 s 25(1)); paras 158 note 18, 159 note 1 ante; and *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA. The Factors Act 1889 s 9 (as amended) deals also with circumstances where the buyer obtains possession of the goods but the seller then is unlikely to retain any lien or similar right, except where some special right by agreement (and analogous to lien) is conferred on the seller, as in *Dodsley v Varley* (1840) 12 Ad & El 632.

6 *Cuming v Brown* (1808) 9 East 506; *Pease v Gloahec, The Marie Joseph* (1866) LR 1 PC 219. Cf *Salomons v Nissen* (1788) 2 Term Rep 674 (where the assignee agreed with the buyer to pay for the goods, and did not do so). For the meaning of 'good faith' see PARA 154 ante.

7 See the Factors Act 1889 s 9 (as amended). Notice that the goods have not been paid for is not necessarily notice that the price is due or that the buyer is insolvent.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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255. Rights of pledgee and unpaid seller.

On a transfer of a document of title¹ by way of pledge, the pledgee is entitled, as against the unpaid seller, to be paid only the sum for which the instrument was specifically pledged, and not also the amount of a general balance of account against the pledgor². The unpaid seller is entitled to require the pledgee to satisfy his claim against the buyer first out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer³.

1 As to the meaning of 'document of title to goods' see PARA 253 note 1 ante.

2 *Spalding v Ruding* (1843) 6 Beav 376; *affd* on appeal (1846) 15 LJ Ch 374.

3 *Re Westzinthus* (1833) 5 B & Ad 817. The unpaid seller is in effect, by means of his goods, a surety to the pledgee for the buyer's debt and has as such an equity to oblige the pledgee to have first recourse against any other available goods or securities of the buyer: *Re Westzinthus* *supra*. See also *Re Holland, ex p Alston* (1868) 4 Ch App 168 (consignment to factor); *Re Stratton, ex p Salting* (1883) 25 ChD 148, CA.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(i) When the Right of Stoppage in Transit exists/256. Stoppage on buyer's insolvency.

(3) STOPPAGE IN TRANSIT

(i) When the Right of Stoppage in Transit exists

256. Stoppage on buyer's insolvency.

Subject to the Sale of Goods Act 1979¹, when the buyer² of goods³ becomes insolvent⁴, the unpaid seller⁵ who has parted with the possession⁶ of the goods has the right of stopping them in transit, that is to say he may resume possession of the goods as long as they are in course of transit⁷, and may retain them⁸ until payment or tender of the price⁹.

The right of stoppage in transit is one available only against the goods themselves¹⁰. It is, therefore, for example, not available against the proceeds of an insurance policy effected by the buyer against damage to the goods during the transit¹¹.

1 See the Sale of Goods Act 1979 s 45 (duration of transit: see PARA 259 et seq post), s 46 (mode of stoppage: see PARA 271 et seq post), s 47 (effect of disposition of goods made by buyer: see PARA 278 post), s 48(1), (2) (effect of stoppage: see PARA 277 post) and s 55 (as amended) (exclusion of implied terms: see PARAS 12, 100 ante).

2 For the meaning of 'buyer' see PARA 29 ante.

3 For the meaning of 'goods' see PARA 30 ante.

4 For the meaning of 'insolvent' see PARA 206 ante.

5 For the meaning of 'unpaid seller' see PARA 238 ante.

6 I.e. by delivering them to a carrier or other bailee for transmission, whereby the lien is lost: see the Sale of Goods Act 1979 s 43(1)(a); and PARA 244 head (1) ante.

7 As to when goods are in the course of transit see PARA 259 post. As to stoppage in transit where the carriage is by air see PARA 259 note 4 post; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 158 et seq.

8 I.e. so as to re-vest the lien, this (and not rescission of the contract) being the effect of a stoppage in transit: see the Sale of Goods Act 1979 s 48(1); and PARA 277 post. These words also show that stoppage in transit in the strict meaning only exists where the goods have become the property of the buyer. The common law was the same at the date of the Sale of Goods Act 1893 (repealed): *Kemp v Falk* (1882) 7 App Cas 573 at 581, HL, per Lord Blackburn; *Phelps, Stokes & Co v Comber* (1885) 29 ChD 813 at 821, CA, per Cotton LJ.

9 Sale of Goods Act 1979 s 44. See also *Lickbarrow v Mason* (1787) 6 East 20n; 1 Smith LC (13th Edn) 703; and notes at 1 Smith LC (13th Edn) 748 et seq. See also CARRIAGE AND CARRIERS vol 7 (2008) PARA 766 et seq. Stoppage in transit in the proper sense applies only where both property and right to possession have passed to the buyer, but not actual possession: *Lickbarrow v Mason* supra at 27 per Buller J; *Gibson v Carruthers* (1841) 8 M & W 321 at 335 per Parke B; *Kendall v Marshall, Stevens & Co* (1883) 11 QBD 356 at 364, CA, per Brett LJ. Again, it is necessary that the goods should be in the possession of a carrier as the buyer's agent. Accordingly, it is not, properly speaking, stoppage in transit where the seller withholds or reclaims delivery of goods the property in which has not passed to the buyer (see the Sale of Goods Act 1979 s 39(2); paras 237 ante, 279 post; *Loeschman v Williams* (1815) 4 Camp 181 (seller reclaims from packer); *Craven v Ryder* (1816) 6 Taunt 433; *Turner v Liverpool Docks Trustees* (1851) 6 Exch 543, Ex Ch; *Moakes v Nicolson* (1865) 19 CBNS 290 (seller reclaims from carrier)); where the seller countermands an order on his own agent to deliver the goods so as to prevent his lien being lost (*William M'Ewan & Sons v Smith* (1849) 2 HL Cas 309); nor where a principal, having consigned goods to his factor, countermands the delivery by the carrier to the factor so as to prevent the factor from acquiring a lien (*Kinloch v Craig* (1790) 3 Term Rep 783, HL).

10 *Berndtson v Strang* (1868) 3 Ch App 588 at 591 per Lord Cairns LC; *Kemp v Falk* (1882) 7 App Cas 573 at 578, HL, per Lord Selborne LC (but cf the same case sub nom *Re Kiell, ex p Falk* (1880) 14 ChD 446, CA). See also *Re Knight, ex p Golding Davis & Co Ltd* (1880) 13 ChD 628, CA.

11 *Berndtson v Strang* (1868) 3 Ch App 588.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(i) When the Right of Stoppage in Transit exists/257. Stoppage in anticipation of buyer's insolvency.

257. Stoppage in anticipation of buyer's insolvency.

Goods may be stopped in transit notwithstanding that the buyer has not been found to be, or is not, insolvent¹ at the time of the stoppage, if he has become so by the time of the termination of the transit².

1 For the meaning of 'insolvent' in the Sale of Goods Act 1979 see PARA 206 ante.

2 *The Constantia* (1807) 6 Ch Rob 321 at 326 per Sir W Scott; *The Tigress* (1863) Brown & Lush 38 at 44 per Dr Lushington.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(i) When the Right of Stoppage in Transit exists/258. Solvent buyer's right of indemnity.

258. Solvent buyer's right of indemnity.

If, after stoppage in transit, the buyer proves not to be insolvent¹, he is entitled to the delivery of the goods and to receive an indemnity from the seller for any loss caused by the stoppage². The cause of action in such a case will be conversion since, by delivering the goods to the carrier, the seller has prima facie passed the property in the goods to the buyer³ and delivered them to him⁴.

1 For the meaning of 'insolvent' in the Sale of Goods Act 1979 see PARA 206 ante.

2 *The Constantia* (1807) 6 Ch Rob 321. The same principles doubtless apply where the stoppage is for any other reason invalid.

3 See the Sale of Goods Act 1979 s 18 r 5(2); and PARA 127 ante.

4 See *ibid* s 32(1); and PARA 188 ante.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/259. Course of transit.

(ii) Duration of Transit

259. Course of transit.

Goods¹ are deemed to be in course of transit² from the time when they are delivered to a carrier³ or other bailee⁴ for the purpose of transmission to the buyer⁵ until the buyer or his agent in that behalf⁶ takes delivery⁷ of them from the carrier or other bailee⁸.

Goods are thus deemed to be in course of transit so long as they remain in the possession of the carrier or other bailee for transmission⁹ in his capacity as such¹⁰, whether or not he has been named by the buyer and whether the goods are actually in motion on their journey or are lodged in any place in the course of transmission¹¹. The mere fact that the buyer travels by the same conveyance as the goods does not prevent the goods from being stopped in transit¹².

The course of transit of the goods may be fixed either by the contract of sale¹³ or by the subsequent directions of the buyer to the seller¹⁴.

1 For the meaning of 'goods' see PARA 30 ante.

2 As to the general duties and liabilities of carriers during transit see CARRIAGE AND CARRIERS vol 7 (2008) PARA 7 et seq.

3 I.e. being the agent of the buyer, such as a forwarding agent. The presumption is that the carrier is the buyer's agent where the seller, on delivering the goods to the carrier, does not reserve the right of disposal: see the Sale of Goods Act 1979 s 18 r 5(2); and PARAS 127, 188 et seq ante. If the carrier or other bailee is the seller's agent, the lien is not lost and no question of stoppage in transit arises.

4 The corresponding words in the Sale of Goods Act 1893 s 45(1) (repealed) were 'to a carrier by land or water, or other bailee' and it is considered that a carrier by air was and is included under the phrase 'other bailee'. As to the consignor's right of stoppage of goods in transit, as against the carrier, in international air carriage see the Carriage by Air Act 1961 s 1(1) (as substituted), Sch 1 art 12 or, as the case may be, Sch 1A art 12 (added by the Carriage by Air Acts (Implementation of Protocol No 4 of Montreal, 1975) Order 1999, SI 1999/1312, art 2(1), (6)), and in non-international air carriage see the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 158 et seq.

5 For the meaning of 'buyer' see PARA 29 ante.

6 le an agent to keep the goods for the buyer, not an agent for transmission of them to him: *Dodson v Wentworth* (1842) 4 Man & G 1080 (delivery at warehouse used by buyer); *Jobson v Eppenheim & Co* (1905) 21 TLR 468. 'A mere delivery at the place of destination is not necessarily a termination of the transit; the transit remains until the goods have come into the possession of the consignee': *Heinekey v Earle* (1857) 8 E & B 410 at 423 per Lord Campbell CJ. See also *Johann Plischke und Söhne GmbH v Allison Bros Ltd* [1936] 2 All ER 1009.

7 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante. Although the word 'lawfully' which appears in the Sale of Goods Act 1979 s 43(1)(b) (see PARA 244 head (2) ante) does not appear in s 45(1), it is submitted that the buyer cannot wrongfully take possession of the goods, having regard to the definition of 'delivery'. The point was previously doubtful: see *Whitehead v Anderson* (1842) 9 M & W 518 at 534 per Parke B; but cf Blackburn's Contract of Sale (3rd Edn) 406. It should also be noted that under the Sale of Goods Act 1979 s 45(6) a wrongful refusal by the carrier to deliver terminates the transit: see PARA 266 post. The inference to be drawn is that a rightful refusal does not.

8 Ibid s 45(1). See *Northey and Lewis v Field* (1797) 2 Esp 613 (goods on arrival warehoused in King's stores; claim by seller before sale for duties); *Fowler v Kymer* (1797) cited in 3 East at 396 (delivery on buyer's ship chartered by demise); *Wright v Lawes* (1801) 4 Esp 82 (buyer warehouses and samples goods on arrival); *Inglis v Usherwood* (1801) 1 East 515 (shipment abroad on buyer's chartered ship, retaking by seller under foreign law); *Nix v Olive* (1805) cited in Abbott's Merchant Shipping (14th Edn) at 851 (similar to *Northey and Lewis v Field* supra); *Noble v Adams* (1816) 7 Taunt 59 (transit ended on shipment by buyer); *Tucker v Humphrey* (1828) 4 Bing 516 (arrival at wharf; no possession taken by buyer); *Dodson v Wentworth* (1842) 4 Man & G 1080 (goods delivered by carrier at warehouse used by buyer). Cf *Orr v Murdock* (1851) 2 ICLR 9 (goods consigned to excise collector; lodgment with him by buyer of delivery order); *Fraser v Witt* (1868) LR 7 Eq 64 (charterparty; arrival of goods at intermediate port); *Re Whitworth, ex p Gibbes* (1875) 1 ChD 101 (transfer by seller's agent of bill of lading on arrival of goods; possession taken); *Re Worsdell, ex p Barrow* (1877) 6 ChD 783 (goods delivered by carrier at warehouse of carrier's agent); *McLeod & Co v Harrison* (1880) 8 R 227, Ct of Sess (goods to be shipped 'to buyer's orders'; bill of lading taken by buyer for delivery at A for transit to B); *Bethell v Clark* (1888) 20 QBD 615, CA (goods delivered by buyer's orders to carrier for further transit); *Re Gurney, ex p Hughes* (1892) 67 LT 598 (receipt in buyer's name by dock superintendent at place of shipment); *Reid v Snowball Co Ltd* (1905) 7 F 35, Ct of Sess (goods to be shipped at M 'cif to G'; transit extends to G). See also the cases cited in notes 4, 6 supra and notes 9-11 infra. See generally the cases cited in the notes to paras 261-270 post.

9 The existence of a carrier or other bailee for transmission is essential to the right of stoppage in transit in a proper sense: *Gibson v Carruthers* (1841) 8 M & W 321 at 328 per Rolfe B, approved in *Re Cock, ex p Rosevear China Clay Co* (1879) 11 ChD 560 at 569, CA, per James LJ.

10 *Re McLaren, ex p Cooper* (1879) 11 ChD 68 at 73, 75, CA, per Brett LJ and at 78 per James LJ; *Kendall v Marshall, Stevens & Co* (1883) 11 QBD 356 at 361, 364, CA, per Brett LJ; *Reddall v Union Castle Mail Steamship Co Ltd* (1914) 84 LJKB 360.

11 *Mills v Ball* (1801) 2 Bos & P 457; *James v Griffin* (1837) 2 M & W 623, Ex Ch; *Edwards v Brewer* (1837) 2 M & W 375; *Kendall v Marshall, Stevens & Co* (1883) 11 QB 356 at 364-365, CA, per Brett LJ. 'Goods can be stopped only while they are passing through channels of communication for the purpose of reaching the hands of the vendee': *Kendall v Marshall, Stevens & Co* supra at 368 per Bowen LJ. In *Scott v Pettit* (1803) 3 Bos & P 469 and *Leeds v Wright* (1803) 3 Bos & P 320 the goods had reached the hands of the buyer's agent.

12 *Lyons v Hoffnung* (1890) 15 App Cas 391, PC.

13 *Re Love, ex p Watson* (1877) 5 ChD 35, CA; *Bethell v Clark* (1888) 20 QBD 615 at 617, CA, per Lord Esher MR.

14 *Bethell v Clark* (1888) 20 QBD 615 at 617, CA, per Lord Esher MR. See also *Nicholls v Le Feuvre* (1835) 2 Bing NC 81.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/260. Effect of seller's ignorance or knowledge of destination.

260. Effect of seller's ignorance or knowledge of destination.

The seller's ignorance of the destination of the goods contemplated by the buyer does not prevent the goods from being in transit until arrival if under the contract the goods were delivered by the seller to a carrier for transmission to that destination¹; but, where the goods, before their arrival, are delivered to the buyer or to his agent to hold the goods for him, the seller's knowledge of the destination does not prolong the transit until the goods arrive there².

1 *Re Cock, ex p Rosevear China Clay Co* (1879) 11 ChD 560, CA.

2 *Valpy v Gibson* (1847) 4 CB 837; *Re Isaacs, ex p Miles* (1885) 15 QBD 39, CA (goods deliverable to forwarding agent to await buyer's orders) (explaining *Re Love, ex p Watson* (1877) 5 ChD 35, CA (bargain that goods should go to a particular destination)); *Re Bruno, Silva & Son, ex p Francis & Co Ltd* (1887) 56 LT 577 (mate's receipt handed by seller to buyer; bill of lading in buyer's name); *Jobson v Eppenheim & Co* (1905) 21 TLR 468. Cf *Kemp v Ismay, Imrie & Co* (1909) 100 LT 996 (goods to be dispatched to forwarding agent for shipment; no further orders of buyer necessary). See also *Reddall v Union Castle Mail Steamship Co Ltd* (1914) 84 LJKB 360.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/261. Bill of lading transferred to buyer etc.

261. Bill of lading transferred to buyer etc.

The fact that a bill of lading is transferred by the seller to the buyer¹ or that by the terms of a bill of lading the buyer² or a sub-buyer³ is the shipper or consignee of the goods does not prevent the goods from being in transit on and after shipment. Indeed it is normally only after a bill of lading originally taken to the order of the seller is transferred to the buyer that the right of stoppage in transit becomes of importance. Before that date, the property in the goods being prima facie vested in the seller⁴, he is in a position to exercise his right of withholding delivery; and, even if, on the facts, the general property has passed to the buyer before transfer of the bill of lading, the seller may have retained his lien⁵.

1 *The Tigress* (1863) Brown & Lush 38; *Fraser v Witt* (1868) LR 7 Eq 64. Similarly, the delivery by the seller to the buyer's agent of a delivery order on the seller's agent which the buyer transfers to the carrier as his authority to receive the goods does not of itself amount to a taking of actual possession by the buyer's agent before shipment: *Jackson v Nichol* (1839) 5 Bing NC 508. There would seem to be no case in which the seller himself transfers a bill of lading to a sub-buyer; and it may be that such a transfer would be an 'assent' to a sub-sale so as to divest a right of stoppage under the Sale of Goods Act 1979 s 47(1): see PARA 278 post.

2 *Thompson v Trail* (1826) 6 B & C 36; *Re McLaren, ex p Cooper* (1879) 11 ChD 68, CA; *Brindley & Co v Cilgwyn Slate Co* (1885) 55 LJQB 67, DC; *Lyons v Hoffnung* (1890) 15 App Cas 391 at 395, PC (buyer stated to be shipper); *Kemp v Ismay, Imrie & Co* (1909) 100 LT 996. Goods are not in transit if the buyer, before shipment, obtains possession and, by taking the bill of lading in his own name, sends the goods on a fresh transit: *Bethell v Clark* (1887) 19 QBD 553 at 562 per Cave J; *Re Bruno, Silva & Son, ex p Francis & Co Ltd* (1887) 56 LT 577. See also *Re Gurney, ex p Hughes* (1892) 67 LT 598 (dock company's receipt given to buyer).

3 *Re Knight, ex p Golding Davis & Co Ltd* (1880) 13 ChD 628, CA. The privity of the seller to this transaction would not seem to be an assent to the sub-sale under the Sale of Goods Act 1979 s 47(1): see PARA 278 post.

4 See *ibid* s 19(1); and PARAS 137 ante, 370 post.

5 *The Parchim* [1918] AC 157 at 170-171, PC, per Lord Parker of Waddington. See also PARA 370 post.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/262. Possession obtained before arrival at destination.

262. Possession obtained before arrival at destination.

If the buyer¹ or his agent in that behalf obtains² delivery³ of the goods⁴ before their arrival at the appointed destination⁵, the transit is at an end⁶.

1 For the meaning of 'buyer' see PARA 29 ante.

2 As to the effect of a demand of delivery before the arrival of the goods at the destination see the Sale of Goods Act 1979 s 45(6); and PARA 266 post.

3 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

4 For the meaning of 'goods' see PARA 30 ante.

5 'The appointed destination' means the destination mentioned by the buyer to the seller: *Coates v Railton* (1827) 6 B & C 422. See also *Morley v Hay* (1828) 3 Man & Ry KB 396; *Kendall v Marshall, Stevens & Co* (1883) 11 QBD 356, CA. However, sending goods to their appointed destination means more than the mere mention of a place, but rather the naming of a particular person who is to receive the goods at the place: *Re Isaacs, ex p Miles* (1885) 15 QBD 39 at 43, CA, per Brett MR. See also *Johann Plischke und Söhne GmbH v Allison Bros Ltd* [1936] 2 All ER 1009.

6 Sale of Goods Act 1979 s 45(2). See also *Mills v Ball* (1801) 2 Bos & P 457 at 461 per Lord Alvanley CJ; *Whitehead v Anderson* (1842) 9 M & W 518 at 534; *Kendall v Marshall, Stevens & Co* (1883) 11 QBD 356 at 366, CA, per Cotton LJ and at 369 per Bowen LJ; *Johann Plischke und Söhne GmbH v Allison Bros Ltd* [1936] 2 All ER 1009. The rule covers the case where the buyer obtains possession of the goods constructively by the attornment of the carrier to him: *Foster v Frampton* (1826) 6 B & C 107. Cf *Coventry v Gladstone* (1868) LR 6 Eq 44 (where evidence of attornment was wanting). See also *Reddall v Union Castle Mail Steamship Co Ltd* (1914) 84 LJB 360.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/263. Attornment by carrier to buyer after arrival.

263. Attornment by carrier to buyer after arrival.

If, after the arrival of the goods¹ at the appointed destination², the carrier or other bailee acknowledges to the buyer³ or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination⁴ for the goods may have been indicated by the buyer⁵.

1 For the meaning of 'goods' see PARA 30 ante.

2 For the meaning of 'appointed destination' see PARA 262 note 5 ante. The mere arrival of the goods at the appointed destination is insufficient to end the transit; there must be a delivery to the buyer or his agent (see the Sale of Goods Act 1979 s 45(1); and PARA 259 ante) or the carrier must agree to hold the goods for the buyer or his agent (*Bethell v Clark* (1887) 19 QBD 553 at 561 per Cave J). As to attornment by the carrier before the arrival of the goods see PARA 262 note 6 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 *Kendall v Marshall, Stevens & Co* (1883) 11 QBD 356, CA.

5 Sale of Goods Act 1979 s 45(3). See also *Re McLaren, ex p Cooper* (1879) 11 ChD 68, CA. The assent of both carrier and buyer to the attornment is necessary: *Foster v Frampton* (1826) 6 B & C 107; *James v Griffin* (1837) 2 M & W 623, Ex Ch; *Jackson v Nichol* (1839) 5 Bing NC 508; *Wentworth v Outhwaite* (1842) 10 M & W 436; *Whitehead v Anderson* (1842) 9 M & W 518 (followed in *Coventry v Gladstone* (1868) LR 6 Eq 44); *Bolton v Lancashire and Yorkshire Rly Co* (1866) LR 1 CP 431; *Re Millo, ex p Gouda* (1872) 20 WR 981; *Re Worsdell, ex p Barrow* (1877) 6 ChD 783; *Kendall v Marshall, Stevens & Co* (1883) 11 QBD 356, CA; *Taylor v Great Eastern Rly Co* [1901] 1 KB 774. See, however para 266 note 4 post. It is doubtful whether the simple act of allowing the goods to be marked or samples to be taken from them is sufficient to show an attornment, unless such acts are accompanied by other circumstances: *Whitehead v Anderson* supra at 535. Cf *Foster v Frampton* supra (where such circumstances existed). The fact that the carrier retains his lien for the freight is relevant but not conclusive to disprove an attornment: *Re McLaren, ex p Cooper* supra. See also *Allan v Gripper* (1832) 2 Cr & J 218; *Kemp v Falk* (1882) 7 App Cas 573 at 584, HL, per Lord Blackburn.

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236-284 Rights of Unpaid Seller Against the Goods

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/264. Capacity in which buyer's agent takes delivery.

264. Capacity in which buyer's agent takes delivery.

Where the goods are delivered by the seller or a carrier to an agent on behalf of the buyer, the question whether the goods, while in the agent's possession, are in transit or whether the transit has ended by the delivery of the goods to him depends on whether the agent is a bailee for the transmission¹ of the goods during the transit or an agent to hold the goods at the disposal of the buyer². The fact that the seller has the buyer's authority to instruct the agent as to the further transmission of the goods or that, on the contrary, at the time of the contract of sale the agent has received or will receive orders from the buyer with regard to such transmission is relevant to prove or disprove respectively that the goods, while in the agent's possession, are in transit³.

1 *Smith v Goss* (1808) 1 Camp 282 (buyer's authority to seller to instruct agent as to transmission); *Coates v Railton* (1827) 6 B & C 422; *Nicholls v Le Feuvre* (1835) 2 Bing NC 81; *Bethell v Clark* (1888) 20 QBD 615, CA (goods ordered to be shipped on a named ship for transmission abroad); *Kemp v Ismay, Imrie & Co* (1909) 14 Com Cas 202 (delivery to forwarding agent for transmission abroad). Cf *Rowe v Pickford* (1817) 8 Taunt 83 (no ulterior destination named to seller and delivery to buyer's warehouseman); *McLeod & Co v Harrison* (1880) 8 R 227, Ct of Sess (goods by bill of lading deliverable to A at R 'to be forwarded in transit to M').

2 *Dixon v Baldwin* (1804) 5 East 175 (forwarding agents to await buyer's orders). See also *Leeds v Wright* (1803) 3 Bos & P 320; *Scott v Pettit* (1803) 3 Bos & P 469 (delivery to buyer's packer); *Valpy v Gibson* (1847) 4 CB 837; *Kendall v Marshall, Stevens & Co* (1883) 11 QBD 356, CA; *Re Isaacs, ex p Miles* (1885) 15 QBD 39, CA; *Jobson v Eppenheim & Co* (1905) 21 TLR 468 (forwarding agents).

3 *Kendall v Marshall, Stevens & Co* (1883) 11 QBD 356, CA (buyer's orders); *Bethell v Clark* (1888) 20 QBD 615, CA (followed in *Kemp v Ismay, Imrie & Co* (1909) 14 Com Cas 202); *Reddall v Union Castle Mail Steamship Co Ltd* (1914) 84 LJB 360. See also *Smith v Goss* (1808) 1 Camp 282 (seller's orders); *Valpy v Gibson* (1847) 4 CB 837 at 865.

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236-284 Rights of Unpaid Seller Against the Goods

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/265. Effect of rejection of goods by buyer.

265. Effect of rejection of goods by buyer.

If the goods¹ are rejected by the buyer² and the carrier or other bailee continues in possession of them³, the transit is not deemed to be at an end, even if the seller⁴ has refused to receive them back⁵.

Such a rejection by the buyer is not a preference⁶ within the meaning of the law of bankruptcy⁷.

1 For the meaning of 'goods' see PARA 30 ante.

2 For the meaning of 'buyer' see PARA 29 ante.

3 le in his capacity of carrier or bailee for transmission. It is otherwise if the buyer rejects the goods after his agent has taken possession of them; this does not prolong the transit: *Jobson v Eppenheim & Co* (1905) 21 TLR 468.

4 As to the meaning of 'seller' see PARA 241 ante.

5 Sale of Goods Act 1979 s 45(4). See *James v Griffin* (1837) 2 M & W 623, Ex Ch (buyer taking temporary possession coupled with rejection); *Bolton v Lancashire and Yorkshire Rly Co* (1866) LR 1 CP 431; *Booker & Co v Milne* (1870) 9 M 314, Ct of Sess. If the buyer intends not to take the goods (even though his intention is not communicated to the carrier), the goods remain in the possession of the carrier as such: *James v Griffin* supra.

6 le under the Insolvency Act 1986 s 340: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 656 et seq. As to the saving of the rules in bankruptcy see the Sale of Goods Act 1979 s 62(1); and PARA 10 ante.

7 *Re McLaren, ex p Cooper* (1879) 11 ChD 68 at 73, CA, per Brett LJ. Even a transfer by an insolvent buyer to the seller (with his consent) of the bill of lading, although it may be a preference, probably has not the effect of divesting the seller's right of stoppage: *Re O'Sullivan, ex p Ferd Baller & Co* (1892) 61 LJB 228 at 233 per Collins J (Vaughan Williams J dissenting), approved by Bigham J in *Re Johnson, ex p Wright* (1908) 99 LT 305, but revsd on another ground 67 LT 464, CA.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/266. Wrongful refusal by carrier to deliver.

266. Wrongful refusal by carrier to deliver.

Where the carrier or other bailee¹ wrongfully refuses to deliver the goods² to the buyer³ or his agent in that behalf, the transit is deemed to be at an end⁴.

1 le for the purpose of transmission of the goods to the buyer: see the Sale of Goods Act 1979 s 45(1); and PARA 259 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 Sale of Goods Act 1979 s 45(6). See also *Bird v Brown* (1850) 4 Exch 786 (demand on arrival of goods by buyer's assignees and tender of freight). A refusal is wrongful where the buyer is entitled to demand delivery, and Lord Blackburn suggests that the actual refusal must be so tortious as to render the middleman liable in conversion: see Blackburn's Contract of Sale (3rd Edn) 407. The language of the Sale of Goods Act 1979 s 45(6) is wide enough to cover the case of a refusal to deliver the goods on a demand made before the arrival of the goods at their destination, a demand which a consignee is competent to make (*Scothorn v South Staffordshire Rly Co* (1853) 8 Exch 341; *London and North Western Rly Co v Bartlett* (1861) 7 H & N 400; *Cork Distilleries Co v Great Southern and Western Rly Co (Ireland)* (1874) LR 7 HL 269), but the carrier will be entitled to demand his full freight (*Metcalfe v Britannia Ironworks Co* (1876) 1 QBD 613 at 632 per Mellor J and Quain J). In *Jackson v Nichol* (1839) 5 Bing NC 508 at 519 (carrier's wrongful refusal to deliver on tender of freight), however, a demand of the goods before the end of the journey was held to be insufficient to terminate the transit, there being no actual delivery and no attornment by the carrier, but it is doubtful whether this case is good law. See also *Coventry v Gladstone* (1868) LR 6 Eq 44.

UPDATE**236-284 Rights of Unpaid Seller Against the Goods**

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/267. Goods sent by separate routes.

267. Goods sent by separate routes.

Where part of the goods is sent by one route and part by another, and the part sent by one route is stopped in transit, the stoppage is not effective to entitle the seller to the possession of the goods sent by the other route, the transit of which has terminated, even though both parcels of goods may have been bought under an entire contract, but it entitles the seller to exercise his lien on the goods stopped for the price of the goods sent by the other route¹.

¹ *Wentworth v Outhwaite* (1842) 10 M & W 436. The lien of a seller is ordinarily indivisible: see PARA 240 ante.

UPDATE**236-284 Rights of Unpaid Seller Against the Goods**

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/268. Delivery on buyer's vessel.

268. Delivery on buyer's vessel.

A delivery of the goods on board the buyer's own vessel¹, whether it is a general ship or one sent specially for the goods, is not a delivery to the master as agent to take delivery for the buyer if the master receives the goods in the capacity of a carrier only². If the goods are so received, the fact that the master has no authority to receive the goods except as an agent to take delivery for the buyer is immaterial³.

In particular, a reservation by the seller on the shipment of the goods on board the buyer's vessel of the right of disposal of the goods⁴ shows that the goods are delivered to the master of the vessel in the capacity of a carrier, notwithstanding that the seller may afterwards transfer the bill of lading to the buyer⁵.

1 Similar principles apply to the buyer's cart, wagon or other vehicle or presumably aircraft: cf para 259 note 4 ante. It does not follow as a proposition of law that goods delivered to the buyer's own vehicle are not in transit: *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 ChD 205 at 219 per Jessel MR. However, there is no transit after delivery if the vehicle is the destination of the goods: *Berndtson v Strang* (1867) LR 4 Eq 481 at 489 per Wood V-C.

2 *Turner v Liverpool Docks Trustees* (1851) 6 Exch 543, Ex Ch; *Schotsmans v Lancashire and Yorkshire Rly Co* (1867) 2 Ch App 332. 'Although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery and so prevent it from being absolute and irrevocable': *Schotsmans v Lancashire and Yorkshire Rly Co* supra at 335 per Lord Chelmsford LC. See also *Berndtson v Strang* (1867) LR 4 Eq 481 at 491 per Wood V-C. If the seller, intending to deliver the goods to a carrier, by mistake delivers on board the buyer's own vessel, such delivery is perhaps not a delivery to the buyer: *Schotsmans v Lancashire and Yorkshire Rly Co* supra at 335 per Lord Chelmsford LC.

3 *Turner v Liverpool Docks Trustees* (1851) 6 Exch 543 at 565, Ex Ch.

4 Eg where the seller takes the bill of lading to his own order: see the Sale of Goods Act 1979 s 19(2); and PARA 370 post.

5 *Schotsmans v Lancashire and Yorkshire Rly Co* (1867) 2 Ch App 332 at 336 per Lord Chelmsford LC; *Berndtson v Strang* (1867) LR 4 Eq 481. Such a transfer may pass the property (*Re Tappenbeck, ex p Banner* (1876) 2 ChD 278 at 288, CA), but the right of stopping the goods in transit remains, as being a right exercisable as against the possession: see the Sale of Goods Act 1979 s 44; and PARA 256 ante.

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236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/269. Delivery on chartered vessel.

269. Delivery on chartered vessel.

When goods are delivered to a vessel¹ chartered by the seller, the goods are nevertheless in transit² unless by the terms of the charterparty the ship is demised to him, making the master and crew his servants and thus giving him possession of the ship and its cargo; if this is so, the seller, not having given up possession, preserves his lien and no question of stoppage in transit arises³.

When goods⁴ are delivered to a ship chartered by the buyer⁵, it is a question depending on the circumstances of the particular case whether the goods are in the possession of the master as a carrier or as agent to the buyer⁶. If they are in his possession as carrier, the goods are still in transit; but, where the charterparty amounts to a demise of the ship so as to make the master the servant of the buyer, shipment will effect delivery to the buyer and end the transit unless⁷ the seller has reserved the right of disposal⁸. There may be other exceptional cases to be judged on their particular facts⁹.

1 Similar principles apply to the seller's or buyer's hired vehicles: see *Master etc of Trinity House v Clark* (1815) 4 M & S 288 at 299 (where Lord Ellenborough, comparing a ship and a cart, shows that possession of the goods may be in the hirer notwithstanding that the cart is in the charge of the wagoner of the owner of the cart). The principles also apply presumably to aircraft: cf para 259 note 4 ante.

2 *Gurney v Behrend* (1854) 3 E & B 622; *Fraser v Witt* (1868) LR 7 Eq 64; *Re McLaren, ex p Cooper* (1879) 11 ChD 68, CA. The seller's lien is lost on shipment unless the charter is by demise: *Gurney v Behrend* supra at 633. See also note 8 infra.

3 The master being the seller's agent to deliver, so that the seller still retains possession through his agent, the buyer has not even constructive possession. See note 2 supra. As to the chartering of ships generally see CARRIAGE AND CARRIERS vol 7 (2008) PARA 205 et seq.

4 For the meaning of 'goods' see PARA 30 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 Sale of Goods Act 1979 s 45(5). See also *Meletopulo v Ranking* (1842) 6 Jur 1095.

7 lie under the Sale of Goods Act 1979 s 19: see PARAS 137 ante, 370 post.

8 The case of a charterparty by way of demise (see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 210-212) is not very common in practice. Where it does occur, the charterer becomes, as it were, the temporary owner of the ship, but the nature of his title is irrelevant to the doctrine of stoppage in transit. What is relevant is that he then gets possession of the goods as soon as they come under the control of his servant, the master of the ship. See *Fowler v Kymer or M'Taggart* (1797) cited in 1 East at 522 and 3 East at 396; *Berndtson v Strang* (1867) LR 4 Eq 481 at 491 per Wood V-C. In charters by demise 'the owner divests himself of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it': *Frazer v Marsh* (1811) 13 East 238 per Lord Ellenborough CJ. As to the kinds of charterparty see CARRIAGE AND CARRIERS vol 7 (2008) PARA 205 et seq.

9 *Bohtlingk v Inglis* (1803) 3 East 381 (bill of lading made out to buyer); *Berndtson v Strang* (1867) LR 4 Eq 481 (bill of lading to seller's order transferred to buyer); *Re Cock, ex p Rosevear China Clay Co* (1879) 11 ChD 560, CA.

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236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(ii) Duration of Transit/270. Effect of part delivery.

270. Effect of part delivery.

Where part delivery of the goods¹ has been made to the buyer² or his agent in that behalf, the remainder of the goods may be stopped in transit, unless the part delivery has been made under such circumstances as to show an agreement³ to give up possession of the whole of the goods⁴. The fact that the carrier retains his lien for the freight of the goods is relevant to show that a part delivery is not intended to be a constructive delivery of all the goods⁵.

1 For the meaning of 'goods' see PARA 30 ante.

2 For the meaning of 'buyer' see PARA 29 ante.

3 As the goods are ex hypothesi in the possession of a carrier, the agreement to give up possession is one between the person taking delivery and the carrier and not between such person and the seller: *Re McLaren, ex p Cooper* (1879) 11 ChD 68 at 78, CA. The Sale of Goods Act 1979 s 45(3) (see PARA 263 ante) seems to exclude attornment before arrival at the destination, and a similar intention may lie behind the presence of the word 'agreement' in s 45(7).

4 Ibid s 45(7). These provisions are so complete in detail that the older cases have little relevance except as illustrations: see *Hammond v Anderson* (1803) 1 Bos & PNR 69; *Tanner v Scovell* (1845) 14 M & W 28 (part delivery by wharfinger; no evidence of his attornment to buyer); *Re Piggott, ex p Cross* (1851) Fonbl 215; *Re McLaren, ex p Cooper* (1879) 11 ChD 68 at 74, 77, CA (explaining *Slubey v Heyward* (1795) 2 Hy Bl 504 (attornment by carrier)); *Mechan & Sons Ltd v North Eastern Rly Co* (1911) 48 SLR 987. The rule before the Sale of Goods Act 1893 (repealed) has been stated as follows: 'Delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole': *Bolton v Lancashire and Yorkshire Rly Co* (1866) LR 1 CP 431 at 440 per Willes J. As to the effect on a lien of part delivery see the Sale of Goods Act 1979 s 42; and PARA 243 ante.

5 *Re McLaren, ex p Cooper* (1879) 11 ChD 68, CA; *Kemp v Falk* (1882) 7 App Cas 573 at 584, HL, per Lord Blackburn. See also *Edwards v Brewer* (1837) 2 M & W 375 (goods landed by carrier at neutral wharf 'subject to freight and charges'). The fact that a carrier's lien exists is, however, not conclusive. The carrier's warehouse may be the destination of the goods: *Allan v Gripper* (1832) 2 Cr & J 218. Alternatively, the carrier may attorn to the buyer subject to the lien: *Kemp v Falk* supra at 584 per Lord Blackburn. In *Crawshay v Eades* (1823) 1 B & C 181 the goods had not been weighed to ascertain the freight.

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(iii) Exercise of Right of Stoppage in Transit

271. Modes of stoppage.

The unpaid seller¹ may² exercise his right of stoppage in transit either by taking actual possession of the goods³ or by giving notice of his claim to the carrier or other bailee in whose possession the goods are⁴. The notice may be given either to the person in actual possession of the goods or to his principal⁵. If given to the principal, the notice is ineffective unless given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer⁶.

It is not necessary for the seller to prove to the carrier that events have happened which justify a stoppage in transit⁷.

1 For the meaning of 'unpaid seller' see PARA 238 ante.

2 The methods of stoppage which are set out in the Sale of Goods Act 1979 s 46(1) are probably not exhaustive. In *Snee v Prescott* (1743) 1 Atk 245 at 250, Lord Hardwicke LC said that the seller might recover the goods by any means not criminal. Thus, a demand of the bill of lading is a good stoppage (*Re Love, ex p Watson* (1877) 5 ChD 35, CA), and in *Hutchings v Nunes* (1863) 1 Moo PCCNS 243, taking possession of a small part of the goods in the name of the whole was treated as effectual. It has not been decided whether a notice to stop may be given to the consignee of the goods: *Phelps, Stokes & Co v Comber* (1885) 29 ChD 813, CA.

3 For the meaning of 'goods' see PARA 30 ante.

4 Sale of Goods Act 1979 s 46(1). See also *Northey and Lewis v Field* (1797) 2 Esp 613 (notice of claim to customs officials; goods warehoused for unpaid duties).

5 Sale of Goods Act 1979 s 46(2).

6 Ibid s 46(3). For the meaning of 'buyer' see PARA 29 ante. See also *Whitehead v Anderson* (1842) 9 M & W 518; *Bethell v Clark* (1888) 20 QBD 615, CA. It is the duty of the shipowner to forward the notice (*Kemp v Falk* (1882) 7 App Cas 573 at 585, HL, per Lord Blackburn, disapproving the contrary opinion of Bramwell LJ in *Re Kiell, ex p Falk* (1880) 14 ChD 446 at 455, CA), and it would appear that this is at his own cost, there being no provision to the contrary at the end of the Sale of Goods Act 1979 s 46(4) (see PARA 272 post). It may be that this is a duty 'declared by the Act' so as to be enforceable by action under s 60: see PARA 14 ante.

7 In other words, the seller need not prove his right to stop; he stops at his peril: *The Tigress* (1863) Brown & Lush 38.

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272. Carrier's duty on receipt of notice of stoppage.

When notice of stoppage in transit is given by the seller¹ to the carrier or other bailee in possession of the goods², he must³ redeliver the goods to, or according to the directions of, the seller⁴. The expenses of such redelivery must be borne by the seller⁵. If the carrier, after a valid notice of stoppage in transit, delivers the goods to the buyer, he is liable in conversion⁶.

Where the delivery by the carrier of the goods to the buyer after a valid notice of stoppage in transit has been brought about under a bona fide mistake, the mistake does not cause the delivery to terminate the transit and the buyer is bound to return the goods to the seller on demand⁷. If he omits to do so, he is liable for the conversion of the goods⁸.

1 As to the meaning of 'seller' see PARA 241 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 Since a duty is here cast on the carrier, it is enforceable by action: see the Sale of Goods Act 1979 s 60; para 14 ante; and *Booth Steamship Co v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570 at 581, 598, CA. Where the unpaid seller has transferred a bill of lading to the buyer, the carrier may find himself in a difficult position: the Sale of Goods Act 1979 s 46(4) requires him to re-deliver the goods to, or according to the instructions of, the seller, while the Carriage of Goods by Sea Act 1924 s 2(1) grants rights of suit to the buyer as lawful holder of the bill of lading, which rights of suit will include a claim for mis-delivery if the carrier refuses to deliver the goods to him. Short of requiring the carrier to investigate whether the buyer has paid the purchase price under the sale contract, the carrier now faces claims for delivery of the goods on two fronts, both claims being based on different statutes, the unpaid seller's on the Sale of Goods Act 1979 s 46(4) and the buyer's on the Carriage of Goods by Sea Act 1924 s 2(1). It has been suggested that the carrier can resolve such difficulties by interpleading: see Benjamin's Sale of Goods (6th Edn, 2003) PARA 15-085. It has also been suggested, however, that an unpaid seller who has transferred the bill of lading loses his right of stoppage in transit through the operation of the Sale of Goods Act 1979 s 45(6), which terminates transit where the carrier wrongfully refuses to deliver the goods to the buyer: see Debattista *Sale of Goods Carried by Sea* (2nd Edn, 1998) PARA 2-51. See also Atiyah *Sale of Goods* (10th Edn, 2001) (it may be that in practice businessmen simply do not believe that

they have the right to reclaim the goods from the carrier once they have transferred the bill of lading to a buyer even though he has bought on credit and becomes insolvent before paying the price).

The duty of the carrier is in unqualified terms but does not take away his lien and, therefore, he is not bound to redeliver the goods unless his freight is tendered or a tender is waived. As to waiver of tender see *Thompson v Trail* (1826) 6 B & C 36 (other reason given for non-delivery of cargo); *Scarfe v Morgan* (1838) 4 M & W 270 (tender not waived); *Jones v Tarleton* (1842) 9 M & W 675 (claim for general lien acts as waiver of tender for amount of particular lien); *Kerford v Mondel* (1859) 28 LJ Ex 303 (claim on double grounds amounting to waiver of tender of either). As to the carrier's particular lien see PARA 274 post; and as to the carrier's duty in relation to stoppage in transit of goods in his possession generally see CARRIAGE AND CARRIERS vol 7 (2008) PARA 766 et seq.

4 Sale of Goods Act 1979 s 46(4). For the meaning of 'buyer' see PARA 29 ante. See also *Jackson v Nichol* (1839) 5 Bing NC 508; *The Tigress* (1863) Brown & Lush 38 at 45 per Dr Lushington; *Mechan & Sons Ltd v North Eastern Rly Co* 1911 SC 1348. In case of doubt the carrier should interplead: see *The Tigress* supra; CARRIAGE AND CARRIERS vol 7 (2008) PARA 771; and CIVIL PROCEDURE vol 12 (2009) PARA 1585 et seq.

5 Sale of Goods Act 1979 s 46(4). See also CARRIAGE AND CARRIERS vol 7 (2008) PARA 770. Section 46(4) regulates the rights of the carrier and of the seller inter se in the absence of a contract to the contrary; but, if goods are delivered freight-free on the buyer's own ship and the master has authority so to receive them, the seller, having stopped the goods, is entitled to have them redelivered without a tender of freight as against persons to whom, without the seller's knowledge, the buyer has sold the ship: *Mercantile Bank v Gladstone* (1868) LR 3 Exch 233.

6 As the law gives the seller the right to put an end to the contract of carriage by demanding possession of the goods, a dealing by the carrier with them inconsistently with such right is wrongful: *Pontifex v Midland Rly Co* (1877) 3 QBD 23 at 26, DC. See also *Syeds v Hay* (1791) 4 Term Rep 260; *Mills v Ball* (1801) 2 Bos & P 457 (where the wharfinger agreed expressly to hold the goods for the seller); *The Tigress* (1863) Brown & Lush 38; *Ormonde Cycle Co v Bailey and Leetham* (1895) 11 TLR 219. Cf *Allan v Gripper* (1832) 2 Cr & J 218 (where the seller's notice was too late).

7 *Litt v Cowley* (1816) 7 Taunt 169; *Re Deveze, ex p Cote* (1873) 9 Ch App 27; *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570 at 581, 598, CA. The view of the court in *Litt v Cowley* supra, that a stoppage in transit reverted the property in the goods in the seller, is no longer good law: see the Sale of Goods Act 1979 s 48(1); and PARA 277 post.

8 *Litt v Cowley* (1816) 7 Taunt 169. As to the general principle that conversion lies at the suit of a person entitled to the possession of a chattel see *Roberts v Wyatt* (1810) 2 Taunt 268.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

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273. Stoppage must have been intended.

Any act relied on as a stoppage in transit must have been done with that intent and by virtue of a right in respect of the goods adverse to that of the buyer¹. If so, it is immaterial that it is done with the buyer's consent².

1 *Phelps, Stokes & Co v Comber* (1885) 29 ChD 813, CA. See also *Siffken v Wray* (1805) 6 East 371.

2 *Mills v Ball* (1801) 2 Bos & P 457; *Smith v Goss* (1808) 1 Camp 282; *Nicholls v Le Feuvre* (1835) 2 Bing NC 81 (buyer's request to his agent not to ship). These cases should be compared with *Siffken v Wray* (1805) 6 East 371 (where the act done was not adverse, being done under a special agreement with the buyer).

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274. Carrier's lien on goods stopped.

The seller's right of stoppage in transit is subject to the particular lien of the carrier for the conveyance of the goods¹, but is paramount to any general lien of the carrier as against the consignee² and also to the rights of any execution creditor of the consignee³.

1 *Oppenheim v Russell* (1802) 3 Bos & P 42 at 53 per Chambre J; *Morley v Hay* (1828) 3 Man & Ry KB 396 (wharfinger's particular lien); *United States Steel Products Co v Great Western Rly Co* [1916] 1 AC 189, HL. See also CARRIAGE AND CARRIERS vol 7 (2008) PARA 770. In *Mercantile Bank v Gladstone* (1868) LR 3 Exch 233 the goods were freight-free by express agreement.

2 *Oppenheim v Russell* (1802) 3 Bos & P 42. See also *Richardson v Goss* (1802) 3 Bos & P 119; *Morley v Hay* (1828) 3 Man & Ry KB 396; *Nicholls v Le Feuvre* (1835) 2 Bing NC 81 (buyer's shipping agent acquires no lien by relanding goods on seller's account); *United States Steel Products Co v Great Western Rly Co* [1916] 1 AC 189, HL.

3 *Smith v Goss* (1808) 1 Camp 282.

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275. Carrier's right to freight.

The notice of stoppage in transit involves an obligation on the seller to pay to the carrier the whole freight due in respect of the goods carried; and, if the seller repudiates that obligation,

the carrier may sue the seller for damages equivalent to the freight which would have been earned if the voyage had been completed¹.

1 *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570 at 584, CA.

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Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(iii) Exercise of Right of Stoppage in Transit/276. Stoppage by unauthorised person.

276. Stoppage by unauthorised person.

A stoppage in transit purporting to be made on account of the seller by a person unauthorised in that behalf may be ratified before the transit has terminated so as to make it effectual, but it cannot be ratified afterwards¹. The dispatch during the transit by the seller to the person making the stoppage in transit of a letter of authority is, however, sufficient as a ratification, notwithstanding that the letter may not be received by the unauthorised agent until after the termination of the transit².

1 *Bird v Brown* (1850) 4 Exch 786. See also *Siffken v Wray* (1805) 6 East 371. The rule is founded on two principles of the law of agency: (1) that the act to be ratified must have been done professedly as an act of agency; and (2) that a ratification is not effectual unless it is made at a time when the principal could himself do the act ratified: see AGENCY vol 1 (2008) PARA 57 et seq. Where the rights of third persons intervene, there is the further principle that a ratification cannot prejudice the vested right of a third person: see AGENCY vol 1 (2008) PARA 63.

2 *Hutchings v Nunes* (1863) 1 Moo PCCNS 243. In *Bird v Brown* (1850) 4 Exch 786 the stoppage was not made by the agent until after the buyer had demanded the goods, whereas in *Hutchings v Nunes* supra the stoppage was made by the agent in due time. *Bird v Brown* supra in fact decided: (1) that the agent did not act in time on the authority dispatched in time; and (2) that the principal could not, after the end of the transit, ratify another stoppage made in time but unauthorised when made.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(iv)

Effect of Exercise by Seller of his Right of Stoppage in Transit/277. Exercise of seller's right of stoppage in transit.

(iv) Effect of Exercise by Seller of his Right of Stoppage in Transit

277. Exercise of seller's right of stoppage in transit.

Subject to certain statutory provisions¹, a contract of sale² is not rescinded³ by the mere exercise⁴ by an unpaid seller⁵ of his right of stoppage in transit⁶, and when the unpaid seller resells the goods the buyer acquires a good title to them as against the original buyer⁷.

1 The subject to the Sale of Goods Act 1979 s 48(3), (4) (resale): see PARAS 282-283 post.

2 For the meaning of 'contract of sale' see PARA 29 ante.

3 The cannot be treated by the seller as rescinded, for the buyer could not so treat it and so take advantage of his own wrong: *Roberts v Wyatt* (1810) 2 Taunt 268; *Malins v Freeman* (1838) 4 Bing NC 395.

4 The by the mere fact that the buyer is insolvent and the goods have been stopped (see the Sale of Goods Act 1979 s 44; and PARA 256 ante).

5 For the meaning of 'unpaid seller' see PARA 238 ante.

6 Sale of Goods Act 1979 s 48(1), (2). See also *Booth Steamship Co v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570 at 581, 598, CA.

7 Sale of Goods Act 1979 s 48(2). See also PARAS 249-250 ante.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(3) STOPPAGE IN TRANSIT/(v) Effect of Dispositions by Buyer on Seller's Right of Stoppage in Transit/278. Effect on unpaid seller's right of stoppage in transit.

(v) Effect of Dispositions by Buyer on Seller's Right of Stoppage in Transit

278. Effect on unpaid seller's right of stoppage in transit.

Subject to the Sale of Goods Act 1979¹, the unpaid seller's² right of stoppage in transit³ is not affected by any sale or other disposition of the goods⁴ which the buyer⁵ may have made, unless the seller has assented to it⁶. Where a document of title⁷ to goods has been lawfully transferred⁸ to any person⁹ as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith¹⁰ and for valuable consideration¹¹, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of stoppage in transit is defeated, and, if such last-mentioned transfer was made by way of pledge¹² or other disposition

for value, the unpaid seller's right of stoppage in transit can only be exercised subject to the rights of the transferee¹³.

The considerations as to the protection of the buyer's disponent¹⁴, the transfer of title¹⁵ and the rights of a pledgee¹⁶ are the same as in the case of the unpaid seller's right of lien.

When the unpaid seller's right of stoppage in transit as regards the goods has been defeated by a transfer by the buyer of a document of title to a sub-buyer, it is doubtful whether the seller, if he gives such a notice of stoppage in transit as would, but for the sub-sale, be effectual, is equitably entitled to so much of the sub-buyer's unpaid purchase money as will satisfy the seller's claim against the buyer¹⁷.

1 le subject to the Sale of Goods Act 1979 s 25 (see PARA 158 ante), s 47(2) (see PARAS 253-254 ante) and s 55 (as amended) (see PARAS 12, 100 ante).

2 For the meaning of 'unpaid seller' see PARA 238 ante.

3 As to stoppage in transit see PARA 256 et seq ante.

4 For the meaning of 'goods' see PARA 30 ante.

5 For the meaning of 'buyer' see PARA 29 ante.

6 Sale of Goods Act 1979 s 47(1).

7 As to the meaning of 'document of title to goods' see PARA 253 note 1 ante.

8 As to the meaning of 'lawfully transferred' see PARA 253 note 3 ante.

9 As to the meaning of 'person' see PARA 157 note 1 ante.

10 As to the question of good faith see PARA 154 ante.

11 See PARA 253 note 8 ante.

12 There is no decided authority for the proposition that the seller's right of stoppage in transit may be partially defeated under the Factors Act 1889 s 9 (as amended); but stoppage in transit falls within the words 'other right of the original seller', and pledge is one of the dispositions authorised to which the seller must be taken to have consented to that extent only. Where the pledge of the document of title by the buyer is for an antecedent debt, the effect of s 4, which, it is thought, should be read with s 9 (as amended), is to make the rights of the pledgee subject to the seller's right of lien or of stoppage.

13 See the Sale of Goods Act 1979 s 47(2); and PARA 253 ante.

14 See PARA 252 ante.

15 See the Sale of Goods Act 1979 s 47(2); and PARAS 253-254 ante.

16 See PARA 249 ante.

17 See *Re Kiell, ex p Falk* (1880) 14 ChD 446, CA, following *Re Knight, ex p Golding Davis & Co Ltd* (1880) 13 ChD 628, CA. See, however, to the contrary, *Kemp v Falk* (1882) 7 App Cas 573 at 577-578, HL, per Lord Selborne. The unpaid seller is entitled in equity to stop in transit everything which is not covered by the pledge: *Kemp v Falk* supra at 582 per Lord Blackburn. See also *Berndtson v Strang* (1868) 3 Ch App 588 per Lord Cairns LC. It is submitted that, according to Lord Selborne's opinion in *Kemp v Falk* supra, the right of stoppage is one against the goods only; and that, as a sub-buyer, being the transferee of a document of title, takes the goods free from the right of stoppage, which is 'defeated', there should be no right to intercept his unpaid purchase money. Where, however, the right has not been defeated, it may well be given effect to by the sub-buyer's purchase money being paid to the seller to the extent of his claim.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(4) RIGHT OF WITHHOLDING DELIVERY/279. Quasi-lien and right of stoppage.

(4) RIGHT OF WITHHOLDING DELIVERY

279. Quasi-lien and right of stoppage.

Where the property¹ in the goods² has not passed to the buyer³, the unpaid seller⁴ has, in addition to his other remedies⁵, a right of withholding delivery⁶ similar to and co-extensive with his rights of lien⁷ and stoppage in transit⁸ where the property has passed to the buyer⁹.

1 For the meaning of 'property', in relation to goods see PARA 27 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 For the meaning of 'unpaid seller' see PARA 238 ante.

5 I.e. a right of action for the price by agreement, even though the property has not passed (see the Sale of Goods Act 1979 s 49(2); and PARA 286 post), or an action for non-acceptance (see s 50; and PARA 287 et seq post). There is also a general right of withholding delivery where any condition precedent or concurrent to delivery has not been fulfilled: see s 28; and PARA 162 ante.

6 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

7 As to the seller's lien see PARA 242 et seq ante.

8 As to stoppage in transit see PARA 256 et seq ante.

9 Sale of Goods Act 1979 s 39(2). See also *Craven v Ryder* (1816) 6 Taunt 433; *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289 (following *Griffiths v Perry* (1859) 1 E & E 680); *Bellamy v Davey* [1891] 3 Ch 540 (quasi-lien); *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA; *Reid v JB Snowball Co Ltd* (1905) 7 F 35, Ct of Sess. As the right given under the Sale of Goods Act 1979 s 39(2) is similar to and co-extensive with the rights of lien and stoppage in transit, this right of withholding delivery arises if the price is due and unpaid or if the buyer becomes insolvent. It would seem that the case in which the property in goods has not passed to the seller himself at the time when he exercises his rights falls under s 39(2) rather than under s 38(2): see PARA 241 ante.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(4) RIGHT OF WITHHOLDING DELIVERY/280. Effect of right to withhold delivery.

280. Effect of right to withhold delivery.

In an ordinary contract for the sale of goods, the statutory right to withhold delivery¹ does not really extend the rights of an unpaid seller where the property in the goods has not yet passed to the buyer. Delivery of the goods and payment of the purchase price are *prima facie* concurrent conditions²; and, since the unpaid seller's rights of lien and stoppage in transit are exercisable only until payment or tender of the purchase price, the statutory right to withhold delivery conferred on him is no greater than the right conferred on him by the concurrent condition implied in the contract. It is only where the contract contains special terms excluding the implication that payment and delivery are concurrent conditions that the right is of assistance to an unpaid seller³.

1 le under the Sale of Goods Act 1979 s 39(2): see PARA 279 ante.

2 See *ibid* s 28; and PARAS 162, 207 ante.

3 See *ibid* s 55(1); and PARAS 12, 100 ante.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(5) RESALE BY SELLER/281. Resale where buyer repudiates contract.

(5) RESALE BY SELLER

281. Resale where buyer repudiates contract.

When the buyer by his words or conduct repudiates the contract, the seller is entitled, even where the property has passed, to treat the contract of sale as rescinded and to resell the goods as an owner of them but without prejudice to his right to damages in respect of any loss caused to him by the buyer's default¹. In particular, the seller may resell the goods when the buyer becomes insolvent and expressly or by implication intimates his insolvency to the seller in circumstances showing that he is unwilling or unable to pay the price of the goods².

1 See *Bloomer v Bernstein* (1874) LR 9 CP 588; *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434, HL. This is not a rescission in the sense of a rescission by agreement but one at the option of the seller only, who may elect not to perform his obligations under the contract: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 844-845, [1980] 1 All ER 556 at 562-563, HL, per Lord Wilberforce. See generally CONTRACT vol 9(1) (Reissue) PARA 986 et seq.

² Eg where the price is not tendered in cash within a reasonable time by the buyer or his trustee or, it appears, a sub-buyer: *Re Nathan, ex p Stapleton* (1879) 10 ChD 586, CA; *Re Phoenix Bessemer Steel Co, ex p Carnforth Haematite Iron Co* (1876) 4 ChD 108, CA; *Morgan v Bain* (1874) LR 10 CP 15; *Lawrence v Knowles* (1839) 5 Bing NC 399; *Mess v Duffus & Co* (1901) 6 Com Cas 165. The necessity that cash should be tendered, even where the contract allows credit, is a provision superadded by the law in spite of the agreement of the parties (*Re Phoenix Bessemer Steel Co, ex p Carnforth Haematite Iron Co* supra at 112-113 per Jessel MR); but, if the seller elects to abide by the contract, he must perform it according to its terms, including the allowance of credit (*Morgan v Bain* supra at 27 per Brett J).

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(5) RESALE BY SELLER/282. Resale under statutory rights.

282. Resale under statutory rights.

Where the goods¹ are of a perishable nature², or where the unpaid seller³ gives notice to the buyer⁴ of his intention to resell⁵, and the buyer does not pay or tender the price within a reasonable time⁶, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract⁷. When the unpaid seller so resells the goods, he does so as full owner, treating the buyer's failure to pay as a repudiation of the contract⁸.

¹ For the meaning of 'goods' see PARA 30 ante.

² I.e. not only physically but commercially perishable, as by deteriorating in market value by delay (*Maclean v Dunn* (1828) 4 Bing 722 at 728) or by deteriorating so as to become of unsatisfactory quality (formerly unmerchantable) (see *Duthie v Hilton* (1868) LR 4 CP 138; *Sharp v Christmas* (1892) 8 TLR 687, CA; *Asfar & Co v Blundell* [1896] 1 QB 123, CA).

³ For the meaning of 'unpaid seller' see PARA 238 ante.

⁴ For the meaning of 'buyer' see PARA 29 ante.

⁵ A request by the seller to the buyer, after a delivery and rejection of the goods, to resell them for the seller is evidence of a mutual rescission of the contract: *Gomery v Bond* (1815) 3 M & S 378.

⁶ What is a reasonable time is a question of fact: see PARA 120 text and note 16 ante.

⁷ Sale of Goods Act 1979 s 48(3). See also *Maclean v Dunn* (1828) 4 Bing 722; *Page v Cowasjee Eduljee* (1866) LR 1 PC 127 at 145; *Lord v Price* (1874) LR 9 Exch 54 at 55 per Bramwell B. As the right of resale is exercisable on default by the buyer in payment, it is thought that, where the price has been apportioned to separate portions of the goods and is separately payable, the seller may sell only that portion of the goods in respect of which there has been default in payment: see PARA 187 ante. Prima facie the amount of the seller's loss is the difference in the price realised added to the expenses of the resale: see the Sale of Goods Act 1979 s 50; and PARA 287 et seq post. See also *Maclean v Dunn* supra; *Noble v Edwardes*, *Edwardes v Noble* (1877) 5 ChD 378, CA; *Re Nathan, ex p Stapleton* (1879) 10 ChD 586, CA.

⁸ *RV Ward Ltd v Bignall* [1967] 1 QB 534, [1967] 2 All ER 449, CA, overruling *Gallagher v Shilcock* [1949] 2 KB 765, [1949] 1 All ER 921. It appears to follow that the seller need not account to the buyer for any profit received on the resale.

UPDATE**236-284 Rights of Unpaid Seller Against the Goods**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(5) RESALE BY SELLER/283. Effect of express power of resale or of repurchase.

283. Effect of express power of resale or of repurchase.

Where the seller¹ expressly² reserves the right of resale in case the buyer³ should make default⁴, and, on the buyer making default, resells the goods⁵, the original contract of sale⁶ is rescinded, but without prejudice to any claim the seller may have for damages⁷. Accordingly, the seller is entitled to any profits resulting from the resale⁸.

In calculating the loss resulting from the buyer's default, the seller must take into account any deposit on the price which may have been paid by the buyer⁹.

Conversely, where, pursuant to an express power in that behalf exercisable on the seller's default in delivery, the buyer buys similar goods from a third person, the contract is rescinded and the buyer is entitled to any profits on the repurchase¹⁰.

1 As to the meaning of 'seller' see PARA 241 ante.

2 The same result as in the rule stated occurs where a power of resale is given by usage of trade (*Re Tate, ex p Moffatt* (1841) 2 Mont D & De G 170), and the damages, being ascertainable, constitute a provable debt in bankruptcy (*Re Tate, ex p Moffatt* supra).

3 For the meaning of 'buyer' see PARA 29 ante.

4 I.e. such default as is contemplated by the terms of the power, not necessarily such default as would justify a resale in the absence of express power.

5 For the meaning of 'goods' see PARA 30 ante.

6 For the meaning of 'contract of sale' see PARA 29 ante.

7 Sale of Goods Act 1979 s 48(4), adopting the law laid down in *Lamond v Davall* (1847) 9 QB 1030. The result of the resale is that the buyer is no longer liable for the price as such, the resale being made by the seller as an owner and not as the buyer's agent: *Lamond v Davall* supra. See further PARA 281 note 1 ante.

8 *Ex p Hunter* (1801) 6 Ves 94 at 97. See also the reasoning of Kennedy J in *Simmonds v Millar & Co* (1898) 15 TLR 100.

9 *Ockenden v Henly* (1858) EB & E 485; *Shuttleworth v Clews* [1910] 1 Ch 176 (both cases of sale of land).

10 *Simmonds v Millar & Co* (1898) 15 TLR 100. See also *Kynoch Ltd v R* (1909) Times, 30 March, CA. The buyer may also, like the seller, recover any loss as damages: *Simmonds v Millar & Co* supra per Kennedy J. If the party not in default does not proceed under the express power, he may pursue his other remedies: *Shipton, Anderson & Co (1927) Ltd v Micks, Lambert & Co* [1936] 2 All ER 1032.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/5. RIGHTS OF UNPAID SELLER AGAINST THE GOODS/(5) RESALE BY SELLER/284. Effect of retaking of goods by seller.

284. Effect of retaking of goods by seller.

Where the goods are retaken by the seller after delivery under an express power exercisable on the buyer's default, the retaking operates as a rescission of the contract so that, unless it has been otherwise agreed, the price, although it may then be due, is thereafter not recoverable by the seller and must, if paid, be returned by him¹. Where, however, the goods are retaken wrongfully, the retaking is both tortious and a breach of the implied warranty that the buyer will enjoy quiet possession of the goods². It cannot, therefore, operate of itself as a rescission of the contract or entitle the buyer to treat the contract as at an end³.

1 *Hewison v Ricketts* (1894) 63 LJQB 711, DC (as explained in *Brooks v Beinrstein* [1909] 1 KB 98, DC); *A-G v Pritchard* (1928) 97 LJB 561. In *Hewison v Ricketts* supra and *A-G v Pritchard* supra the property had not passed, but it is considered that the same rule applies where the property has passed, on the analogy of *Lamond v Davall* (1847) 9 QB 1030 and the Sale of Goods Act 1979 s 48(4) (see PARA 283 ante). Where the contract is of hire with an option only of purchase, the rule has no application; the contract there is rescinded for the future only, arrears of rent remaining recoverable (*Brooks v Beinrstein* supra), for existing rights are not affected: see CONSUMER CREDIT vol 9(1) (Reissue) PARAS 34, 39, 47, 52, 54. See also *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311. The buyer's licence to the seller to enter his premises to retake the goods is irrevocable: *Heath v Randall* 58 Mass 195 (1849). A mere notice by the seller of his intention to resume possession is not a rescission of the contract, at any rate as against the right of distress of the buyer's lessor: *Hackney Furnishing Co v Watts* [1912] 3 KB 225, overruling *London Furnishing Co v Solomon* (1912) 28 TLR 265, DC. For restrictions on the right of the seller to resume possession of the goods in the case of transactions regulated by the Consumer Credit Act 1974 see CONSUMER CREDIT vol 9(1) (Reissue) PARA 263 et seq.

2 As the buyer is the person entitled to possession of the goods, he will be able to bring an action against the seller for wrongful interference with them, even where property in them has not passed to him: see TORT vol 45(2) (Reissue) PARA 542 et seq.

3 Where the property in the goods has passed, the buyer has received the consideration for the sale and the seller's conduct cannot be treated by the buyer as a rescission: *Stephens v Wilkinson* (1831) 2 B & Ad 320; *Gillard v Brittan* (1841) 8 M & W 575; *Re Humberston* (1846) De G 262; *Page v Cowasjee Eduljee* (1866) LR 1 PC 127. Even where the property has not passed, the breach of warranty does not entitle the buyer to treat the contract as repudiated: see the Sale of Goods Act 1979 s 11(3); and PARA 64 ante. The circumstances of the retaking may, however, be such as to show an intention on the part of the seller not to perform his remaining obligations under the contract, in which case the buyer will be entitled to treat himself as discharged from performance of his obligations and to recover any money paid by him in addition to claiming damages: see PARAS 180, 187 ante. As to the measure of damages see the cases cited in this note supra; *Chinery v Viall* (1860) 5 H & N 288. As to the remedy for breach of warranty see the Sale of Goods Act 1979 s 53 (as amended); and PARA 307 et seq post.

UPDATE

236-284 Rights of Unpaid Seller Against the Goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(1) REMEDIES OF THE SELLER/(i) Action for the Price/285. Where property has passed.

6. BREACH OF THE CONTRACT

(1) REMEDIES OF THE SELLER

(i) Action for the Price

285. Where property has passed.

Where, under a contract of sale¹, the property² in the goods³ has passed to the buyer⁴, and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller⁵ may maintain an action⁶ against him for the price of the goods⁷.

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 For the meaning of 'property', in relation to goods see PARA 27 ante.

3 For the meaning of 'goods' see PARA 30 ante.

4 For the meaning of 'buyer' see PARA 29 ante.

5 For the meaning of 'seller' see PARA 27 ante.

6 For the meaning of 'action' see PARA 14 ante. The right of action of either party may be barred by a submission to arbitration: see *Ayscough v Sheed Thomson & Co* (1923) 92 LJKB 878, CA; affd (1924) 93 LJKB 924, HL. Cf *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 KB 690. See also *Heyman v Darwins Ltd* [1942] AC 356, [1942] 1 All ER 337, HL; and ARBITRATION vol 2 (2008) PARA 1201 et seq. The machinery of arbitration is not in general appropriate to issues raising a question of law of general importance such as the construction of a commercial instrument in common use: see *Fairclough Dodd and Jones Ltd v JH Vantol Ltd* [1956] 3 All ER 921 at 922, [1957] 1 WLR 136 at 137, HL, per Lord Simmonds LC.

7 Sale of Goods Act 1979 s 49(1). The law was the same before the Sale of Goods Act 1893 (repealed): see generally *Kymer v Suwercroft* (1807) 1 Camp 109 (goods stopped in transit); *Gomery v Bond* (1815) 3 M & S 378 (price not payable after seller's consent to rescind); *Alexander v Gardner* (1835) 1 Bing NC 671 (goods lost at sea); *Broomfield v Smith* (1836) 1 M & W 542 (no action during period of credit); *Garey v Pyke* (1839) 10 Ad & El 512 (price payable out of fund in seller's hand); *Scott v England* (1844) 2 Dow & L 520; *Smith v Winter* (1852) 12 CB 487 (prepayment); *Mackay v Dick* (1881) 6 App Cas 251, HL (price payable on condition; condition waived by buyer). As to interest on the price see PARA 220 et seq ante. The neglect or refusal to pay must be wrongful. Prima facie payment of the price and delivery of the goods are concurrent conditions (see the Sale of Goods Act 1979 s 28; and PARA 162 ante), but the parties may make any bargain they please as to priority of delivery or payment (*Calcutta and Burmah Steam Navigation Co v De Mattos* (1863) 32 LQJ 322 at 328 per Blackburn J (on appeal (1864) 33 LQJ 214, Ex Ch)); so that, if delivery is not a condition precedent to payment of the price, the price is recoverable, if it is otherwise due, without delivery. The buyer may, however, by the terms of the contract, be entitled to credit. Credit allowed, but not as a term of the contract, is revocable: *De Symons v Minchew* (1795) 1 Esp 429. When the property has passed and the price is payable, it becomes payable as an ordinary debt: *Martindale v Smith* (1841) 1 QB 389. If the property has not passed, then, in the absence of express stipulation as to prepayment of the price, the seller's only remedy is an action for damages under the Sale of Goods Act 1979 s 50: see PARAS 287-289 post. This was the common law rule: *Atkinson v Bell* (1828) 8 B & C 277; *Boswell v Kilborn* (1862) 15 Moo PCC 309. As to the seller's right to recover for the care and custody of the goods, and as to loss caused by the buyer's delay in taking delivery see the Sale of Goods Act 1979 s 37; and PARA 205 ante. It would appear that s 37 applies only where the property has passed.

UPDATE**285-321 Breach of the Contract**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(1) REMEDIES OF THE SELLER/(i) Action for the Price/286. Where property has not passed.

286. Where property has not passed.

Where, under a contract of sale¹, the price is payable on a day certain irrespective of delivery², and the buyer³ wrongfully neglects or refuses to pay such price, the seller⁴ may maintain an action⁵ for the price, although the property⁶ in the goods⁷ has not passed and the goods have not been appropriated to the contract⁸. However, if the goods agreed to be sold have not been delivered to the buyer, the seller's entitlement to sue for the price depends on his continuing ability and willingness to deliver the goods to the buyer⁹.

1 For the meaning of 'contract of sale' see PARA 29 ante.

2 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 For the meaning of 'seller' see PARA 27 ante.

5 For the meaning of 'action' see PARA 14 ante.

6 For the meaning of 'property', in relation to goods see PARA 27 ante.

7 For the meaning of 'goods' see PARA 30 ante.

8 Sale of Goods Act 1979 s 49(2). See *Dunlop v Grote* (1845) 2 Car & Kir 153. The price is not payable on a day certain irrespective of delivery where goods are sold 'cash against documents on arrival of the steamer' (*Stein, Forbes & Co v County Tailoring Co* (1916) 86 LJB 448) or when the price is payable against delivery of documents (*Muller, Maclean & Co v Leslie and Anderson* [1921] WN 235) or where goods are sold on 'prompt cash against invoice' (*Henderson and Keay Ltd v AM Carmichael Ltd* 1956 SLT (Notes) 58, OH). The Sale of Goods Act 1979 s 49(2) also applies to instalments of the price (*Workman, Clark & Co Ltd v Lloyd Brazilleno* [1908] 1 KB 968, CA) and to cif contracts (*Trafigura Beheer BV v BCL Trading GmbH* [2002] EWCA Civ 251, [2002] All ER (D) 130 (Feb)).

9 *Otis Vehicle Rentals Ltd (formerly Brandrick Hire (Birmingham) Ltd) v Ciceley Commercials Ltd* [2002] EWCA 1064, [2002] All ER (D) 203 (Jul); *Maclean v Dunn* (1828) 4 Bing 722.

UPDATE**285-321 Breach of the Contract**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(1) REMEDIES OF THE SELLER/(ii) Damages for Non-acceptance/287. When remedy available.

(ii) Damages for Non-acceptance

287. When remedy available.

Where the buyer¹ wrongfully neglects or refuses to accept and pay for the goods², the seller³ may maintain an action⁴ against him for damages for non-acceptance⁵. This remedy is not limited to cases in which the property in the goods has not passed to the buyer⁶. Where the property has passed⁷, it is an alternative to an action for the price⁸. A claim for damages for non-acceptance will, however, generally amount to an election to treat the buyer's refusal to accept and pay for the goods as a repudiation of the contract⁹. Where the property has not passed to the buyer, the seller's only remedy, subject to the possibility of obtaining specific performance of the contract of sale¹⁰, is to sue for damages for non-acceptance¹¹.

1 For the meaning of 'buyer' see PARA 29 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'seller' see PARA 27 ante.

4 For the meaning of 'action' see PARA 14 ante. See also PARAS 14, 285 note 6 ante.

5 Sale of Goods Act 1979 s 50(1). There may be conditions precedent (see CONTRACT vol 9(1) (Reissue) PARAS 966-970, 991) to be performed by the seller, and the action does not lie if he has failed to perform them (see eg *Graves v Legg* (1854) 9 Exch 709 (names of ships to be declared on shipment of goods)), unless they have been waived by the buyer, as in *Braithwaite v Foreign Hardwood Co* [1905] 2 KB 543, CA. As to damages for default in taking delivery see the Sale of Goods Act 1979 s 37; and PARA 205 ante. Subject to the provisions of s 49(2) (see PARA 286 ante), if the property in the goods has not passed, the seller's only remedy is by action under s 50 (see supra; and PARAS 288-289 post). See also *Boswell v Kilborn* (1862) 15 Moo PCC 309; *Colley v Overseas Exporters* [1921] 3 KB 302.

6 As to where property has not passed see PARA 286 ante.

7 See PARA 285 ante.

8 Ie under the Sale of Goods Act 1979 s 49(1); see PARA 285 ante.

9 In such a case the property in the goods would appear to revert in the seller when he exercises his election.

10 See the Sale of Goods Act 1979 s 52; and PARA 305 post.

11 Ie under *ibid* s 50(1); see the text and notes 1-5 supra. As to where the property has not passed see s 49(2); and PARA 286 ante. See also *Demby Hamilton & Co Ltd v Barden* [1949] 1 All ER 435 (where damages equivalent to the price were recovered when the risk but not the property had passed).

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(1) REMEDIES OF THE SELLER/(ii) Damages for Non-acceptance/288. Measure of damages.

288. Measure of damages.

The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's¹ breach of contract². This is the ordinary rule of the ascertainment of damages for breach of contract, but it can be displaced by the express terms of the contract itself, as where damages for breach are fixed by the contract³, but they must be such as plainly to show that it is intended to displace the rule⁴.

1 For the meaning of 'buyer' see PARA 29 ante.

2 Sale of Goods Act 1979 s 50(2). See *Cort v Ambergate Nottingham and Boston and Eastern Junction Rly Co* (1851) 17 QB 127; *Ellis Lever & Co v Dunkirk Colliery Co* (1880) 43 LT 706, HL; *Re Vic Mill Ltd* [1913] 1 Ch 183 (affd [1913] 1 Ch 465, CA); *Hill & Sons v Edwin Showell & Sons Ltd* (1918) 87 LJB 1106, HL; *Whitaker Ltd v Bowater Ltd* (1918) 35 TLR 114; and the cases cited in PARA 290 note 7 post. Cf *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA; *Crystal Knitters Ltd v BRS Kumar Bros Ltd* [1988] BTLC 212, CA (both cases of failure to provide letter of credit). See DAMAGES vol 12(1) (Reissue) PARA 1056. The Sale of Goods Act 1979 s 50(2) adopts the first part of the rule laid down for breaches of contract generally in *Hadley v Baxendale* (1854) 9 Exch 341 at 354, and defines only what are called ordinary or general damages. The seller must take reasonable steps to mitigate his loss: *Robbins of Putney Ltd v Meek* [1971] RTR 345; *Gebrüder Metelmann GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614, CA. See also PARA 296 note 3 post. The most common application of it is given by the Sale of Goods Act 1979 s 50(3) (see PARA 289 post), which, however, remains subject to the general rule in s 50(2): see *Bem Dis A Turk Ticaret S/A TR v International Agri Trade Co Ltd* [1999] 1 All ER (Comm) 619, CA. As to special damages see the Sale of Goods Act 1979 s 54; and PARAS 309, 320 post. As to damages generally see DAMAGES vol 12(1) (Reissue) PARA 941 et seq.

3 See *Diestal v Stevenson* [1906] 2 KB 345. The amount actually recoverable then depends on whether the sum fixed by the contract is a penalty or liquidated damages: see DAMAGES vol 12(1) (Reissue) PARA 1065 et seq. The effect of an express term will be limited in certain contracts by the Unfair Contract Terms Act 1977 s 3 (see PARA 450 post) and the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended) (see PARAS 105 ante, 452 et seq post).

4 See *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Com Cas 39 (where the rule was applied despite a clause that the sellers could invoice all the instalments to the buyers on failure to take up one instalment); cf *Millar's Machinery Co Ltd v Way & Son* (1935) 40 Com Cas 204, CA. See also PARA 303 post.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(1) REMEDIES OF THE SELLER/(ii) Damages for Non-acceptance/289. Market-price rule for ascertaining measure of damages.

289. Market-price rule for ascertaining measure of damages.

Where there is an available market¹ for the goods² in question³, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price⁴ at the time or times⁵ when the goods ought to have been accepted, or, if no time was fixed for acceptance, at the time of the refusal⁶ to accept⁷.

This rule is, however, only a prima facie rule and must be read subject to the overriding effect of the general rule previously stated⁸, and of the further provision that nothing in the Sale of Goods Act 1979 affects the right of the buyer⁹ or the seller¹⁰ to recover interest or special damages in any case where by law interest or special damages may be recoverable¹¹. The prima facie rule is founded on the general duty of the seller to mitigate his damage by taking all reasonable steps to minimise his loss¹², and, where in breach of a contract for the sale of goods a buyer refuses to accept or pay for them, the reasonable step for the seller to take in normal circumstances is to sell the goods for the best price that he can. The difference between the market or current price at which he sells them and the contract price which he would have obtained for them is the true measure of the damages consequent on the buyer's breach of the contract¹³.

1 As to what is an available market see PARAS 290, 294 note 1 post.

2 For the meaning of 'goods' see PARA 30 ante.

3 If there is no difference between the contract and market price, the damages are nominal: *Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92 at 99 per Martin B. See further PARA 294 note 1 post.

4 The rule involves the assumption that the goods are sold under the same description as sold to the buyer: see *Macklin v Newbury Sanitary Laundry* (1919) 63 Sol Jo 337, DC. In comparing the contract price to the market price in a hypothetical sale, the court is to disregard any characteristics of the seller which might have led to a lower price being obtained: *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd (No 2)* [1990] 3 All ER 723, [1990] 1 Lloyd's Rep 441.

5 The phrase 'or times' points to instalment contracts: see *Brown v Muller* (1872) LR 7 Exch 319; *Roper v Johnson* (1873) LR 8 CP 167. As to non-delivery in instalment contracts, where the same rule applies see further PARA 294 note 5 post. As to postponement of delivery see PARAS 301-302 post; and as to anticipatory repudiation see PARA 291 post. Where there is a shipment period, the market price should be assessed as at the last day of the period notwithstanding that a party may already be in breach, as the other party is entitled not to treat the breach as final until then: *Phoebus D Kyprianou Co v Wm H Pim Jnr & Co Ltd* [1977] 2 Lloyd's Rep 570; *Lusograin Comercio Internacional de Cereas Ltda v Bunge AG* [1986] 2 Lloyd's Rep 654.

6 A subsequent rise or fall in the market is, therefore, irrelevant: see *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65, CA. See also DAMAGES vol 12(1) (Reissue) PARAS 1044, 1056. Cf the rules as to non-delivery: see PARA 294 post.

7 Sale of Goods Act 1979 s 50(3). See also note 6 supra; *Maclean v Dunn* (1828) 4 Bing 722 (auction sale); *Boorman v Nash* (1829) 9 B & C 145 (tender of instalments at fixed date; bankruptcy of buyer); *Phillpotts v Evans* (1839) 5 M & W 475 (tender at fixed date; buyer's previous repudiation); *Boswell v Kilborn* (1862) 15 Moo PCC 309; *Re Nathan, ex p Stapleton* (1879) 10 ChD 586, CA; *Ginner v King* (1890) 7 TLR 140, CA (damages at date of buyer's refusal); *Tredgar Iron and Coal Co v Hawthorn Bros & Co* (1902) 18 TLR 716, CA (buyer's previous repudiation); *Braithwaite v Foreign Hardwood Co* [1905] 2 KB 543, CA. Cf *Charter v Sullivan* [1957] 2 QB 117, [1957] 1 All ER 809, CA. These damages do not constitute a debt: *Green v Bicknell* (1838) 8 Ad & El 701.

8 The rule laid down in the Sale of Goods Act 1979 s 50(2): see PARA 288 ante; *Bem Dis A Turk Ticaret S/A TR v International Agri Trade Co Ltd* [1999] 1 All ER (Comm) 619, CA. Where the claim was not for non-acceptance but for failure to provide a letter of credit, as a result of which the seller was unable to obtain the goods from his supplier, the seller was entitled to recover his loss of profit, notwithstanding that the market price was at the material time higher than the contract price, but not to have a declaration of indemnity against claims by the supplier: *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA. See further PARA 295 note 5 post.

9 For the meaning of 'buyer' see PARA 29 ante.

10 For the meaning of 'seller' see PARA 27 ante.

11 See the Sale of Goods Act 1979 s 54; and PARAS 309, 320 post.

12 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] AC 673 at 689, HL. Cf para 296 note 3 post. See also DAMAGES vol 12(1) (Reissue) PARA 1041 et seq.

13 Cf, however, note 6 supra.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

289 Market-price rule for ascertaining measure of damages

NOTE 7--See also *Westbrook Resources Ltd v Globe Metallurgical Inc* [2009] EWCA Civ 310, [2009] 2 All ER (Comm) 1060.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(1) REMEDIES OF THE SELLER/(ii) Damages for Non-acceptance/290. Displacement of market-price rule.

290. Displacement of market-price rule.

The market-price rule¹ presupposes that there is a real market for the goods, and according to how far the facts of any particular case fall short of this supposition the market-price rule is displaced. Thus, there may be no market or current price for the goods, as where they are specially manufactured to the order of the buyer² or are otherwise unique³, or the market for the goods may be a limited market so that, if the seller were to sell the unaccepted goods to another purchaser, he would merely be satisfying an order which would in any event have come to him. In the last case the seller's damages resulting from the buyer's breach may be measured by his loss of profit on the goods which the buyer has refused to accept⁴. In particular, where the goods can only be sold at a fixed retail price, there cannot, it seems, be said to be an available market, since there can never be a difference between the contract price and the 'market' price⁵. In such cases, whether the retail seller is able to recover his profit from the defaulting buyer will depend on the general rule⁶, and, in particular, whether supply of the goods exceeds demand for them. If it does, the seller will be able to recover the profit, which he has truly lost⁷. If demand exceeds supply, he has not lost his profit since he can sell all the goods available⁸.

1 As to the market-price rule see PARA 289 ante.

2 *Dunkirk Colliery Co v Lever* (1879) 41 LT 633, CA (affd sub nom *Ellis, Lever & Co v Dunkirk Colliery Co* (1880) 43 LT 706, HL); *Re Vic Mill Ltd* [1913] 1 Ch 465, CA. The measure of damages in such a case may amount to the whole price of the goods or such price less a break-up price obtainable on sale. See also *Harlow and Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509 (where it was held that one alternative buyer for only part of the goods is not an available market).

3 *Lazenby Garages Ltd v Wright* [1976] 2 All ER 770, [1976] 1 WLR 459, CA; *J Sargent (Garages) Ltd v Motor Auctions (West Bromwich) Ltd* [1977] RTR 121, CA (both cases involving secondhand cars). See also *Robbins of Putney Ltd v Meek* [1971] RTR 345; *Gebrüder Metelmann GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614 at 626, CA.

4 *Re Vic Mill Ltd* [1913] 1 Ch 465, CA; *Interoffice Telephones Ltd v Robert Freeman Co Ltd* [1958] 1 QB 190, [1957] 3 All ER 479, CA.

5 *Charter v Sullivan* [1957] 2 QB 117 at 128, [1957] 1 All ER 809 at 813, CA, per Jenkins LJ, considered in *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd (No 2)* [1990] 3 All ER 723, [1990] 1 Lloyd's Rep 441.

6 The rule laid down in the Sale of Goods Act 1979 s 50(2): see PARA 288 ante.

7 *WL Thompson Ltd v R Robinson (Gunmakers) Ltd* [1955] Ch 177, [1955] 1 All ER 154 (as explained in *Charter v Sullivan* [1957] 2 QB 117 at 130-131, [1957] 1 All ER 809 at 815, CA, per Jenkins LJ); *JH Sparshatt & Sons Ltd v Regan* (1959) Times, 18 December. See also *Interoffice Telephones Ltd v Robert Freeman Co Ltd* [1958] 1 QB 190, [1957] 3 All ER 479, CA, disapproving *British Stamp and Ticket Automatic Delivery Co Ltd v Haynes* [1921] 1 KB 377.

8 *Charter v Sullivan* [1957] 2 QB 117, [1957] 1 All ER 809, CA; *Blythswood Motors Ltd v Raeside* 1966 SLT (Sh Ct) 13 (where there was delay in selling until the supply exceeded demand).

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(1) REMEDIES OF THE SELLER/(ii) Damages for Non-acceptance/291. Anticipatory repudiation by buyer.

291. Anticipatory repudiation by buyer.

Where the buyer gives notice to the seller of his intention to refuse to accept or to pay for goods before the date fixed for delivery, the seller is put to his election whether he will:

- 283 (1) accept the buyer's notice as repudiation of the contract and sue for damages on this basis; or
- 284 (2) continue to hold the buyer to his contract until the appointed time for performance¹.

The right of election is that of the seller alone, and repudiation by the buyer is of no effect until accepted by the seller². Moreover, such acceptance terminates the contract de futuro only, the seller's rights in respect of prior breaches of contract by the buyer being left intact³. Any action taken by the seller which evinces his intention no longer to be bound by the contract, for example a resale of the goods⁴ or the issue of a claim form against the buyer before the date fixed by the contract for its performance⁵, may be evidence of his election to treat the contract as repudiated.

Where the seller accepts the buyer's repudiation of the contract, the damages are calculated with reference to the date of his acceptance of the repudiation⁶, and, if the market-price rule is applicable, the market price is ascertained at that date⁷. Where the subject matter of the sale is goods to be manufactured or produced, or procured for the buyer, and the contract is repudiated by the buyer before the goods are manufactured, produced or procured, as the case may be, the measure of damages, if there is no market for the goods⁸, or, it would seem, only a limited market for the goods⁹, is the loss of the profit which the seller would have made on the sale¹⁰. If, however, the seller elects to hold the buyer to his bargain, he must continue ready

and willing to deliver the goods¹¹, and damages are then calculated at the date at which the buyer ought to have accepted or paid for them¹².

Where the seller has delayed delivery at the request of the buyer, and after such delay the buyer refuses to accept the goods, the seller is entitled to have damages assessed with reference to the market price at a reasonable time after the request to withhold delivery¹³.

1 See *Melachrino v Nickoll and Knight* [1920] 1 KB 693 at 697 (anticipatory breach by seller); *Michael v Hart & Co* [1902] 1 KB 482, CA. See CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

2 *Tredegar Iron and Coal Ltd v Hawthorn Bros & Co* (1902) 18 TLR 716 at 717, CA, per Mathew LJ. See CONTRACT vol 9(1) (Reissue) PARA 989.

3 See *Damon Cia Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein* [1985] 1 All ER 475, [1985] 1 WLR 435, CA (where a seller was entitled to the payment of a deposit prior to his (the seller's) acceptance of the buyer's repudiatory breach, the seller remained entitled to the deposit despite the termination of the contract through the seller's acceptance of the buyer's breach); and generally CONTRACT vol 9(1) (Reissue) PARA 1002.

4 See *Lamond v Davall* (1847) 9 QB 1030.

5 *L Roth & Co v Taysen, Townsend & Co and Grant & Co* (1895) 73 LT 628; affd (1896) 12 TLR 211, CA.

6 *Birchgrove Steel Co Ltd v Shaws Brow Iron Co Ltd* (1891) 7 TLR 246, HL; *Nickoll and Knight v Ashton, Edridge & Co* [1900] 2 QB 298; *Tredegar Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 TLR 716, CA; *Sudan Import and Export Co (Khartoum) Ltd v Société Générale de Compensation* [1958] 1 Lloyd's Rep 310, CA. The quantity of goods by reference to which damages are to be calculated is the quantity which would have been delivered, and is not to be increased against the wrongdoer to the maximum allowed by the contract unless this is justified by the evidence: see *Sudan Import and Export Co (Khartoum) Ltd v Société Générale de Compensation* supra at 317 (where the contract allowed for delivery of 10% more or less than mean quantity, and mean quantity was taken as the basis for damages).

7 *L Roth & Co v Taysen, Townsend & Co and Grant & Co* (1895) 73 LT 628; *Sudan Import and Export Co (Khartoum) Ltd v Société Générale de Compensation* [1958] 1 Lloyd's Rep 310, CA. The reason for this rule is that the seller, having elected to treat the buyer's refusal to accept as a repudiation of the contract, must immediately take steps to mitigate his damage, and the ordinary steps would be to sell the goods: see *Braithwaite v Foreign Hardwood Co* [1905] 2 KB 543, CA; *Melachrino v Nickoll and Knight* [1920] 1 KB 693.

8 *Cort v Ambergate, Nottingham and Boston and Eastern Junction Rly Co* (1851) 17 QB 127; *Silkstone and Dodsworth Coal and Iron Co Ltd v Joint Stock Coal Co Ltd* (1876) 35 LT 668. Cf *Tredegar Iron and Coal Co v Gielgud* (1883) Cab & El 27 (where there was some evidence of a market). It would seem that the principles laid down in this last case should not be extended in view of the Sale of Goods Act 1979 s 50(2): see PARA 288 ante.

9 *Re Vic Mill Ltd* [1913] 1 Ch 465, CA.

10 *Re Vic Mill Ltd* [1913] 1 Ch 465, CA. See also the cases cited in note 8 supra.

11 As to the rights of the innocent party generally see CONTRACT vol 9(1) (Reissue) PARA 1002 et seq.

12 *Reid v Hoskins* (1856) 6 E & B 953, Ex Ch. See also *Phillpotts v Evans* (1839) 5 M & W 475; *Ripley v M'Clure* (1849) 4 Exch 345, Ex Ch; *Michael v Hart & Co* [1902] 1 KB 482, CA; *Tredegar Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 TLR 716, CA.

13 *Hickman v Haynes* (1875) LR 10 CP 598. See also PARAS 300-301 post.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/292. When action lies.

(2) REMEDIES OF THE BUYER

(i) Action for Non-delivery

292. When action lies.

Where the seller¹ wrongfully neglects or refuses to deliver² the goods³ to the buyer⁴, the buyer may maintain an action⁵ against the seller for damages for non-delivery⁶.

1 For the meaning of 'seller' see PARA 27 ante.

2 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

3 For the meaning of 'goods' see PARA 30 ante.

4 For the meaning of 'buyer' see PARA 29 ante. As to exception clauses excusing performance of a contract if rendered impossible by circumstances such as force majeure see CONTRACT vol 9(1) (Reissue) PARA 906. Cf *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd* [1960] AC 684, [1960] 2 All ER 100, PC.

5 For the meaning of 'action' see PARA 14 ante.

6 Sale of Goods Act 1979 s 51(1). See *Jones v Gibbons* (1853) 8 Exch 920 (where goods were to be delivered as required); *Lewis v Clifton* (1854) 14 CB 245 (where growing timber was to be removed by the buyer and an independent trespass by the buyer was held to be no defence). The neglect or refusal must be wrongful, ie in breach of the contract: Sale of Goods Act 1979 s 51(1). See *Berg v Sadler and Moore* [1937] 2 KB 158, [1937] 1 All ER 637, CA. The buyer has three remedies in case of wrongful non-delivery, namely: (1) in all cases an action for damages; (2) if the buyer could not be adequately compensated for breach in damages, a right to specific performance (see PARA 305 post); and (3) if the property has passed, the ordinary remedies of an owner, such as an action for wrongful interference with the goods (see PARA 306 post). When the buyer has exercised his right of rejection under the Sale of Goods Act 1979 s 35 (as amended) (see PARA 199 ante), his remedy in damages is based on s 51; where on the other hand the buyer has lost his right of rejection, his remedy in damages is based on s 53 (as amended) (see PARA 307 post): *AC Daniels & Co Ltd v Jungwoo Logic (a firm)* (14 April 2000, unreported).

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

292 When action lies

NOTE 6--The 1979 Act s 51 is concerned with cases involving a duty of care and not to cases involving a duty of strict liability to deliver goods under a contract of sale: *CTI Group Inc v Transclear SA* [2007] EWHC 2340 (Comm), [2007] All ER (D) 227 (Oct).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/293. General rule as to damages.

293. General rule as to damages.

The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's¹ breach of contract².

1 For the meaning of 'seller' see PARA 27 ante.

2 Sale of Goods Act 1979 s 51(2). As to damages generally see DAMAGES vol 12(1) (Reissue) PARA 941 et seq. Section 51(2) merely applies to the case of non-delivery the first part of the general rule of damages for breach of contract laid down in *Hadley v Baxendale* (1854) 9 Exch 341 at 354: see DAMAGES vol 12(1) (Reissue) PARA 1015 et seq, particularly para 1024. In applying this measure of damages, the court will take account of the particular impact of the seller's breach on the particular buyer: see *Sealace Shipping Co Ltd v Oceanvoice Ltd, The Alecos M* [1991] 1 Lloyd's Rep 120, CA. When a contract is repudiated after a previous breach, damages may be recovered for both the breach and for the repudiation: *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293, PC.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/294. Prima facie rule as to damages.

294. Prima facie rule as to damages.

Where there is an available market¹ for the goods² in question, the measure of damages is prima facie³ to be ascertained by the difference⁴ between the contract price and the market or current price of the goods at the time or times⁵ when they ought to have been delivered⁶, or, if no time was fixed, at the time of the refusal to deliver⁷.

1 For varying views as to what constitutes an 'available market' see *Dunkirk Colliery Co v Lever* (1878) 9 ChD 20, CA; *ABD (Metals and Waste) Ltd v Anglo Chemical and Ore Co Ltd* [1955] 2 Lloyd's Rep 456; *WL Thompson Ltd v R Robinson (Gunmakers) Ltd* [1955] Ch 177, [1955] 1 All ER 154; *Charter v Sullivan* [1957] 2 QB 117, [1957] 1 All ER 809, CA; *Sealace Shipping Co Ltd v Oceanvoice Ltd, The Alecos M* [1991] 1 Lloyd's Rep 120 at 124, CA. The existence of an available market is a question of fact: *Marshall & Co v Nicoll & Son* 1919 SC (HL) 129. Moreover, the only factual inquiry relevant to the question whether the applicable rule is that found in the Sale of Goods Act 1979 s 50(2) (see PARA 288 ante) or s 50(3) (see PARA 289 ante) is whether there is or is not an available market; and, for that decision to be made, it need not be further established whether or not it was within the contemplation of the parties that there be no available market: see *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No 2), The Marine Star* [1994] 2 Lloyd's Rep 629 at 634-635; revsd on another point [1996] 2 Lloyd's Rep 383, CA. 'It is immaterial whether the rise in price is occasioned by scarcity, or increased demand, or any other cause': *Josling v Irvine* (1861) 6 H & N 512 at 517 per Wilde B. The market is that in which, in mitigating his loss, the party deals: see *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459 at 497, [1954] 3 All ER 165 at 169 per Devlin J. See also *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1050; *Hong Guan & Co Ltd v R Jumabhoy and Sons Ltd* [1960] AC 684 at 703, [1960] 2 All ER 100 at 108, PC. It may include a surreptitious market: see *British Motor Trade*

Association v Gilbert [1951] 2 All ER 641; *Mouat v Betts Motors Ltd* [1959] AC 71, [1958] 3 All ER 402, PC (where there was a breach of covenant by the buyer not to resell and the seller's damages were based on the resale price received by the buyer in an illegal market). As to damages where there is no market see PARA 299 post. Where there is no market at the place of delivery, the value at the nearest available place, less the cost of transport there, may sometimes be taken as the market value (*Wertheim v Chicoutimi Pulp Co* [1911] AC 301, PC; *Grand Tower Co v Phillips* 90 US 471 (1874); *Macauley v Horgan* [1925] 2 IR 1, CCA); as may also the value in controlling markets (*Cahen v Platt* 69 NYSR 348 at 352 (1877)). If there is no market price at the place of delivery at the time when the goods should have been delivered, the price for a brief period before or after that time may serve: *Cahen v Platt* supra.

2 For the meaning of 'goods' see PARA 30 ante.

3 It is not an absolute rule, and, if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances: *Johnson v Agnew* [1980] AC 367 at 401, [1979] 1 All ER 883 at 896, HL, per Lord Wilberforce. See also note 5 infra; and, in relation to the analogous provisions of the Sale of Goods Act 1979 s 53(3), *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA (cited in PARAS 295 note 8, 309 note 5, 314 note 2, 315 note 5 post); *Dampskibsselskabet 'Norden' A/S v Andre & Cie SA* [2003] EWHC 84 (Comm), [2003] All ER (D) 305 (Jan); *Dreyfus (Louis) Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), [2004] All ER (D) 24 (Jan).

4 If there is no difference, the damages are nominal: *Valpy v Oakeley* (1851) 16 QB 941; *Griffiths v Perry* (1859) 1 E & E 680; *Aryeh v Lawrence Kostoris & Son Ltd* [1967] 1 Lloyd's Rep 63, CA.

5 Where the time of delivery is indefinite, and within the seller's control, it would seem that the buyer, being induced by the seller to believe that a breach has not occurred, may treat the date of his discovery of the breach as the date of the breach: *Wilson v London and Globe Finance Corp Ltd* (1897) 14 TLR 15, CA. See also *James Finlay & Co Ltd v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400, CA (where the claim was not founded on the bill of lading and the damages were nominal in spite of a fall in the market); *Produce Brokers New Co (1924) Ltd v British Italian Trading Co Ltd* [1952] 1 Lloyd's Rep 379 (where the market price included export duty). In the case of instalment contracts the damages must prima facie be calculated with reference to the market price at the time for the delivery of each instalment: *Brown v Muller* (1872) LR 7 Exch 319; *Roper v Johnson* (1873) LR 8 CP 167. As to indeterminate instalments see *Barningham v Smith* (1874) 31 LT 540; *Bergheim v Blaenavon Iron and Steel Co Ltd* (1875) LR 10 QB 319. The buyer cannot accumulate successive breaches and treat them as a single breach at the end of the contract period: *Barningham v Smith* supra. As to postponement of delivery see *Re Voss, ex p Llansamlet Tin Plate Co* (1873) LR 16 Eq 155. Where any tax or increased tax would be payable by the buyer for the substituted goods, it seems that this must be taken into account: see *Martin v LCC* [1947] KB 628, [1947] 1 All ER 783 (conversion). As to the time at which damages are to be assessed where the time for delivery has been extended see PARA 301 post.

6 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante. See *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd* [1960] AC 684 at 703, [1960] 2 All ER 100 at 107-108, PC; and the cases cited in note 7 infra. Normally, the earliest date on which the buyer could buy in on the market will be the day after the date on which the goods ought to have been delivered, and, where that is the case, damages will be assessed by reference to the market price on that day: *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL; *Toepfer v Schwarze* [1980] 1 Lloyd's Rep 385, CA; *C Czarnikow Ltd v Bunge & Co Ltd* [1987] 1 Lloyd's Rep 202; *Kaines (UK) Ltd v Österreichische Warrenhandelsgesellschaft Austrowaren Gesellschaft mbH (formerly CGL Handelsgesellschaft mbH)* [1993] 2 Lloyd's Rep 1, CA. Cf, however, *Alfred C Toepfer v Peter Cremer* [1975] 2 Lloyd's Rep 118, CA.

7 Sale of Goods Act 1979 s 51(3). See *Leigh v Paterson* (1818) 8 Taunt 540 (previous repudiation not accepted by buyer) (followed in *Gainsford v Carroll* (1824) 2 B & C 624); *Startup v Cortazzi* (1835) 2 Cr M & R 165; *Barrow v Arnaud* (1846) 8 QB 595 at 609, Ex Ch; *Shaw v Holland* (1846) 15 M & W 136 at 146 (shares); *Peterson v Ayre* (1853) 13 CB 353; *Josling v Irvine* (1861) 6 H & N 512 (market price unusually high); *Williams v Reynolds* (1865) 6 B & S 495; *Ashmore & Son v CS Cox & Co* [1899] 1 QB 436 at 443; *Kidston & Co v Monceau Ironworks Co* (1902) 18 TLR 320; *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, PC (delay in delivery); *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814; *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130n, [1967] 2 All ER 353, HL. As to anticipatory breach see PARA 300 post. If the goods are to be removed at the buyer's expense, then, in calculating the difference, the expenses of removal must be added to the contract price: *M'Neill v Richards* [1899] 1 IR 79. Similarly, dead freight paid by the buyer to the ship owner, on a short delivery by the seller, may be recovered from the seller in addition to the cost of substituted goods: *E Braude (London) Ltd v Porter* [1959] 2 Lloyd's Rep 161. Oral evidence to enhance the measure of damages under a written contract is not admissible: see *Brady v Oastler* (1864) 3 H & C 112. In Scotland the rule was formerly not so strictly applied, and more latitude in considering actual loss was allowed: *Dunlop v Higgins* (1848) 1 HL Cas 381 at 403, approving *Watt v Mitchell* (1839) 1 D 1157, Ct of Sess.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

294 Prima facie rule as to damages

NOTE 7--See also *Sony Computer Entertainment UK Ltd v Cinram Logistics UK Ltd* [2008] EWCA Civ 955, [2009] 2 All ER (Comm) 65.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/295. Effect on damages of sub-contracts by buyer.

295. Effect on damages of sub-contracts by buyer.

Where the buyer has resold to a third person the specific goods which are the subject matter of his contract with the seller, his duty to mitigate his damage has no room to operate, since under his contract with the third person he cannot deliver any goods other than the actual goods which were the subject matter of his sub-contract.

The rule as to remoteness of damages is, however, often effective to prevent the sub-contract from being taken into consideration in estimating the loss directly and naturally resulting from the seller's breach¹. This rule as applied to breaches of contract is that the damages to be awarded must be such as may reasonably have been supposed to be in the contemplation of both parties when they made the contract as the probable result of a breach of it². The courts will not presume that, when a contract is made for the sale of goods, it is contemplated by both buyer and seller that the buyer will contract to sell the identical goods to a third person before delivery. Thus, if the buyer does make such a sub-contract, the loss of profit on his sub-contract cannot be treated as the loss naturally and directly resulting from the seller's breach³.

If, however, it is proved that, at the time of the original contract for the sale of goods⁴, both buyer and seller contemplated that the goods would be resold by the buyer before delivery and that the buyer's loss on non-delivery by the seller would be his loss of profit on resale, such loss of profit⁵ will be the true measure of damages⁶.

In order to bring the measure of damages within this exception, it is not sufficient that at the date of the contract the seller was aware that the buyer might resell⁷; it must be shown that both parties contemplated that he would resell⁸; but it is not necessary that the terms of the contract should be completely disclosed, liability being incurred in respect of so much of the sub-contract as is communicated⁹.

1 For the general rule as to damages see PARA 293 ante.

2 *Hadley v Baxendale* (1854) 9 Exch 341; *Hydraulic Engineering Co Ltd v McHaffie* (1878) 4 QBD 670, CA; *Hammond & Co v Bussey* (1887) 20 QBD 79, CA; *André & Cie SA v JH Vantol Ltd* [1952] 2 Lloyd's Rep 282. See also *Sanders v Stuart* (1876) 1 CPD 326; *Skinner v City of London Marine Insurance Corp'n* (1885) 14 QBD 882, CA. For the general principle see *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 536-537, [1949] 1 All ER 997 at 1001, CA, per Asquith LJ. See also *Diamond v Campbell-Jones* [1961] Ch 22, [1960] 1 All ER 583; and DAMAGES vol 12(1) (Reissue) PARA 1015 et seq. As to damages for breach of warranty see PARA 307 et seq post.

3 *Rodocanachi v Milburn* (1886) 18 QBD 67, CA; *Williams Bros v Ed T Agius* [1914] AC 510, HL; *Sheik Mohammad Habib Ullah v Bird & Co* (1921) 37 TLR 405, PC; *The Arpad* [1934] P 189, CA. See also the cases

cited in note 2 supra; and *Williams v Reynolds* (1865) 6 B & S 495. In *The Arpad* supra the court took the view that the fact that the goods were bought for resale was not present to the minds of the vendors but left open the question whether the resale price might not have been taken as evidence of the market price. As to resales see PARA 314 post.

4 It is not sufficient that the seller should be made aware of the sub-contract after the date of the contract but before breach: *Portman v Middleton* (1858) 4 CBNS 322. See also *Re R and H Hall Ltd and WH Pim Junior & Co's Arbitration* (1927) 32 Com Cas 144, CA; revsd on different grounds (1928) 33 Com Cas 324, HL.

5 It seems that, where damages do include loss of profit and will be taxable in the hands of the recipient, the incidence of tax on that profit should now be taken into account (*British Transport Commission v Gourley* [1956] AC 185, [1955] 3 All ER 796, HL, applied in *West Suffolk County Council v W Rought Ltd* [1957] AC 403, [1956] 3 All ER 216, HL (compensation for disturbance)), but not if the sum of damages awarded will fall to be included in the successful party's statement of profits and there taxed in any event (see *PC Products Ltd v Wilfred Dalton* [1957] RPC 199 at 202 (damages for passing off); *Diamond v Campbell-Jones* [1961] Ch 22, [1960] 1 All ER 583 (sale of land)).

6 *JL Lyon & Co Ltd v Fuchs* (1920) 2 Ll L Rep 333; *Mott v Muller* (1922) 13 Ll L Rep 492; *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 KB 535; *Re R and H Hall Ltd and WH Pim Junior & Co's Arbitration* (1928) 139 LT 50, HL. See also *Grébert-Borgnis v J & W Nugent* (1885) 15 QBD 85, CA; and PARA 314 post. The buyer is also entitled to a declaration of indemnity limited to such damages as might be found legally due from the buyer to the third person and can be handed on to the seller: see *Household Machines Ltd v Cosmos Exporters Ltd* [1947] KB 217, [1946] 2 All ER 622 (distinguished in *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA). See also *Re FI Bourgeois and Wilson, Holgate & Co* (1920) 25 Com Cas 260, CA; *London and Provincial Motor and Tractor Co Ltd v Boundary Garage* [1948] WN 267. For the buyer to recover his loss of profit on a resale contract, that profit must not be unusual: see *Coastal International Trading Ltd (now Challenger Petroleum Ltd) v Maroil AG* [1988] 1 Lloyd's Rep 92. See *Contigroup Companies Inc v Glencore AG* [2004] EWHC 2750 (Comm), [2005] 1 Lloyd's Rep 241, [2004] All ER (D) 387 (Nov) (settlement between claimant buyer and sub buyer taken into account in assessing damages).

7 *Thol v Henderson* (1881) 8 QBD 457; cf *Hammond & Co v Bussey* (1887) 20 QBD 79, CA (breach of warranty). See also PARA 314 post.

8 *Williams v Reynolds* (1865) 6 B & S 495; *British Columbia Saw-Mill Co v Nettleship* (1868) LR 3 CP 499; *Horne v Midland Rly Co* (1872) LR 7 CP 583; *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 KB 535 at 540. See also *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA (where facts such as liabilities towards third parties are proved to have been within the reasonable contemplation of the parties, such liabilities may be taken into account in quantifying the buyer's loss); and PARAS 294 note 3 ante, 309 note 5, 314 note 2, 315 note 5 post. It would seem from the general trend of the modern cases that now sub-contracts are more often held to have been in the contemplation of the parties, eg where there are sales of cargoes afloat. This is simply recognising the modern commercial practice of making such sales. The standard forms of contract in many import and export trades indicate that sub-sales are within the contemplation of the parties by providing that arbitration between first seller and last buyer will be binding on intermediate buyers and sellers.

9 *Prior v Wilson* (1860) 1 LT 549; *Borries v Hutchinson* (1865) 18 CBNS 445; *Elbinger AG v Armstrong* (1874) LR 9 QB 473; *Grébert-Borgnis v J & W Nugent* (1885) 15 QBD 85 at 90, CA, per Brett MR.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/296. Application of market-price rule.

296. Application of market-price rule.

As in the case of damages for non-acceptance¹ the market-price rule is only a prima facie rule and must be read subject to the general rule stated previously², but the market-price rule is less easily displaced in the case of damages for non-delivery than it is in the case of damages for non-acceptance; and, in considering what loss directly and naturally results to the buyer from the seller's breach of his duty to deliver the contract goods, the common law rules as to the buyer's duty to mitigate his damage³, as to loss which is in fact avoided by the buyer⁴, and as to remoteness of damage⁵, must be borne in mind. The combined effect of these three rules is to render immaterial, in the majority of cases, any special circumstances affecting the buyer, such as the use to which he intends to put the goods himself⁶, or sub-contracts which he may have made with third persons⁷. Thus, if, before obtaining delivery, the buyer has contracted to sell goods similar to the contract goods to a third person and such similar goods are obtainable at the date of the seller's failure to deliver, the buyer's duty to mitigate his damage requires him to buy in the market the similar goods necessary to fulfil his sub-contracts, and, if he performs that duty, the measure of the damage which he has suffered is the difference between the contract price and the market price of such goods⁸. The price at which the buyer, in reliance on his contract with the seller, has contracted to sell similar goods to third persons is thus irrelevant, unless there is no market in which the buyer can obtain such goods at the date of the seller's failure to deliver⁹.

Where, after a buyer has lawfully rejected goods, a new agreement is entered into by the same parties for the sale and purchase of the same goods at a reduced price, but the buyer sues the seller for damages under the original contract, the ordinary principle of mitigation of damages permits account to be taken of the profit made by the buyer on the subsequent contract, provided that it is found as a fact that the subsequent contract is part of a continuous dealing between the parties¹⁰.

1 As to damages for non-acceptance see PARA 287 et seq ante.

2 I.e. the rule laid down in the Sale of Goods Act 1979 s 51(2): see PARA 293 ante. It must also be read subject to the rule in s 54: see PARAS 309, 320 post.

3 See DAMAGES vol 12(1) (Reissue) PARA 1041 et seq. The buyer's obligation to mitigate his damage is limited to doing that which a prudent business person would do. He need not take steps which would damage his own reputation: *James Finlay & Co Ltd v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400, CA; *Lesters Leather & Skin Co Ltd v Home & Overseas Brokers Ltd* (1948) 82 Ll L Rep 202, CA. See also *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694 at 702, [1954] 1 WLR 1286 at 1296; *Goodall, Young & Co Ltd v N and C Boost SA* [1959] 2 Lloyd's Rep 674; *Harlow and Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509 at 530. What steps a claimant should take in mitigating damage is a question of fact not law: *Wilson v Hicks* (1857) 26 LJ Ex 242; *L Roth & Co Ltd v Taysen, Townsend & Co and Grand and Grahame* (1896) 1 Com Cas 306, CA; *Payzu Ltd v Saunders* [1919] 2 KB 581, CA. The claimant is not normally bound to enter into a new contract to mitigate the loss: *Brown v Muller* (1872) LR 7 Exch 319; *Roper v Johnson* (1873) LR 8 CP 167. It may sometimes be unreasonable, however, for him not to do so: *Sotiros Shipping Inc and Aeeco Maritime SA v Sameiet Solholt, The Solholt* [1983] 1 Lloyd's Rep 605, CA. If the seller offers to buy back goods at the contract price, the buyer ought to accept: *Houndsditch Warehouse Co Ltd v Waltex Ltd* [1944] KB 579, [1944] 2 All ER 518; *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240 at 256-257 (obiter). Cf *Tredegar Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 TLR 716, CA; *ABD (Metals and Waste) Ltd v Anglo Chemical and Ore Co Ltd* [1955] 2 Lloyd's Rep 456.

4 See DAMAGES vol 12(1) (Reissue) PARA 1044.

5 See DAMAGES vol 12(1) (Reissue) PARA 1015 et seq.

6 *Cory v Thames Ironworks Co* (1868) LR 3 QB 181.

7 *Rodocanachi v Milburn* (1886) 18 QBD 67, CA. Where the contract expressly limits damages to 'the difference between the contract price and the market price on the day of default', such words are to be interpreted so as to exclude any claims to compensation for the loss of sub-sales: *C Czarnikow Ltd v Bunge & Co Ltd* [1987] 1 Lloyd's Rep 202. Cf *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA (cited in PARA 295 note 8 ante); *Brading v F McNeill & Co Ltd* [1946] Ch 145 (real property).

8 *Rodocanachi v Milburn* (1886) 18 QBD 67, CA; *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 at 307, PC; cf *Mouat v Betts Motors Ltd* [1959] AC 71, [1958] 3 All ER 402, PC.

9 As to the position where there is no market see PARA 299 post.

10 *R Pagnan and Fratelli v Corbisa Industrial Agropacuaria Lda* [1971] 1 All ER 165, [1970] 1 WLR 1306, CA.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/297. Goods bought for buyer's use.

297. Goods bought for buyer's use.

Where the buyer buys goods for his own use and suffers exceptional damage as a result of their non-delivery, for example an essential part of a machine which the buyer requires for use in his business¹, he may recover his full loss only if he can establish that at the time of the contract of sale both he and the seller contemplated that such a loss would result from non-delivery².

1 *Hadley v Baxendale* (1854) 9 Exch 341; *Cory v Thames Ironworks Co* (1868) LR 3 QB 181; *Kleinert v Abosso Gold Mining Co Ltd* (1913) 58 Sol Jo 45, PC (failure to provide adequate machinery); *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA (delay); cf *Combex Ltd v Cork N Seals Ltd* (1942) 86 Sol Jo 376, DC. See also the cases cited in PARA 302 note 1 post.

2 See *Grébert-Borgnis v J & W Nugent* (1885) 15 QBD 85, CA; *Marcus v Myers and Davis* (1895) 11 TLR 327; *Monte Video Gas and Dry Dock Co v Clan Line Steamers Ltd* (1921) 37 TLR 866, CA. The last two cases are not cases of the sale of goods, but the same principles apply.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/298. Loss of goodwill.

298. Loss of goodwill.

Where the seller's failure to deliver results not merely in the buyer's loss of profit on his sub-contracts, or contracts which he could have performed had due delivery been made, but also results in loss of custom or goodwill, such a loss is nearly always too remote¹. Damages in respect of such loss may be recovered, however, if such loss was within the reasonable contemplation of the parties when they made their contract and is proved to have occurred².

1 *Lancashire and Yorkshire Rly Co v Gidlow* (1875) LR 7 HL 517; *Doe v WH Bowater Ltd* [1916] WN 185.

2 As to the loss of goodwill see PARA 316 post.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/299. Where there is no market for the goods.

299. Where there is no market for the goods.

Where there is no market¹ for the goods in question, the court must endeavour to ascertain the value of the goods in some other way². The price at which the goods have been resold by the buyer may be evidence of their value³, as may the cost⁴ of obtaining substituted goods⁵; but matters special to the buyer and not within the contemplation of the parties at the date of the contract of sale must be ignored⁶.

1 The existence of an available market is a question of fact: see PARA 294 note 1 ante.

2 See *R Pagnan & Flli v Lebanese Organisation for International Commerce, The Caloric* [1981] 2 Lloyd's Rep 675.

3 *Elbinger AG v Armstrong* (1874) LR 9 QB 473 at 476. See also *France v Gaudet* (1871) LR 6 QB 199; *Hinde v Liddell* (1875) LR 10 QB 265; *Stroud v Austin & Co* (1883) Cab & El 119; *Grébert-Bornis v J & W Nugent* (1885) 15 QBD 85, CA; *Sheik Mohammad Habib Ullah v Bird & Co* (1921) 37 TLR 405, PC; *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 KB 535; *The Arpad* [1934] P 189 at 201, CA; and the cases cited in PARA 294 note 1 ante.

4 *J Leavey & Co Ltd v George H Hirst & Co Ltd* [1944] 1 KB 24, [1943] 2 All ER 581, CA (cloth to be made up).

5 *Portman v Middleton* (1858) 4 CBNS 322; *Hinde v Liddell* (1875) LR 10 QB 265; *Erie County Natural Gas and Fuel Co v Carroll* [1911] AC 105, PC; *The Arpad* [1934] P 189, CA. See also PARA 294 note 1 ante.

6 *The Arpad* [1934] P 189, CA. See also *Grébert-Bornis v J & W Nugent* (1885) 15 QBD 85 at 90, CA. See generally *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/300. Anticipatory breach.

300. Anticipatory breach.

Where there is a time fixed for delivery of the goods and the seller has repudiated the contract before that time and the buyer has accepted such repudiation so as to rescind the contract, the measure of damages is prima facie the difference between the contract price and the value of the goods at the time fixed for delivery, although this is subject to the duty of the buyer, where appropriate, to take reasonable steps to mitigate the damage by buying the goods at a lower price at an earlier date after the acceptance of repudiation but before the contract date for performance¹. Where no time is fixed for delivery, the measure of damages is ascertained by reference to the time for performance, subject to the same duty to mitigate as in the case of a fixed date for delivery².

Likewise, if the buyer elects to hold the seller to the contract until the time for performance comes³, the damages must be ascertained as at the date on which the goods should have been delivered⁴.

¹ *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130n at 1140n, [1967] 2 All ER 353 at 360, HL. See also *Hochster v De la Tour* (1853) 2 E & B 678; *Roper v Johnson* (1873) LR 8 CP 167; *Nickoll and Knight v Ashton, Edridge & Co* [1900] 2 QB 298 (on appeal [1901] 2 KB 126, CA); *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814; *Melachrino v Nickoll and Knight* [1920] 1 KB 693; *Millett v Van Heek & Co* [1920] 3 KB 535 (affd [1921] 2 KB 369, CA); *Kaines (UK) Ltd v Österreichische Warrenhandels-gesellschaft Austrowaren Gesellschaft mbH (formerly CGL Handelsgesellschaft mbH)* [1993] 2 Lloyd's Rep 1, CA.

² *Millett v Van Heek & Co* [1920] 3 KB 535 (affd [1921] 2 KB 369, CA); *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (a firm)* [1979] AC 91, [1978] 1 All ER 515, PC.

³ *Tredegear Iron and Coal Co v Hawthorn Bros & Co* (1902) 18 TLR 716, CA; *Melachrino v Nickoll and Knight* [1920] 1 KB 693 at 697. Cf *Nickoll and Knight v Ashton, Edridge & Co* [1900] 2 QB 298 at 305 per Mathew J; on appeal [1901] 2 KB 126 at 135, CA, per Vaughan Williams LJ. See also CONTRACT vol 9(1) (Reissue) PARAS 1002-1011.

⁴ *Melachrino v Nickoll and Knight* [1920] 1 KB 693 at 697.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/301. Extension of time for delivery.

301. Extension of time for delivery.

Where the time for delivery has been extended at the seller's request, the moment for ascertainment of the damages is at the expiration of the extended time, or, if no such time is fixed, at the expiration of a reasonable time after the seller's last request for a postponement. The result will thus be to give the buyer or the seller, as the case may be, the benefit of a market change since the date fixed for delivery¹.

1 *Ogle v Earl Vane* (1868) LR 3 QB 272, Ex Ch (distinguished in *Re Voss, ex p Llansamlet Tin Plate Co* (1873) LR 16 Eq 155 (no request by seller for postponement; ordinary rule)); *Hickman v Haynes* (1875) LR 10 CP 598; *Wilson v London and Globe Finance Corp Ltd* (1897) 14 TLR 15, CA (shares); *HO Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784 at 796, 800, CA; *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 1 KB 540 at 554 (affd without reference to this point [1918] 2 KB 467, CA). See also *Re Fl Bourgeois and Wilson, Holgate & Co* (1920) 25 Com Cas 260, CA. Where the extension of time is not voluntary but under a new contract, the prima facie rule in the Sale of Goods Act 1979 s 51(3) (see PARA 294 ante) in terms applies. All the cases mentioned supra were cases in which the market price had risen at the extended time, but it is submitted that the seller may take advantage of the fact that the market has fallen.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/302. Delay in delivery.

302. Delay in delivery.

Where the seller delivers the goods later than the contract time and the buyer accepts them, the measure of damages where the goods are bought for resale is prima facie the difference between the value which the goods would have had at the place of delivery if they had been delivered in due time and the value which they had at that place when they were delivered¹. Where goods are bought to keep and not for resale, this difference in value will not be recoverable²; but, in the case of a profit-earning chattel, damages will normally include the loss of profit which the vendor might reasonably foresee would result from the delay³.

1 See the Sale of Goods Act 1979 s 51(2); and PARA 293 ante. See also *Fletcher v Tayleur* (1855) 17 CB 21; *Borries v Hutchinson* (1865) 18 CBNS 445 (increased freight and insurance); *Wilson v Lancashire and Yorkshire Rly Co* (1861) 9 CBNS 632; *Cory v Thames Ironworks Co* (1868) LR 3 QB 181 (profits of ordinary but not exceptional use of chattel); *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA (reasonable, but not particular, profits from use of chattel). Cf *Steam Herring Fleet Ltd v S Richards & Co Ltd* (1901) 17 TLR 731; *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, PC (resale at price above market price); *Credito Italiano v Swiss Bankverein* (1916) 85 LJB 1477, CA (depreciation in value of Russian rouble); *Rappaport v London Plywood and Timber Co Ltd* [1940] 1 All ER 576; *B Sunley & Co Ltd v Cunard White Star Ltd* [1940] 1 KB 740, [1940] 2 All ER 97, CA (carrier). In the case of delay in delivery, the contract price, as representing goods which the buyer has received, is not the determining factor in the ascertainment of the damages: see *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 522, HL, per Lord Dunedin.

2 *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, [1982] 1 All ER 28, CA.

3 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; but cf *Koufos v C Czarnikow Ltd, The Heron II* [1969] 1 AC 350, [1967] 3 All ER 686, HL (where the wording of the test in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* supra is criticised). The fact that the goods constitute part only of a profit-making machine is significant only in so far as it has a bearing on the vendor's capacity to foresee the consequence of non-delivery: see *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* supra. See also PARA 297 ante; and DAMAGES vol 12(1) (Reissue) PARA 1015 et seq. Cf CARRIAGE AND CARRIERS vol 7 (2008) PARA 777.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/303. Damages fixed by contract.

303. Damages fixed by contract.

Where the contract itself fixes the damages, the ordinary rules are excluded and the courts will give effect to the agreement between the parties¹ unless the agreement as to damages is in law a penalty² against which relief may be obtained³, in which case damages as calculated by the ordinary rules are alone payable. Any clause in the contract which purports to modify the buyer's general right to damages under the rules laid down in the Sale of Goods Act 1979 must, however, be clear and unambiguous in its terms to have effect⁴. Moreover, the effect of such a clause will be limited in certain contracts by the Unfair Contract Terms Act 1977⁵ and the Unfair Terms in Consumer Contracts Regulations 1999⁶.

1 See the Sale of Goods Act 1979 s 55 (as amended); and PARAS 12-13, 100 ante. See also *Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6, HL (delay); *Diestal v Stevenson* [1906] 2 KB 345; *Smith Bros (Hull) Ltd v Gosta Jacobsson & Co* [1961] 2 Lloyd's Rep 522; *RW Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep 602. A fine for delay in delivery in an instalment contract should be calculated from the time at which the last delivery should have been made: *Bergheim v Blaenavon Iron and Steel Co Ltd* (1875) LR 10 QB 319.

2 As to the distinction between liquidated damages and a penalty, and as to the amount recoverable see DAMAGES vol 12(1) (Reissue) PARA 1065 et seq.

3 As to equitable relief against penalties and forfeitures see EQUITY vol 16(2) (Reissue) PARA 801 et seq.

4 See *Re FI Bourgeois and Wilson, Holgate & Co* (1920) 25 Com Cas 260, CA (General Produce Brokers' Association standard contract); *Millar's Machinery Co v Way & Son* (1935) 40 Com Cas 204, CA; *JF Adair & Co Ltd v Birnbaum* [1939] 2 KB 149, [1938] 4 All ER 775, CA. As to the London Corn Trade and Produce Brokers' Association clause, providing that on default of the seller the goods will be invoiced back at a price fixed by the Association see *Roth, Schmidt & Co v D Nagase & Co* (1920) 2 Ll L Rep 36, CA; *Lancaster v JF Turner & Co Ltd* [1924] 2 KB 222, CA; *Lang v Crude Rubber Washing Co Ltd* (1911) [1939] 2 KB 173n. See also *Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd* [1962] 1 All ER 418, [1962] 1 WLR 34; *Cassir, Moore & Co Ltd v Eastcheap Dried Fruit Co* [1962] 1 Lloyd's Rep 400.

5 Ie by the Unfair Contract Terms Act 1977 s 3: see PARA 450 ante.

6 Ie the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARAS 105 ante, 452 et seq post.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(i) Action for Non-delivery/304. Price prepaid.

304. Price prepaid.

Where the price has been prepaid by the buyer, he is entitled to recover the price in addition to any other damages he may obtain. The price is recoverable as money had and received, and the courts may grant interest on it¹. It is thought that, apart from the recovery of the price, the buyer is only entitled to damages ascertained on the same principles as where the price has not been paid, but some of the older cases suggest the contrary².

¹ As to interest on the price see PARA 220 et seq ante; and as to actions for money had and received see RESTITUTION vol 40(1) (2007 Reissue) PARA 5.

² It has been held at nisi prius that the value of the goods should be taken at the time of the trial: *Elliot v Hughes* (1863) 3 F & F 387. See also *Startup v Cortazzi* (1835) 2 Cr M & R 165 (market price plus interest on money); *Robertson v Dumaresq* (1864) 10 LT 110, PC (land). The measure must, however, vary according to the facts. In some of the United States of America the value of the goods is taken at the highest price between the date fixed for delivery and the trial: *Clark v Pinney* 7 Cowen's Reports 681 (1827) (where the cases are considered); *West v Pritchard* 19 Conn 212 (1848).

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(ii) Specific Performance; Injunctions/305. Discretion of the court and scope of judgment.

(ii) Specific Performance; Injunctions

305. Discretion of the court and scope of judgment.

In any action¹ for breach of contract to deliver² specific³ or ascertained⁴ goods⁵ the court may, if it thinks fit⁶, on the claimant's⁷ application, by its judgment or decree direct that the contract be performed specifically, without giving the defendant the option of retaining the goods on payment of damages⁸. The claimant's application may be made at any time before judgment or

decree⁹. The judgment or decree may be unconditional, or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court¹⁰.

These provisions deal only with claims by a buyer against a seller in respect of specific or ascertained goods. However, in those rare cases where damages will not be an adequate remedy the court may:

- 285 (1) order a contract for the sale of goods to be specifically performed by the buyer or may grant an injunction restraining the buyer from acting in breach of its terms¹¹; and
- 286 (2) order a contract for the sale of non-specific or unascertained goods to be specifically performed by the seller or may grant an injunction restraining the seller from acting in breach of its terms¹².

1 For the meaning of 'action' see PARA 14 ante. As to statutory rights enforceable by action see PARA 14 ante.

2 The Mercantile Law Amendment Act 1856 s 2 (repealed) contained the words 'for a price in money', but no change is intended: see PARA 5 ante. For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

3 For the meaning of 'specific goods' see PARA 54 ante.

4 'Ascertained goods' are goods identified in accordance with the agreement after the contract of sale is made: *Re Wait* [1927] 1 Ch 606 at 630, CA. See also *Thames Sack and Bag Co Ltd v Knowles & Co Ltd* (1918) 88 LJKB 585 (goods not ascertained); and PARA 54 note 7 ante.

5 For the meaning of 'goods' see PARA 30 ante.

6 The remedy, being one for specific performance, is discretionary and will not normally be granted where damages provide a sufficient remedy: *Whiteley Ltd v Hilt* [1918] 2 KB 808 at 819, CA; *Cohen v Roche* [1927] 1 KB 169; *Société des Industries Métallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep 465, CA; *CN Marine Inc v Stena Line AB and Regie Voor Maritiem Transport, The Stena Nautica (No 2)* [1982] 2 Lloyd's Rep 336, CA.

7 For the meaning of 'claimant' see PARA 14 ante. The Sale of Goods Act 1979 s 52(1) refers to 'plaintiff'; but on and after 26 April 1999 all proceedings, whether in a county court or the High Court, are now started when the court issues a claim form at the request of the claimant: see CPR 7.2(1); and CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq.

8 Sale of Goods Act 1979 s 52(1). This provision applies whether or not the property has passed by the contract: *James Jones & Sons Ltd v Earl Tankerville* [1909] 2 Ch 440 at 445 per Parker J. As to specific performance generally see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 813 et seq. The Sale of Goods Act 1979 s 52(4) saves the law of Scotland, under which specific implement is an ordinary and not an extraordinary remedy: see *Stewart v Kennedy* (1890) 15 App Cas 75 at 102, 105, HL.

9 Sale of Goods Act 1979 s 52(2).

10 Ibid s 52(3); and see *CN Marine Inc v Stena Line AB and Regie Voor Maritiem Transport, The Stena Nautica (No 2)* [1982] 2 Lloyd's Rep 336, CA.

11 *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Com Cas 39 at 46 (specific performance). As to injunctions enforcing solus agreements by restraining the buyer from obtaining goods elsewhere see *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch 799; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL; *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1977] 1 NZLR 366 (on appeal [1978] 1 NZLR 538, NZ CA).

12 *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954, [1974] 1 WLR 576. See also *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA. Cf *Re Wait* [1927] 1 Ch 606, CA. Where the goods are obtainable elsewhere, an injunction will not be granted: *Fothergill v Rowland* (1873) 43 LJ Ch 252 at 255 per Sir George Jessel MR; *Re Clarke, Coombe v Carter* (1887) 36 ChD 348 at 352, CA, per Cotton LJ. See also *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293, PC.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iii) Action in Tort/306. Wrongful interference with goods by seller.

(iii) Action in Tort

306. Wrongful interference with goods by seller.

Where the property in goods has passed to the buyer and he is entitled to delivery, he may, instead of suing for damages for non-delivery, maintain an action against the seller for wrongful interference with the goods¹; but he cannot, by bringing his action in tort, obtain higher damages against the seller than he would have recovered by suing in contract².

1 See generally the Torts (Interference with Goods) Act 1977; and TORT vol 45(2) (Reissue) PARA 542 et seq. See also *Kieran v Sandars* (1837) 6 Ad & El 515; *Milgate v Kebble* (1841) 3 Man & G 100 (buyer not entitled to possession). Cf *Martindale v Smith* (1841) 1 QB 389; *Gurr v Cuthbert* (1843) 12 LJ Ex 309 (consumption of goods by seller); *Langton v Higgins* (1859) 4 H & N 402; *Johnson v Lancashire and Yorkshire Rly Co and Wigan Waggon Co Ltd* (1878) 3 CPD 499. As to actions in tort generally see TORT vol 45(2) (Reissue) PARA 301 et seq.

In an action for wrongful interference against a person who is in possession or control of goods, the court has power to make an order for delivery of those goods with or without the alternative of paying damages by reference to their value: see the Torts (Interference with Goods) Act 1977 s 3; and TORT vol 45(2) (Reissue) PARA 653. Cf CPR 40.14 (judgment in favour of certain part owners relating to the detention of goods); and TORT vol 45(2) (Reissue) PARA 653. In relation to the sale of goods, this power will presumably be exercised on the same basis as the similar power under the Sale of Goods Act 1979 s 52: see PARA 305 ante. See also *Industria Azucarera Nacional SA (IANSA) v Expresa Exportadora de Azucar (Cubazucar)* [1982] Com LR 171 (where a retaking of the goods by the seller after shipment was held to be a conversion of them).

2 *Chinery v Viall* (1860) 5 H & N 288; *Johnson (Assignee of Cumming, a bankrupt) v Stear* (1863) 15 CBNS 330 (conversion by prepaid pledgee); *Hiort v London and North Western Rly Co* (1879) 4 Ex D 188, CA; *The Arpad* [1934] P 189, CA. In actions against strangers the buyer can recover the full value of the goods without deduction of the unpaid price (*France v Gaudet* (1871) LR 6 QB 199, Ex Ch; *Johnson v Lancashire and Yorkshire Rly Co and Wigan Waggon Co Ltd* (1878) 3 CPD 499), even where he is not the owner, but only the bailee under a contract of sale. In this case he is, however, a trustee for the seller for the unpaid purchase money: *Turner v Hardcastle* (1862) 11 CBNS 683.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/307. Buyer's remedies on breach.

(iv) Remedies for Non-conforming Goods

307. Buyer's remedies on breach.

Where there is a breach of warranty¹ by the seller², or where the buyer³ elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty⁴, the buyer is not by reason only⁵ of such breach of warranty entitled to reject the goods⁶; but he may:

- 287 (1) set up against the seller the breach of warranty in diminution or extinction of the price⁷; or
- 288 (2) maintain an action⁸ against the seller for damages for the breach of warranty⁹.

Apart from any other remedies the buyer may have for breach of warranty or of condition¹⁰, whether under a contract for the sale¹¹, transfer¹² or hire¹³ of goods, where the buyer deals as consumer¹⁴ and the goods do not conform¹⁵ to the contract of sale, transfer or hire at the time of delivery¹⁶, the buyer may¹⁷ require the seller to repair¹⁸ or replace¹⁹ the goods²⁰. If the buyer requires the seller to repair or replace the goods, the seller must²¹ repair or, as the case may be, replace the goods within a reasonable time²², but without causing significant inconvenience to the buyer, and the seller must also bear any necessary costs incurred in doing so, including in particular the cost of any labour, materials or postage²³.

Where the buyer is not entitled to require the seller to repair or replace the goods²⁴ or where, although the buyer is entitled so to require, the seller has failed to repair or replace the goods within a reasonable time and without significant inconvenience to the buyer²⁵, the buyer may²⁶ require²⁷ the seller to reduce the purchase price of the goods to the buyer by an appropriate amount²⁸, or to rescind²⁹ the contract with regard to the goods in question³⁰.

1 For the meaning of 'warranty' see PARA 63 ante; and as to the distinction between warranties, conditions and innominate or intermediate terms see PARA 64 ante.

2 For the meaning of 'seller' see PARA 27 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 As to the buyer's compulsory election see the Sale of Goods Act 1979 s 11(4) (as amended); and PARA 66 ante.

5 *Payne v Whale* (1806) 7 East 274. The contract may, however, be subject to a condition subsequent (*Gompertz v Denton* (1832) 1 Cr & M 207 at 209; *Foster v Smith* (1856) 18 CB 156; *Head v Tattersall* (1871) LR 7 Exch 7), or a stipulation which might have been treated as a warranty may have been made fraudulently, and so be a ground for rescinding the contract and returning the goods (*Gompertz v Denton* supra; *Clarke v Dickson* (1858) EB & E 148; *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 at 323, 338, HL). Further, the contract itself may in its inception be founded on the fulfilment of a condition assumed as the basis of the contract: *Bannerman v White* (1861) 10 CBNS 844. As to conditions and warranties generally see PARA 62 et seq ante.

6 Sale of Goods Act 1979 s 53(1). The same rule applies to goods taken in exchange: *Emanuel v Dane* (1812) 3 Camp 299. For the meaning of 'goods' see PARA 30 ante.

7 Sale of Goods Act 1979 s 53(1)(a). See *King v Boston* (1789) 7 East 481n (extinction); *Poulton v Lattimore* (1829) 9 B & C 259 (extinction); *Street v Blay* (1831) 2 B & Ad 456; *Allen v Cameron* (1833) 1 Cr & M 832; *Cousins v Paddon* (1835) 2 Cr M & R 547 (reduction); *Grounsell v Lamb* (1836) 1 M & W 352 (express agreement; extinction); *Dicken v Neale* (1836) 1 M & W 556 (reduced value paid); *Mondel v Steel* (1841) 8 M & W 858 at 870 (work and labour). The rule here adopted was first definitely formulated in *Basten v Butter* (1806) 7 East 479. If, however, the buyer wrongfully rejects the goods and repudiates the contract, and so waives the performance of conditions precedent, he cannot set up in reduction of the damages a breach of warranty of quality or description when sued for non-acceptance: *Braithwaite v Foreign Hardwood Co* [1905] 2 KB 543 at

552, CA (as explained in *Fercometal SARL v Mediterranean Shipping Co SA, The Simona* [1989] AC 788 at 801-806, [1988] 2 All ER 742 at 748-752, HL, per Lord Ackner); *Taylor v Oakes, Roncoroni & Co* (1922) 127 LT 267, CA (as explained in *British and Beningtons Ltd v North Western Cacher Tea Co Ltd* [1923] AC 48, HL); *Sinason-Teicher Inter-American Grain Corp v Oilcakes and Oilseeds Trading Co Ltd* [1954] 2 All ER 497, [1954] 1 WLR 935 (affd [1954] 3 All ER 468, [1954] 1 WLR 1394, CA) (waiver by seller). In addition, the buyer cannot show a mere breach of warranty as a defence pro tanto to a negotiable instrument given for the price: *Tye v Gwynne* (1810) 2 Camp 346; *Trickey v Larne* (1840) 6 M & W 278; *Warwick v Nairn* (1855) 10 Exch 762. He may, however, show a total failure of consideration: *Wells v Hopkins* (1839) 5 M & W 7; *All Trades Distributors Ltd v Agencies Kaufman Ltd* (1969) 113 Sol Jo 995, CA. A breach of warranty may, however, now be set up by way of counterclaim to an action on the instrument: see CIVIL PROCEDURE vol 11 (2009) PARA 618 et seq.

8 For the meaning of 'action' see PARA 14 ante. As to statutory rights enforceable by action see PARA 14 ante. Where the buyer has lost the right of rejection, then he still has a right to damages on the basis, however, not of the Sale of Goods Act 1979 s 53(1)(b) but on the basis of s 51: see *AC Daniels & Co Ltd v Jungwoo Logic (a firm)* (14 April 2000, unreported); and PARA 292 ante.

9 Sale of Goods Act 1979 s 53(1)(b). It is of historic interest to note that formerly the action could be framed not only in contract but in tort, and without averring knowledge, or proving it, if averred: *Williamson v Allison* (1802) 2 East 446; *Wood v Smith* (1829) 5 Man & Ry KB 124; *Brown v Edgington* (1841) 2 Man & G 279; but see *Rowe Bros & Co Ltd v Crossley Bros* (1912) 57 Sol Jo 144, CA. The right of action is not excluded by a provision in the contract that the buyer will pay in cash after inspection of the goods on arrival: *Khan v Duché* (1905) 10 Com Cas 87. In Australia it has been held that, in an action for damages for breach of warranty by the buyer against a seller who has not been paid, the buyer may receive the full amount of his damages without giving credit for the purchase price, leaving the seller to bring a separate action for the price: *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584, Aust HC.

10 See PARA 64 ante.

11 Ie under the Sale of Goods Act 1979 s 2: see PARA 29 ante.

12 Ie under the Supply of Goods and Services Act 1982 s 1(2) (as amended): see PARA 32 ante.

13 Ie under *ibid* s 6 (as amended): see PARA 33 ante.

14 References in the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 to dealing as consumer are to be construed in accordance with the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended), and it is for the seller, transferor or bailor to prove that the buyer, transferee or bailee does not deal as consumer: see the Sale of Goods Act 1979 s 61(5A) (as added); the Supply of Goods and Services Act 1982 s 18(4) (as added); and PARAS 73 note 7, 75 note 10 ante, 450 note 10 post. Additional rights for buyers in consumer cases (see the Sale of Goods Act 1979 ss 48A-48F (as added)) and transferees in consumer cases (see the Supply of Goods and Services Act 1982 ss 11M-11S (as added)) were granted by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, regs 5, 9 (see the text and notes 10-13 supra, 15-30 infra). In those regulations 'consumer' is defined as any natural person who, in the contracts covered by the regulations, is acting for purposes which are outside his trade, business or profession: reg 2. It has, however, been suggested that this somewhat wider definition is intended for use exclusively in connection with reg 15 which deals with consumer guarantees (see PARA 456 post): see Benjamin's Sale of Goods (Special Supplement to 6th Edn, 2003) PARA 1-053.

15 Goods do not conform to a contract of sale if there is, in relation to the goods, a breach of an express term of the contract or a term implied by the Sale of Goods Act 1979 ss 13, 14 or 15 (see PARAS 73, 78, 80, 94 ante): s 48F (ss 48A-48F added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 5). Goods do not conform to a contract for the supply or transfer of goods if there is, in relation to the goods, a breach of an express term of the contract or a term implied by the Supply of Goods and Services Act 1982 ss 3, 4 or 5 (ss 4, 5 as amended) (see PARAS 75-76, 84-85, 89-90, 95-96 ante): s 11S(1)(a) (ss 11M-11S added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 9). If installation of goods forms part of the contract for the transfer of goods, and the goods were installed by the transferor, or under his responsibility, in breach of his duty to supply a service with reasonable care and skill under the Supply of Goods and Services Act 1982 s 13 (see PARA 97 ante) then the goods installed do not conform to a contract for the supply or transfer of goods: s 11S(1)(b) (as so added).

16 Goods which do not conform to the contract of sale or the contract for the transfer of goods at any time within the period of six months starting with the date on which the goods were delivered to the buyer or transferee must be taken not to have so conformed at that date: Sale of Goods Act 1979 s 48A(3) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11M(3) (as added: see note 15 supra). However, it will not be so assumed if it is established that the goods did conform to the contract at the date of delivery or if such an assumption is incompatible with the nature of the goods or the nature of the lack of conformity: Sale of Goods Act 1979 s 48A(4) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11M(4) (as added: see note 15 supra).

17 Although it is up to the buyer to elect which of these remedies to require of the seller, he cannot require a remedy which is impossible or which is disproportionate when compared to any of the other remedies available under the Sale of Goods Act 1979 s 48B(1) (as added: see note 15 supra) or s 48C(1) (as added: see note 15 supra) or under the Supply of Goods and Services Act 1982 s 11N(1) (as added: see note 15 supra) or s 11P(1) (as added: see note 15 supra). The court has the power to substitute one remedy where another, which it considers less appropriate, is asked for: see the Sale of Goods Act 1979 s 48E(3), (4) (as added: see note 15 supra); and the Supply of Goods and Services Act 1982 s 11R(3), (4) (as added: see note 15 supra). One remedy is disproportionate in comparison to the other if the one imposes costs on the seller or transferor which, in comparison to those imposed on him by the other, are unreasonable, taking into account: (1) the value which the goods would have if they conformed to the contract of sale or transfer; (2) the significance of the lack of conformity; and (3) whether the other remedy could be effected without significant inconvenience to the buyer or transferee: Sale of Goods Act 1979 s 48B(4) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11N(4) (as added: see note 15 supra). Any question as to what is a reasonable time or significant inconvenience is to be determined by reference to the nature of the goods and the purpose for which the goods were acquired: Sale of Goods Act 1979 s 48B(5) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11N(5) (as added: see note 15 supra).

18 Sale of Goods Act 1979 s 48B(1)(a) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11N(1)(a) (as added: see note 15 supra).

19 Sale of Goods Act 1979 s 48B(1)(b) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11N(1)(b) (as added: see note 15 supra).

20 Sale of Goods Act 1979 s 48A(1), (2)(a) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11M(1), (2)(a) (as added: see note 15 supra).

21 The court may, in addition to any other power it has, make an order requiring specific performance: Sale of Goods Act 1979 s 48E(2) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11R(2) (as added: see note 15 supra). The court may make such an order unconditionally or on such terms and conditions as to damages, payment of the price and otherwise as it thinks just: Sale of Goods Act 1979 s 48E(6) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11R(6) (as added: see note 15 supra).

22 Where the buyer requires the seller to repair or replace the goods under the Sale of Goods Act 1979 s 48A(2) (as added: see note 15 supra), then he must not reject the goods and terminate the contract for breach of condition (if the non-conformity amounts to a breach of condition) until he has given the seller a reasonable time in which to repair or replace the goods: see the Sale of Goods Act 1979 s 48D (as added: see note 15 supra); and PARA 64 ante. See also the Supply of Goods and Services Act 1982 ss 11M(2), 11Q (as added: see note 15 supra).

23 Sale of Goods Act 1979 s 48B(2) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11N(2) (as added: see note 15 supra).

24 Ie because repair or replacement is impossible or disproportionate: see note 17 supra.

25 See the Sale of Goods Act 1979 s 48C(2) (as added: see note 15 supra); and the Supply of Goods and Services Act 1982 s 11P(2) (as added: see note 15 supra).

26 Ie subject always to the remedy required by the buyer being possible and proportionate: see the Sale of Goods Act 1979 s 48B(3), (4) (as added: see note 15 supra); the Supply of Goods and Services Act 1982 s 11N(3), (4) (as added: see note 15 supra); and note 17 supra.

27 The court may, in addition to any other power it has, make an order requiring specific performance: see the Sale of Goods Act 1979 s 48E(2) (as added: see note 15 supra); and the Supply of Goods and Services Act 1982 s 11R(2) (as added: see note 15 supra). The court may make such an order unconditionally or on such terms and conditions as to damages, payment of the price and otherwise as it thinks just: Sale of Goods Act 1979 s 48E(6) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11R(6) (as added: see note 15 supra).

28 Sale of Goods Act 1979 s 48C(1)(a) (as added: see note 15 supra); Supply of Goods and Services Act 1982 s 11P(1)(a) (as added: see note 15 supra). The traditional remedy of diminution or extinction of the price for breach of warranty of quality conferred by the Sale of Goods Act 1979 s 53(1)(a) (see the text to note 7 supra) is left intact to operate side by side with the remedy of a reduction of the price under s 48C(1)(a) (as added: see Benjamin's Sale of Goods (Special Supplement to 6th Edn, 2003) PARA 1-021).

29 If the buyer rescinds the contract, any reimbursement to the buyer may be reduced to take account of the use he has had of the goods since they were delivered to him: Sale of Goods Act 1979 ss 48C(3), 48E(5) (as

added: see note 15 supra); Supply of Goods and Services Act 1982 ss 11P(3), 11R(5) (as added: see note 15 supra).

30 Sale of Goods Act 1979 ss 48A(2)(b), 48C(1)(b) (as added: see note 15 supra); Supply of Goods and Services Act 1982 ss 11M(2)(b), 11P(1)(b) (as added: see note 15 supra).

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/308. Further damage.

308. Further damage.

The fact that the buyer¹ has set up the breach of warranty² in diminution or extinction of the price does not prevent him from maintaining an action³ for the same breach of warranty if he has suffered further damage⁴. The damages recoverable are, however, limited to such as he was unable to set up and could not have recovered in the previous action⁵.

1 For the meaning of 'buyer' see PARA 29 ante.

2 For the meaning of 'warranty' see PARA 63 ante; and as to the distinction between warranties, conditions and innominate or intermediate terms see PARA 64 ante.

3 For the meaning of 'action' see PARA 14 ante.

4 Sale of Goods Act 1979 s 53(4). Presumably, the same would apply where the buyer has exercised his right under s 48C(1)(a) (as added) (see PARA 307 ante) to require the seller to reduce the purchase price of the goods by an appropriate amount.

5 See *Mondel v Steel* (1841) 8 M & W 858; *Rigge v Burbidge* (1846) 15 M & W 598. Formerly it was held that, when a breach of warranty was pleaded as a defence to an action for the price, a diminution or extinction of the price was limited to the difference between the actual value of the goods and their value as warranted, and that a cross-action only would lie in respect of special or consequential damages not satisfied by the diminution or extinction of the price: *Mondel v Steel* supra; *Rigge v Burbidge* supra. Now that defence and counterclaim may be pleaded together, this point is, however, seldom, if ever, of importance: see CIVIL PROCEDURE vol 11 (2009) PARAS 643, 712. The buyer, if sued by the seller, is not bound to set up the breach of warranty as a defence in the seller's action, but may bring a cross-action: *Davis v Hedges* (1871) LR 6 QB 687, DC, disapproving *Fisher v Samuda* (1808) 1 Camp 190. In the result the buyer may divide his cause of action, or may keep it entire and sue for his whole damage: *Davis v Hedges* supra at 692.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/309. Statutory rules governing measure of damages.

309. Statutory rules governing measure of damages.

The rules as to the measure of damages for breach of warranty¹ laid down in the Sale of Goods Act 1979 are as follows:

- 289 (1) the measure of damages for breach of warranty² is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty³;
- 290 (2) in the case of breach of warranty of quality⁴, such loss is prima facie⁵ the difference between the value of the goods⁶ at the time of delivery⁷ to the buyer⁸ and the value they would have had if they had fulfilled the warranty⁹;
- 291 (3) nothing in the Sale of Goods Act 1979 affects the right of the buyer or the seller¹⁰ to recover interest¹¹ or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed¹².

1 For the meaning of 'warranty' see PARA 63 ante; and as to the distinction between warranties, conditions and innominate or intermediate terms see PARA 64 ante.

2 The measure of damages recoverable for breach of warranty where there has been a breach of condition which the buyer has been compelled to treat as a breach of warranty is no different from that recoverable in any other case for breach of warranty: *Procter & Gamble Philippine Manufacturing Corp'n v Kurt A Becher GmbH & Co KG* [1988] 2 Lloyd's Rep 21 at 31, CA, per Nicholls LJ.

3 Sale of Goods Act 1979 s 53(2). The court's task is to decide what loss to the buyer it is reasonable to suppose would have been in the contemplation of the parties as a serious possibility had they had in mind the breach when they made their contract. If physical injury or damage is within the hypothetical contemplation of the parties, it is irrelevant that the degree of such injury or damage could not have been anticipated: *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, [1978] 1 All ER 525, CA. Where, however, no actual loss can be proved, the claimant may still recover nominal damages: *Taylor & Sons Ltd v Bank of Athens* (1922) 91 LJB 776. See further *Mason v Burningham* [1949] 2 KB 545, [1949] 2 All ER 134, CA; *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286 (measure of damages for breach of implied warranty of title); *Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA (profit-earning chattel); *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136, [1954] 1 WLR 963; *Stock v Urey* [1955] NI 71. Cf AGENCY vol 1 (2008) PARA 86.

4 For the meaning of 'quality' see PARA 81 ante.

5 Where parties to a contract had within their reasonable contemplation facts which indicated to both that the loss in the event of a breach would not be the difference between the value of the goods delivered and the market value, the rule in the Sale of Goods Act 1979 s 53(3) is displaced by that in s 53(2) (see the text to notes 2-3 supra): see *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696; *Dreyfus (Louis) Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), [2004] All ER (D) 24 (Jan), [2004] 2 Lloyd's Rep 243; and PARAS 294 note 3, 295 note 8 ante, 314 note 2, 315 note 5 post.

6 For the meaning of 'goods' see PARA 30 ante.

7 For the meaning of 'delivery' see PARAS 27 note 6, 163 ante.

8 For the meaning of 'buyer' see PARA 29 ante.

9 Sale of Goods Act 1979 s 53(3). See *Curtis v Hannay* (1800) 3 Esp 82 at 84; *Loder v Kekulé* (1857) 3 CBNS 128; *Jones v Just* (1868) LR 3 QB 197; *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] AC 673, HL; *Bunting v Tory* (1948) 64 TLR 353. The price at which the goods were resold by the buyer before he discovered the breach of warranty may be evidence of what the

goods would have been worth if there had been no breach: *Clare v Maynard* (1837) 6 Ad & El 519 at 523n. Cf *Slater v Hoyle and Smith Ltd* [1920] 2 KB 11 at 17-18, CA; distinguished in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 99, [1997] 1 All ER 979 at 988, CA, per Otton LJ and doubted at 102 and 992 per Auld LJ. As to assessment where there is no market value see *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136, [1954] 1 WLR 963. The actual value of the goods at the time of delivery may sometimes be assessed by reference to what would have been a fair market price for the goods had the defects been known: *Jackson v Chrysler Acceptances Ltd (Minorities Garages Ltd, third party)* [1978] RTR 474, CA. The buyer must prove his damage by adducing evidence as to the reduction in value of the goods: *Aryeh v Lawrence Kostoris & Son Ltd* [1967] 1 Lloyd's Rep 63, CA.

10 For the meaning of 'seller' see PARA 27 ante.

11 As to payment of interest see PARA 220 et seq ante.

12 Sale of Goods Act 1979 s 54. As to failure of consideration see PARAS 320-321 post.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/310. Application of the statutory rules.

310. Application of the statutory rules.

The first of the statutory rules governing the measure of damages¹ applies to breaches of warranty in a contract for the sale of goods the general common law principle as to damages for breach of contract, and embodies the first aspect of the established common law rule². The reference to the ordinary course of events excludes the element of the seller's knowledge. His liability is to depend not on the state of his mind but on the facts of the case³. The second aspect of the established common law rule⁴, namely that, where the contract is made in circumstances special to the buyer and those circumstances are communicated to the seller, the damage which results from the special circumstances must be assumed to have been within the contemplation of the parties and thus recoverable, is preserved by the third of the statutory rules⁵. The net result of the first and third of the statutory rules is, therefore, to apply to breaches of contract for the sale of goods the same principles as apply at common law to breaches of contract generally⁶.

The second of the statutory rules governing the measure of damages⁷ differs from the other two in that it is only a prima facie rule and must be read subject to them. It applies only to warranties of quality⁸ and not to warranties of fitness for a particular purpose⁹, and, even where there is merely a breach of warranty of quality, it may be excluded where circumstances render it inappropriate¹⁰.

1 The rule contained in the Sale of Goods Act 1979 s 53(2): see PARA 309 ante.

2 The rule in *Hadley v Baxendale* (1854) 9 Exch 341: see DAMAGES vol 12(1) (Reissue) PARA 1015 et seq, particularly para 1024.

3 *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725 at 736 per Bruce J.

- 4 See note 2 *supra*.
- 5 I.e. the rule contained in the Sale of Goods Act 1979 s 54: see PARAS 309 ante, 320 post.
- 6 As to damages in contract generally see DAMAGES vol 12(1) (Reissue) PARA 1015 et seq.
- 7 I.e. the rule contained in the Sale of Goods Act 1979 s 53(3): see PARA 309 ante.
- 8 I.e. as in *ibid* s 14(2) (as substituted), s 14(4) (as amended) and s 15 (as amended): see PARAS 77-82, 93-94 ante.
- 9 I.e. as in *ibid* s 14(3), (4) (as amended): see PARA 77 et seq ante.
- 10 See *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/311. Goods bought for buyer's use.

311. Goods bought for buyer's use.

Where goods are purchased by the buyer for his own use, *prima facie* the damages for breach of warranty of quality are ascertained by applying the second of the statutory rules governing the measure of damages¹ which have been discussed². If, however, the ordinary use of the goods sold is the creation by the buyer of a new product, as where seed is sold, the difference between the value of the product if the goods had answered to the warranty and the value of the actual product is the true measure of damages directly and naturally resulting in the ordinary course of events from the breach³. If, however, the inferiority of the goods might with reasonable diligence have been detected before they were used for making the new product, it becomes the duty of the buyer to mitigate his damage and the second statutory rule applies⁴. Likewise, if the product is worthless, the value of other goods used in the production may be recovered⁵. Further, where the buyer makes an ordinary and normal use of the goods, as where he eats food⁶, wears clothing⁷, puts purchased animals in a field with other animals⁸, or otherwise uses goods for the purpose for which they are normally sold⁹, damages directly and naturally resulting from such use by him are recoverable. If the use to be made of the goods by the buyer is not the normal use, but has specifically been communicated by the buyer to the seller, the same rule may apply¹⁰. In such cases, where either the special purpose is made known to the seller, or where the use made by the buyer is the ordinary and normal use of the goods, the circumstances of the sale may be regarded as giving rise to the implication that the buyer relied on the seller's skill and judgment, and accordingly the implied condition as to the fitness of the article for the particular purpose arises¹¹. Such a condition of fitness for ordinary and normal use may naturally arise in the case of ordinary retail sales¹², and most of the cases in which damages of this character have been awarded may be put on this basis. However, even where the breach is only of warranty of quality, circumstances may nevertheless enable the buyer to recover damages on a similar scale and the second of the statutory rules may be excluded¹³.

- 1 le the rule contained in the Sale of Goods Act 1979 s 53(3): see PARA 309 ante.
- 2 See PARA 310 ante.
- 3 *Randall v Raper* (1858) EB & E 84 (considered and approved on another point in *Total Liban SA v Vitol Energy SA* [1999] 2 All ER (Comm) 65 at 73-77); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, [1983] 1 All ER 108, CA (affd [1983] 2 AC 803, [1983] 2 All ER 737, HL). Cf *Bunting v Tary* (1948) 64 TLR 353.
- 4 *Wagstaff v Shorthorn Dairy Co* (1884) Cab & El 324.
- 5 *Milburn v Belloni* 39 NYSR 53 (1868); *Smith v Johnson* (1899) 15 TLR 179; *Richard Holden Ltd v Bostock & Co Ltd* (1902) 50 WR 323, CA; *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725.
- 6 *Wilson v Dunville* (1879) 6 LR Ir 210 (brewer's grains which poisoned cattle); *Davis v Miller* (1894) 10 TLR 286 (beer containing oxalic acid; injury to health); *Frost v Aylesbury Dairy Co* [1905] 1 KB 608, CA (milk with typhoid germs; death from typhoid); *Jackson v Watson & Sons* [1909] 2 KB 193, CA. In this last case the wife's executors would now have a claim in tort: see *M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL; *Rose v Ford* [1937] AC 826, [1937] 3 All ER 359, HL; EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 814; NEGLIGENCE vol 78 (2010) PARA 24; TORT vol 45(2) (Reissue) PARA 394.
- 7 *Grant v Australian Knitting Mills Ltd* [1936] AC 85, PC.
- 8 *Smith v Green* (1875) 1 CPD 92 (cow with infectious disease affecting other cows); cf *Ward v Hobbs* (1878) 4 App Cas 13, HL (where diseased pigs were sold with 'all faults' and it was held that the purchaser was unable to recover for the infection of the other pigs); *Bunting v Tary* (1948) 64 TLR 353.
- 9 *Borradaile v Brunton* (1818) 8 Taunt 535 (cable warranted; loss of anchor); *Randall v Newson* (1877) 2 QBD 102, CA (defective carriage pole specially made for carriage; injury to buyer's horse).
- 10 See *Borradaile v Brunton* (1818) 8 Taunt 535; *Randall v Newson* (1877) 2 QBD 102, CA.
- 11 See the cases cited in notes 3-9 supra, 13 infra.
- 12 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 99, PC.
- 13 *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725 (no warranty of fitness).

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/312. Buyer exposed to penalty or damages.

312. Buyer exposed to penalty or damages.

Where, as a result of the breach of warranty, the buyer is, through using the goods in the normal manner contemplated by the seller, exposed to proceedings for a penalty¹ or other penal proceedings² or to an action for damages³, he may, for so long as he is entitled as against the seller to rely on the warranty⁴, recover the penalty⁵ or the damages, his costs and his other losses from the seller⁶. At least where no criminal offence is committed, this will be the case, even if the buyer is liable in negligence to a third person⁷.

1 *Cointat v Myham & Son* [1913] 2 KB 220 (overruled on another point (1914) 84 LJBK 2253, CA); *Proops v WH Chaplin & Co Ltd* (1920) 37 TLR 112, DC (where the seller was held liable to the buyer for the costs of defending a summons for selling whisky under strength). Cf *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 (where a wholesaler was held unable to recover a fine for selling contaminated goods from the manufacturer (followed in *Payne v Ministry of Food* (1953) 103 L Jo 141 (sale of milk)) and where, however, the plaintiff was found guilty of gross negligence). See also *Strongman (1945) Ltd v Sincok* [1955] 2 QB 525, [1955] 3 All ER 90, CA.

2 *Crage v Fry* (1903) 67 JP 240. See also *Stock v Urey* [1955] NI 71 (where tax and duty payable on illegally imported goods were recoverable).

3 *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225, sub nom *Lambert v Lewis* [1981] 1 All ER 1185, HL. See also *Mowbray v Merryweather* [1895] 2 QB 640, CA; *Marles v Philip Trant & Sons Ltd (No 2) (Mackinnon, third party)* [1954] 1 QB 29, [1953] 1 All ER 651, CA; *Hadley v Droitwich Construction Co Ltd* [1967] 3 All ER 911 at 914, [1968] 1 WLR 37 at 43, CA, per Winn LJ. Cf *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 at 38.

4 *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225, sub nom *Lambert v Lewis* [1981] 1 All ER 1185, HL.

5 See the cases cited in note 1 supra.

6 See the cases cited in note 2 supra.

7 See the cases cited in note 3 supra.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/313. Continuing warranty.

313. Continuing warranty.

Where goods are bought for the buyer's use and the warranty of quality is to continue during a period, as usually in the case of a profit-earning chattel, the measure of damages is prima facie the buyer's estimated loss during the period by use of the goods¹. He is, however, under a duty to mitigate his damage; and, if he buys a substituted article, as he should if this will lessen his damage, he may recover from the seller the expenses incident to the purchase if they do not exceed the damages otherwise recoverable. If the substituted article is superior to the one replaced, this fact must be taken into consideration in estimating the buyer's damages².

1 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] AC 673, HL; considered in *Ruxley Electronics and Construction Ltd v Forsyth*, *Laddingford Enclosures Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL. This may be calculated by reference to the buyer's lost capital or his lost profit, but not both if this would lead to double recovery: *Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA; *TC Industrial Plant Pty Ltd v Roberts (Queensland) Pty Ltd* (1963) 37 ALJR 289 (Aust HC); *John Paul Jones Autos v Volvo Distributors* (1975) 14 SASR 297. See also *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136, [1954] 1 WLR 963. Cf the cases on failure and delay in delivery cited in the notes to para 292 et seq ante.

2 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] AC 673 at 691, HL. If he fails to mitigate, the buyer is not entitled to more damages than he would have received if he had: *Nickoll and Knight v Ashton, Edridge & Co* [1900] 2 QB 298 at 305 per Mathew J (approved on appeal [1901] 2 KB 126 at 138, CA); *Melachrino v Nickoll and Knight* [1920] 1 KB 693.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/314. Resales.

314. Resales.

Where a buyer purchases goods which he subsequently resells, it is often difficult to determine whether he may recover from the seller as damages for breach of warranty the actual loss to which he has been put as a result of his liability to his sub-purchasers. Where the buyer's liability to his sub-purchaser is no greater than the loss which he would have suffered if he had used the goods himself, no difficulty arises¹, but the general rule is that the buyer's sub-contracts may not be used to increase or minimise his damages, as the sub-contracts are incidental matters with which the seller had nothing to do².

It is difficult, however, to reconcile the decisions in particular cases as to what facts are sufficient to displace this general rule that sub-contracts are to be ignored in estimating the measure of damages³. Each case must be judged on its own merits, but, broadly speaking, special damages in respect of the buyer's liability⁴ to sub-purchasers are recoverable:

292 (1) where the existence of a sub-contract, either actual or contemplated, is known to the seller at the time of the sale⁵; and

293 (2) where, the buyer being to the knowledge of the seller a merchant or retailer, the seller must have contemplated that the goods were purchased for resale⁶.

1 See *Randall v Raper* (1858) EB & E 84.

2 *James Finlay & Co Ltd v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400 at 406 et seq, CA, per Scrutton LJ, commenting on *Williams Bros Ltd v Ed T Agius Ltd* [1914] AC 510, HL and *Re R and H Hall Ltd and WH Pim Junior & Co's Arbitration* (1928) 33 Com Cas 324, HL. See also *Rodocanachi v Milburn* (1886) 18 QBD 67, CA; *Slater v Hoyle and Smith Ltd* [1920] 2 KB 11, CA (distinguished in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 99, [1997] 1 All ER 979 at 988, CA, per Otton LJ and doubted at 102 and 992 per Auld LJ; and further distinguished in *Dreyfus (Louis) Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), [2004] All ER (D) 24 (Jan), [2004] 2 Lloyd's Rep 243); *The Arpad* [1934] P 189, CA. As to cases decided before the Sale of Goods Act 1893 (repealed) see *Lewis v Peake* (1816) 7 Taunt 153, as explained in *Walker v Hatton* (1842) 10 M & W 249. See generally the cases cited in PARA 295 notes 2, 4, 6, 8 ante. Still less may the claimant recover if there were no contractual relations between him and the potential sub-purchaser: see *Simon v Pawsons and Leafs Ltd* (1932) 38 Com Cas 151, CA (loss of appointment as outfitter to school). See also PARA 315 post.

3 It was said in *Re R and H Hall Ltd and WH Pim Junior & Co's Arbitration* (1928) 33 Com Cas 324, HL, that the right to recover special damages for sub-contracts arises if the contract contemplates by its terms that the purchaser will have the right to enter into sub-contracts; but cf *Williams Bros Ltd v Ed T Agius Ltd* [1914] AC 510, HL and *James Finlay & Co Ltd v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400, CA. See generally

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528 at 536-537, [1949] 1 All ER 997 at 1000-1001, CA. See also PARA 295 ante, particularly note 8; and *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA.

4 The buyer may recover damages to compensate for liability on sub-sales, not merely to compensate for payments made in discharge of such liability: *Total Liban SA v Vitol Energy SA* [2001] QB 643, [1999] 2 All ER (Comm) 65.

5 *Hammond & Co v Bussey* (1887) 20 QBD 79, CA; *Agius v Great Western Colliery Co* [1899] 1 QB 413, CA.

6 *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 KB 690 (poisonous copra cake); *British Oil and Cake Co Ltd v Burstall & Co* (1923) 39 TLR 406; *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 KB 535; *GC Dobell & Co Ltd v Barber and Garratt* [1931] 1 KB 219, CA (statutory warranty under the Fertilisers and Feeding Stuffs Act 1926 s 2 (repealed)); *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314, [1951] 2 All ER 191, CA; *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286; *Contigroup Companies Inc v Glencore AG* [2004] EWHC 2750 (Comm), [2005] 1 Lloyd's Rep 241, [2004] All ER (D) 387 (Nov). See also the cases cited in PARAS 315 notes 2-5, 316 notes 1-2 post. As to the modern tendency of the courts to recognise that the parties must have contemplated a resale see PARA 295 notes 6, 8 ante.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/315. Claim by sub-purchaser.

315. Claim by sub-purchaser.

Where sub-contracts may be taken into consideration in estimating the buyer's damages¹, the buyer is entitled to recover from the seller the amount of such losses as might reasonably be supposed to have been within the contemplation of the parties at the time the contract was made². Thus, in addition to the damages which the buyer has been obliged to pay to his sub-purchaser, he may also recover the costs properly incurred by him in connection with the sub-purchaser's claim³. In addition, if it appears that a chain of sub-purchases was contemplated by the original buyer and seller, as where goods are sold to a wholesaler, who in turn sells them to a retailer who retails them to the public, the rule applies to each of those sales, and the original buyer is entitled to recover all the special damages resulting from the existence of such a chain⁴. Where, however, there is a chain of sub-purchases, the sub-contracts included in the chain must not contain material variations which might lead to contractual claims for damages not contemplated by the original seller⁵. Where the claimant has made a settlement with his sub-purchaser, the amount of the settlement, although not conclusive, should, if reasonable, be taken as the measure of damages⁶.

¹ As to estimating the buyer's damages in the case of sub-contracts see PARA 314 ante.

² For the buyer to recover his loss of profit on a resale contract, that profit must not be unusual: see *Coastal International Trading Ltd (now Challenger Petroleum Ltd) v Maroil AG* [1988] 1 Lloyd's Rep 92.

³ *Hammond & Co v Bussey* (1887) 20 QBD 79, CA; *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 KB 690; *British Oil and Cake Co Ltd v Burstall & Co* (1923) 39 TLR 406; *Sidney Bennett Ltd v Kreeger* (1925) 41 TLR 609 (where the buyer recovered: (1) damages paid by him to the sub-purchaser; (2) costs awarded to the sub-

purchaser; and (3) his own costs on what is now the indemnity basis); *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, [1964] 2 All ER 732.

4 *Kasler and Cohen v Slavouski* [1928] 1 KB 78; *GC Dobell & Co Ltd v Barber and Garratt* [1931] 1 KB 219, CA.

5 *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 106-107, [1997] 1 All ER 979 at 995-996, CA, per Auld LJ (whether or not such losses are too remote is a matter of fact which cannot be determined by reference to a rigid principle of law that all contracts in the chain must be in the same terms), disapproving *Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd* [1926] 1 KB 348, CA (where description of goods varied). Cf *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725 at 742.

6 *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314, [1951] 2 All ER 191, CA; *Contigroup Companies Inc v Glencore AG* [2004] EWHC 2750 (Comm), [2005] 1 Lloyd's Rep 241, [2004] All ER (D) 387 (Nov).

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/316. Loss of goodwill.

316. Loss of goodwill.

Where the buyer, being a merchant or retailer, sustains loss of his goodwill as a result of the breach of warranty, it is a question of fact depending on the circumstances of the case whether he may recover from the seller damages in respect of that loss. Generally speaking, such damages are not recoverable as they are too remote to fall within the rule, that is to say, they do not directly and naturally result in the ordinary course of events from the breach of warranty, for it cannot as a rule be said to be in the contemplation of the parties at the time of the contract that, as a result of the breach of warranty, the buyer's sub-purchasers, in addition to recovering damages against the buyer, will withdraw their future custom from him¹. The buyer may, however, recover damages for such loss if he pleads and proves with sufficient certainty that he has suffered pecuniary loss and that such pecuniary loss was within the presumed contemplation of the seller when the contract was made².

1 *Fitzgerald v Leonard* (1893) 32 LR Ir 675; *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725; *Doe v WH Bowater Ltd* [1916] WN 185; *Simon v Pawson and Leafs Ltd* (1932) 148 LT 154, CA (where the value of an appointment as outfitter to a school was not recoverable).

2 *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555, CA. See also *Swain v Schieffelin* 134 NY St Rep 471 (1892); *Marcus v Myers and Davis* (1895) 11 TLR 327; *Cointat v Myham & Son* [1913] 2 KB 220 (revsd (1914) 84 LJB 2253, CA, but not on this point, which was not referred to); *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393 at 400. See also PARA 298 ante.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/317. Return of goods or notice of breach unnecessary.

317. Return of goods or notice of breach unnecessary.

Unless otherwise agreed, it is not a condition precedent to the buyer's right of action for breach of warranty¹, or to his defence if sued for the price, that he should return the goods to the seller or notify him of the breach².

1 The buyer must return the goods, if entitled to do so, if he sues for a return of the price: *Towers v Barrett* (1786) 1 Term Rep 133.

2 *Filder v Starkin* (1788) 1 Hy Bl 17 (followed in *Pateshall v Tranter* (1835) 3 Ad & El 103); *Buchanan v Parnshaw* (1788) 2 Term Rep 745 (resale by buyer); *Poulton v Lattimore* (1829) 9 B & C 259 (overruling *Hopkins v Appleby* (1816) 1 Stark 477 on this point); *Grounsell v Lamb* (1836) 1 M & W 352 (buyer's defence).

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/318. Expense of keeping the goods.

318. Expense of keeping the goods.

On a breach of warranty the buyer, if he has previously tendered the goods to the seller, may recover the expenses of their keep and preservation until a reasonable opportunity occurs for a resale¹.

1 *Caswell v Coare* (1809) 1 Taunt 566; *M'Kenzie v Hancock* (1826) Ry & M 436; *Chesterman v Lamb* (1834) 2 Ad & El 129; *Ellis v Chinnoek* (1835) 7 C & P 169. See also *Watson v Denton* (1835) 7 C & P 85; *Kolfor Plant Ltd v Tilbury Plant Ltd* (1977) 121 Sol Jo 390, DC.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(2) REMEDIES OF THE BUYER/(iv) Remedies for Non-conforming Goods/319. Substituted remedy by agreement.

319. Substituted remedy by agreement.

Subject to the provisions of the Unfair Contract Terms Act 1977¹ and the Unfair Terms in Consumer Contracts Regulations 1999², an action for breach of warranty may, by express agreement³ of the parties, be excluded and another remedy compulsorily substituted⁴, or the buyer may be given the option of pursuing a substituted remedy⁵. In the second case an action is excluded when the buyer elects to pursue the substituted remedy.

Where the substituted remedy, whether obligatory on the buyer or optional, is a return of the goods to the seller, then:

- 294 (1) the buyer may return them, even though they are not in the same condition as when he received them, unless the change of condition was caused by his act or default⁶; and
- 295 (2) a failure by the buyer to return the goods is, without prejudice to his right to recover the price, excused where, without such act or default, the goods have since their delivery either physically perished or have otherwise, in a commercial sense, ceased to exist as such⁷.

1 See PARAS 103 ante, 450 post.

2 I.e. the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARAS 105 ante, 452 et seq post.

3 I.e. under the Sale of Goods Act 1979 s 55(1): see PARAS 12, 100 ante.

4 *Buchanan v Parnshaw* (1788) 2 Term Rep 745; *Mesnard v Aldridge* (1801) 3 Esp 271 (return and trial of horse); *Bywater v Richardson* (1834) 1 Ad & El 508; *Hinchcliffe v Barwick* (1880) 5 Ex D 177, CA; *Bush v Freeman* (1887) 3 TLR 449 (return of horse); *Chapman v Withers* (1888) 20 QBD 824; cf *Best v Osborn* (1825) 2 C & P 74 (where the buyer was not shown to have been aware of the special term).

5 *Magrane v Loy* (1839) 1 Craw & D 286. See also *Wallace v Jarman* (1817) 2 Stark 162; *Douglass Axe Manufacturing Co v Gardner* 64 Mass 88 (1852); *Shupe v Collender* 56 Conn 489 (1888); *Love & Co v Ross* 89 Iowa 400 (1893) (stallion); *Eyers v Haddem* 70 F 648 (1895). It appears that, if *Adam v Richards* (1795) 2 Hy Bl 573 decided that a buyer, having an option only, must return the goods before suing on the warranty, it is not law: see *Douglass Axe Manufacturing Co v Gardner* supra.

6 *Head v Tattersall* (1871) LR 7 Exch 7; *Allard & Co (Rubber) Ltd v RJ Hawkins & Co (Dudley) Ltd* [1958] 1 Lloyd's Rep 184.

7 *Magrane v Loy* (1839) 1 Craw & D 286; *Chapman v Withers* (1888) 20 QBD 824 (where the goods were specific goods from the first). It is thought that goods which had become specific by delivery to the buyer would in this connection fall within the rule in *Taylor v Caldwell* (1863) 3 B & S 826: see CONTRACT vol 9(1) (Reissue) PARA 897 et seq.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(3) SPECIAL DAMAGES, INTEREST AND FAILURE OF CONSIDERATION/320. Saving of rights of the parties.

(3) SPECIAL DAMAGES, INTEREST AND FAILURE OF CONSIDERATION

320. Saving of rights of the parties.

Nothing in the Sale of Goods Act 1979 affects the right of the buyer¹ or the seller² to recover interest³ or special damages⁴ in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed⁵.

1 For the meaning of 'buyer' see PARA 29 ante.

2 For the meaning of 'seller' see PARA 27 ante.

3 As to payment of interest see PARA 220 et seq ante.

4 As to special damages see PARAS 289-290, 295-296, 307 et seq ante; and as to general damages see PARAS 287 et seq, 292 et seq, 307 et seq ante.

5 Sale of Goods Act 1979 s 54. See also PARA 309 ante.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/6. BREACH OF THE CONTRACT/(3) SPECIAL DAMAGES, INTEREST AND FAILURE OF CONSIDERATION/321. Failure of consideration.

321. Failure of consideration.

Where the consideration for payment of the price wholly fails, or there has been a total failure of part¹ of the consideration², then, if the price has been paid, the price, or a proportionate part respectively, may be recovered by the buyer³ as money had and received⁴ to his use by the seller⁵. If it has not been paid, the buyer may set up the failure of consideration as a defence pro tanto⁶.

1 ie where the consideration is severable and the price can be apportioned to the separate parts of it: *Chanter v Leese* (1840) 5 M & W 698, Ex Ch; *Biggerstaff v Rowatt's Wharf Ltd*, *Howard v Rowatt's Wharf Ltd* [1896] 2 Ch 93, CA.

2 As to failure of consideration see RESTITUTION vol 40(1) (2007 Reissue) PARA 87 et seq.

3 The buyer cannot, however, recover the price where the goods delivered are merely inferior in quality, no condition having been broken (*Fortune v Lingham* (1810) 2 Camp 416), or if the contract is avoided in a specified event and by express agreement the seller is entitled to retain the money (*United States of America v Pelly* (1899) 15 TLR 166). See further note 5 infra. At common law the buyer is not entitled to interest on the price (*Walker v Constable* (1798) 1 Bos & P 306 (contract rescinded)), even though the price has been received by a fraudulent seller (*Crockford v Winter* (1807) 1 Camp 124 at 129). As to the court's statutory power to award interest see PARA 234 text and note 6 ante. Where the contract is in writing, oral evidence is not admissible to show that part of the price was paid in consideration of speedy delivery, which has not been made: *Brady v Oastler* (1864) 3 H & C 112, Martin B dissenting.

4 As to money had and received generally see RESTITUTION vol 40(1) (2007 Reissue) PARA 5.

5 Thus, the buyer may recover the price if the seller fails to deliver the goods: *Giles v Edwards* (1797) 7 Term Rep 181; *Devaux v Conolly* (1849) 8 CB 640 (part delivery); *Portman v Middleton* (1858) 4 CBNS 322. It is otherwise if the seller is a minor (*Cowern v Nield* [1912] 2 KB 419, DC), subject nevertheless to the provisions of the Minors' Contracts Act 1987 s 3 (court's power to order restitution: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 24). The buyer may also recover the price if the seller commits a breach of any condition, whether of title (see the Sale of Goods Act 1979 s 12 (as amended); para 69 ante; and *Eichholz v Bannister* (1864) 17 CBNS 708; *Edwards v Pearson* (1890) 6 TLR 220, CA), description (see the Sale of Goods Act 1979 s 13 (as amended); and PARAS 72-101 ante) or quality (see ss 14, 15 (as amended); and PARAS 77-82, 93-94 ante), or otherwise, which the buyer has not waived, or been compelled to waive (see s 11 (as amended); paras 65-67 ante; and *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725). In such cases the buyer may recover the expenses incidental to the receipt and return of goods together with the price, if he has paid it: *Caswell v Coare* (1809) 1 Taunt 566; *Heilbutt v Hickson* (1872) LR 7 CP 438. Moreover, the buyer may recover the price where the contract is void as founded on some mutual mistake, as under the Sale of Goods Act 1979 s 6: see PARA 54 ante. See also *Cox v Prentice* (1815) 3 M & S 344 (part of price overpaid); and MISTAKE vol 32 (2005 Reissue) PARAS 17-18. He may also recover the price where the contract has been avoided by implication of law, and the price was not payable at the time of the avoidance, as under the Sale of Goods Act 1979 s 7: see PARA 55 ante. Further, the buyer may recover the price where the contract has by agreement been rescinded (*Caswell v Coare* (1809) 1 Taunt 566; *Gomery v Bond* (1815) 3 M & S 378; *Long v Preston* (1828) 2 Moo & P 262 (conduct of seller showing rescission); *Head v Tattersall* (1871) LR 7 Exch 7 (express condition subsequent)), or the buyer is entitled to treat it as rescinded by the seller's wrongful repudiation. It is not so where the buyer only is in default: *Fitt v Cassanet* (1842) 4 Man & G 898; *Thomas v Brown* (1876) 1 QBD 714. As to the remedy of rescission on the grounds of misrepresentation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 812 et seq; and as to rescission and rectification on the grounds of mistake see MISTAKE vol 32 (2005 Reissue) PARA 50 et seq.

6 *Biggerstaff v Rowatt's Wharf Ltd, Howard v Rowatt's Wharf Ltd* [1896] 2 Ch 93, CA (set-off). See also *Chanter v Leese* (1840) 5 M & W 698, Ex Ch.

UPDATE

285-321 Breach of the Contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(1) INTRODUCTION/322. International sale.

7. INTERNATIONAL SALE CONTRACTS

(1) INTRODUCTION

322. International sale.

The contracts primarily contemplated by the Sale of Goods Act 1979 are those to be fully performed in the United Kingdom; but special provisions are made for contracts involving sea transit¹. In all cases, however, rights, duties and liabilities may be negated or varied by usage²; and, in the case of contracts involving sea transit, this is effected, by the usage of traders, in the various forms of contractual documents common in the import and export trades³. Accordingly, particular incidents have become attached to international sale contracts which have been the subject of elaborate elucidation by the courts, both before and after the passing of the Sale of Goods Act 1979⁴.

1 See eg the Sale of Goods Act 1979 s 19(2) (see PARA 370 post), s 19(3) (see PARA 373 post), s 32(3) (see PARA 352 post), s 45(5) (see PARA 269 ante) and s 47(2) (see PARA 253 ante). Moreover, there are in the Sale of Goods Act 1979 a number of provisions which are particularly apt for application to contracts for the international sale of goods carried by sea, many of which relate to goods sold and carried in bulk: see eg s 18 r 5 (as amended) (see PARA 125 ante) and ss 20A, 20B (as added) (see PARAS 134-135 ante). The Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods are incorporated into United Kingdom law by the Uniform Laws on International Sales Act 1967: see PARA 382 post.

2 See the Sale of Goods Act 1979 s 55 (as amended); and PARAS 13, 100 ante. The right to negative or vary contractual terms is now subject to the Unfair Contract Terms Act 1977 (see PARAS 103 ante, 450 et seq post) and to the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended) (see PARAS 105 ante, 452 et seq post). The restrictions on contractual variation of the Sale of Goods Act 1979 which would otherwise be imposed by the Unfair Contract Terms Act 1977 do not, however, apply to international supply contracts: see s 26(1), (3)(b); and PARA 450 text and note 1 post. See *Amiri Flight Authority v BAE Systems plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep 767. Moreover, the restrictions on contractual variation imposed by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended), only apply to consumer contracts: see reg 4(1) (see PARA 452 post); and most of the sales contracts to which para 323 et seq post apply are not consumer contracts. Free of these restrictions on contractual freedom, parties to international sale contracts typically conclude contracts on the basis of standard terms drafted either in-house as general terms and conditions or by trade associations operating in particular markets, eg grains (Grain and Feed Trade Association (GAFTA)) or edible oils (Federation of Oils, Seeds and Fats Association Limited (FOSFA)).

3 The degree of modification varies with the type of contract, eg the rule laid down in the Sale of Goods Act 1979 s 32(3) (see PARA 352 post) relating to insurance during sea transit does not apply to cif contracts (see PARA 324 et seq post) or ex-ship contracts (see PARA 362 post) (see PARAS 336 note 4, 352 note 2 post), but does apply to fob contracts (see PARA 351 et seq post).

4 As to international sale contracts see PARA 323 et seq post.

UPDATE

322 International sale

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(1) INTRODUCTION/323. Evolution and purpose of international sale contracts.

323. Evolution and purpose of international sale contracts.

The commonest forms of transaction, or at any rate those which in modern practice present the greatest legal complication, are cif contracts (cost, insurance and freight)¹ and fob contracts (free on board)² and various modifications of these classic types³. The commercial reason for their evolution lies in the length of time taken in the carriage of goods by sea. It is to the

advantage of neither seller nor buyer that the goods the subject matter of the contract should remain outside commerce while they are in course of shipment. It is in the seller's interest to receive the money equivalent of the goods as soon as possible after the date of the contract of sale, and, until he has received actual payment of the price, he normally desires to be able, if he wishes, to obtain credit on the security of the transaction⁴. The buyer, however, normally desires to be able to deal with the goods for resale or finance as soon as possible. Thus, the object and the result of a cif or fob contract is to enable sellers and buyers to deal with cargoes or parcels afloat and to transfer them freely from hand to hand by giving constructive possession of the goods which are being dealt with⁵. The principal document which has enabled this result to be achieved is the bill of lading⁶.

Contracts, otherwise in ordinary form, which merely involve the carriage of goods whether by land, sea or air are dealt with elsewhere⁷.

1 As to cif contracts see PARA 324 et seq post.

2 As to fob contracts see PARA 351 et seq post.

3 Prima facie the description cif or fob is an indication that the contract has the incidents described in PARAS 324 et seq (cif), 351 et seq (fob) post. However, '[n]ot every contract which is expressed to be a cif contract is such': see *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 309, [1949] 1 All ER 269 at 275, HL, per Lord Porter. See also the cases cited in PARA 328 note 4 post; *Gardano and Giampari v Greek Petroleum, George Mamidakis & Co* [1961] 3 All ER 919, [1962] 1 WLR 40; *Albacruz (Owners) v Albazero (Owners), The Albazero* [1974] 2 All ER 906 at 925-926 per Brandon J; [1975] 3 All ER 21, [1975] 3 WLR 491, CA; affd on this point (but revsd on another ground) [1977] AC 774, [1976] 3 All ER 129, HL.

4 As to the financing of cif contracts see PARA 327 post.

5 *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 311-312, [1949] 1 All ER 269 at 276, HL, per Lord Porter.

6 As to the nature and effect of bills of lading see PARA 366 et seq post.

7 See eg CARRIAGE AND CARRIERS; and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 1 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(i) Nature of the Contract/324. Elements of cif contracts.

(2) CIF CONTRACTS

(i) Nature of the Contract

324. Elements of cif contracts.

Under a cif contract the duty of the seller, so far as physical handing over of the goods themselves is concerned, is accomplished when goods conforming to the contract of sale are put on board a ship for the purpose of the transit to the destination agreed in the contract of sale or through the purchase of such goods already afloat¹ and bound for that destination. In addition, he is under an obligation to make or procure a contract of carriage with the carrier under which the carrier is obliged to carry the goods to, and deliver them at, the destination agreed under the contract of sale, to effect or procure insurance cover for the buyer and to tender the bill of lading, policy of insurance and invoice to the buyer. Against tender of these documents the buyer's liability to pay the price arises. The contract is thus, in a commercial

sense, an agreement for the sale of goods to be performed by delivery of documents² or a sale of documents representing goods³, the seller having obligations in law in relation to both the goods and the documents covering them⁴.

Under a cif contract the property in the goods will commonly pass when the documents which represent the goods are tendered in exchange for the price. However, in accordance with general principle⁵, property may, if the contract shows such an intention, pass at some different stage, as on shipment or on consignment of the documents to the buyer⁶. Risk will pass on or as from shipment⁷.

1 See PARA 330 note 3 post.

2 *Arnhold Karberg & Co v Blythe, Green, Jourdain & Co* [1916] 1 KB 495 at 510, 514, CA, commenting on the dictum of Scrutton J at first instance [1915] 2 KB 379 at 388.

3 See *Congimex Companhia Geral de Comercio Importadora e Exportadora SARL v Tradax Export SA* [1983] 1 Lloyd's Rep 250, CA; *Bangladesh Export Import Co Ltd v Sucden Kerry SA* [1995] 2 Lloyd's Rep 1 at 5; *Cargill International SA v Bangladesh Sugar and Food Industries Corp*n [1996] 4 All ER 563 at 565 (c & f contracts). For the view that a cif contract is not a sale of documents see *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60, HL; *The Gabbiano* [1940] P 166 at 174. A cif contract is clearly a sale of documents in the sense that the buyer is bound to pay the price on tender of the documents stipulated for in the contract, even where such tender is made before the goods arrive at the contract destination: see *E Clemens Horst & Co v Biddell Bros* [1912] AC 18, HL. It is also a sale of documents in the sense that, where a contract, calling itself a cif contract, permits the seller to tender no documents at all and to claim payment simply on delivery of the goods, then such a contract will not be treated as a cif contract: see *Holland Colombo Trading Society Ltd v Segu Mohammed Khaja Alawdeen* [1954] 2 Lloyd's Rep 45 at 50. Where, however, the seller tenders documents stating goods to have been shipped where they have not, the mere tender of documents does not discharge the seller's obligations and in this sense, the contract is a sale of goods: see the cases cited in note 4 infra.

4 *Hindley & Co Ltd v East Indian Produce Co Ltd* [1973] 2 Lloyd's Rep 515 (where the documents were, on their face, proper, but no goods were shipped, and the seller was held to be in breach for non-shipment and for the tender of inaccurate documents). See also *James Finlay & Co Ltd v Kwik Hoo Tong Handel Maatschappij NV* [1928] 2 KB 604; affd [1929] 1 KB 400, CA.

5 See *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 317, [1949] 1 All ER 269 at 279, HL, per Lord Simonds; *Gardano and Giampari v Greek Petroleum, George Mamidakis & Co* [1961] 3 All ER 919, [1962] 1 WLR 40; *Albacruz (Owners) v Albazero (Owners), The Albazero* [1974] 2 All ER 906; affd [1975] 3 All ER 21, [1975] 3 WLR 491, CA; revsd [1977] AC 774, [1976] 3 All ER 129, HL. Where payment is to be cash against documents, property will only pass when there has been both indorsement and delivery of the bill of lading and payment by the buyer: *Ginzberg v Barrow Haematite Steel Co Ltd and McKellar* [1966] 1 Lloyd's Rep 343 at 348. See further the Sale of Goods Act 1979 s 19(3); and PARA 373 post.

6 See PARA 345 post; and *Albacruz (Owners) v Albazero (Owners), The Albazero* [1974] 2 All ER 906; [1975] 3 All ER 21, [1975] 3 WLR 491, CA (affd on this point (although revsd on another ground) [1977] AC 774, [1976] 3 All ER 129, HL). In some trades cif contracts permit the tender of documents relating to an undivided part of a larger bulk. Where such a tender is then made, property cannot pass until the buyer's goods are ascertained, subject to the cases covered by the Sale of Goods Act 1979 s 20A (as added) (see PARA 134 ante). Ascertainment may occur by physical separation from the bulk, eg after discharge, or in some other way, as where the buyers under other cif contracts also acquire the rest of the bulk: see *Karlshamns Oljefabriker v Eastport Navigation Corp*n, *The Elafi* [1982] 1 All ER 208, [1981] 2 Lloyd's Rep 679; and the Sale of Goods Act 1979 s 18 rr 5(3), 5(4) (as added) (see PARA 136 ante). See also *Cremer v Brinkers' Groudstoffen BV* [1980] 2 Lloyd's Rep 605.

7 As to the incidence of risk see PARA 346 post.

UPDATE

324 Elements of cif contracts

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(i) Nature of the Contract/325. Bill of lading, policy of insurance and invoice.

325. Bill of lading, policy of insurance and invoice.

The most important document is the bill of lading, recognised by the law merchant as the symbol of the goods described in it¹. In addition, and in order to guard against the risk of non-delivery by the shipowner, the cif contract requires the seller to take out a policy of marine insurance² on which the buyer may sue. Thus, a person who holds both the bill of lading and a marine insurance policy on the goods is for business purposes in as good a position as if the goods were actually in his possession, subject only to the shipowner's lien. For this reason the delivery to the buyer of a bill of lading and an insurance policy on the goods together with the invoice which identifies them is treated both commercially and legally as satisfying the contractual obligations of the seller under a cif contract. The invoice, which normally debits the buyer with the agreed price, including cost, freight³ and insurance premium⁴, is required partly to identify the goods sold with the goods shipped and insured and so to complete the record of the transaction, and partly, and from the business point of view more particularly, in order to show on the face of the documents the price of the goods and thereby to enable the buyer the more easily to raise money on their security⁵. Other documents beyond the three already mentioned are also often required under the terms of the contract of sale⁶.

1 As to the nature and effect of bills of lading see PARA 366 et seq post.

2 As to marine insurance see PARAS 336-337 post.

3 There are circumstances where the seller finds it necessary to tender a bill of lading providing for payment of the freight by the buyer direct to the carrier. As to so-called 'freight collect' bills of lading see PARA 332 post.

4 Under the simple cif contract the risk of any increase in the cost of the goods or of the freight or insurance rests on the seller: see *Ireland v Livingston* (1872) LR 5 HL 395 at 407; *Houlder Bros & Co Ltd v Public Works Comr* [1908] AC 276 at 290, PC. This is the case even where a supervening event causes such an increase in price as to make the cif contract less profitable than it might otherwise have been for the seller, who cannot in such circumstances plead the common law doctrine of frustration: see *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL; and CONTRACT VOL 9(1) (Reissue) PARA 902. The parties may, however, quite often make specific provision in the contract for the risk of increases in the price to pass to the buyer, to a greater or lesser extent: see eg *Isaac Modiano Bros & Sons v Bailey & Sons Ltd* (1933) 47 Ll L Rep 134 (where the words 'freight payable on discharge' obliged the buyer to pay the freight reserved by the bill of lading 'whatever it might be', there being no suggestion it was an unusual bill of lading or freight). In some trades it is common for the price of the goods itself to vary with movements in the market according to an agreed formula, eg the Platt's formula used in the oil trade which alters the price of the oil depending on the date of the bill of lading. See also *Oulu Osakayetio v Arnold Laver & Co* [1940] 1 KB 750, [1940] 2 All ER 243, CA (where there was an increase in the insurance premium, but this was held to apply only to an increase in the normal market rates and not to rates for a belligerent ship which the sellers chose to charter); *DI Henry Ltd v Clasen* [1973] 1 Lloyd's Rep 159, CA.

5 As to the form of invoice see PARA 338 post.

6 As to such documents see PARA 339 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(i) Nature of the Contract/326. Method of payment.

326. Method of payment.

Under the simple cif contract the buyer's obligation is to pay to the seller the price of the goods in cash on delivery of the documents, namely the bill of lading, invoice and insurance policy¹. Other variants in method of payment are, however, common, and it is often a term of the contract that payment is to be made through a documentary letter of credit to be procured by the buyer². Alternatively, the seller and the buyer may agree, although this has become a far less commonly used method of payment in international sales, that payment is to be made by the buyer through acceptance of a bill of exchange against delivery of the documents. In such a case the bill of exchange drawn by the seller on the buyer is forwarded to the buyer with the other documents, and the property in the goods does not pass unless the buyer, on presentation of the documents, accepts the bill of exchange³.

1 *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 934 at 958, CA, per Kennedy LJ; affd sub nom *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL. Property passes on such payment: see PARAS 324 note 5 ante, 345 post.

2 As to documentary letters of credit see PARA 375 et seq post.

3 See the Sale of Goods Act 1979 s 19(3); and PARAS 368, 373 post. See also *The Prinz Adalbert* [1917] AC 586 at 589-590, PC.

UPDATE

326 Method of payment

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(i) Nature of the Contract/327. Financing of cif contracts.

327. Financing of cif contracts.

Even in the simple form of cif transaction already described there are at least four parties concerned, namely the seller, the buyer, the shipowner and the insurer. However, the contractual link between the seller and the shipowner, and that between the buyer and the shipowner, arises out of the contract of carriage, just as the link between the insurer and the seller and the buyer respectively arises out of the contract of insurance. These ancillary relationships essential to the cif transaction result from ordinary carriage and insurance contracts, and are not in any way peculiar to the contract of sale in the sense that such contracts of carriage and insurance may well exist without there being an underlying contract of sale. However, in a cif contract, the procuring of such contracts forms part of the seller's obligations and the contract of sale may well contain stipulations as to the type of carriage or insurance contract the seller must procure and transfer to the buyer. Moreover, the manner in which cif contracts are financed, based as it is on treatment of the documents as symbolic of the goods, lends itself readily to the introduction of bankers and agents as intermediaries. Thus, in commercial practice the performance of a cif contract normally passes through many stages during which additional parties acquire rights and undertake liabilities. The seller who desires to obtain the money equivalent of his goods before delivery of the documents to the

buyer may tender the documents to a third person, normally the seller's bank, without¹ or with an accompanying bill of exchange². In either case, the bank will forward the documents to another party in the country of delivery, normally another bank, for tender to the buyer against payment, the documents then facilitating the delivery of the goods by the carrier to the buyer.

1 As where the price is paid through a documentary letter of credit: see PARA 375 et seq post.

2 The seller here negotiates the bill of exchange drawn on the buyer, with bill of lading, invoice and insurance policy attached, to the seller's bank, known in this context as the 'buyer of exchange' and the bill of exchange with the documents attached is known as a 'documentary bill': see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 929. Cf *Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849, [1967] 2 All ER 1092 (where the documents were pledged to the bank, and the bank was to collect the purchase price from the buyer against the documents). As between the seller of the goods and the buyer of exchange the delivery of the bill of lading is a delivery by way of pledge, and the security of the buyer of exchange is, until acceptance by the buyer on delivery to him of the documents, the liability of the seller as drawer of the bill of exchange with the bill of lading as collateral security: *The Prinz Adalbert* [1917] AC 586 at 589, PC, per Lord Sumner; *The Orteric* [1920] AC 724 at 733, PC, per Lord Sumner. See also PARA 375 et seq post. After delivery of the documents to the buyer, the security of the buyer of exchange is the acceptance of the buyer of the bill of exchange, together with the continued liability of the seller as drawer of the bill.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(i) Nature of the Contract/328. Special terms.

328. Special terms.

Whilst a cif transaction is usually effected on the broad lines previously mentioned¹, with one or other of the variants indicated, special terms are often introduced which modify it in greater or less degree. For example, a cif contract modified so as to substitute a delivery order for a bill of lading², and a certificate of insurance for a policy³, may nonetheless be a cif contract⁴. It is consequently important that any international contract for the sale of goods should be carefully scrutinised in order to see whether special terms have been expressly incorporated by the parties, and, if so, what is their true meaning⁵. Particular care needs to be taken where an international contract for the sale of goods incorporates⁶ terms from a charterparty concluded⁷ by a seller cif or a seller further up a string of sale contracts, especially where the sale contract fails to impose on the seller an obligation to tender the charterparty to the buyer⁸.

1 See generally para 324 et seq ante.

2 Thus eg where Form 100 (contract for the shipment of feedingstuffs in bulk) of the Grain and Feed Trade Association is incorporated into the contract of sale, the seller is permitted to tender either a bill of lading or a ship's delivery order: see cl 11. Again, where the cif terms of Incoterms 2000 (ICC Publication No 560) are incorporated, the seller is entitled to deliver 'the usual transport document' which is stated to include a negotiable bill of lading, a non-negotiable sea waybill or an inland waterway document. As to bills of lading generally see PARA 366 et seq post.

3 As to insurance see PARAS 336-337 post; and as to marine insurance generally see INSURANCE vol 25 (2003 Reissue) PARA 390 et seq.

4 See *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 309, [1949] 1 All ER 269 at 275, HL, per Lord Porter; *Reinhart Co v Joshua Hoyle & Sons Ltd* [1961] 1 Lloyd's Rep 346, CA; *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146. See also PARA 323 note 3 ante.

5 See eg *The Parchim* [1918] AC 157, PC (a hybrid between a cif and an fob contract); *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293, [1949] 1 All ER 269, HL (where the contract was capable of performance by the seller in various ways, some of which, if adopted, would have made it subject to cif principles, and the contract, as in fact performed (ie by the delivery of a seller's delivery

order in respect of part of a larger bulk), was held not to be cif although so called); *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1982] QB 1022, [1982] 2 WLR 518. Cf *The Gabbiano* [1940] P 166 (conditional cif terms). For other examples of cif contracts with variations from the simple form see *Dupont v British South Africa Co* (1901) 18 TLR 24 (where property passed, but one-half of the price was dependent on delivery at the destination); *Houlder Bros & Co Ltd v Public Works Comr* [1908] AC 276, PC (where property passed, but one-third of the price was dependent on delivery at the destination giving 'the consignee a direct interest in the safe carriage and delivery and so far differentiating this contract from the normal contract'); *Stein, Forbes & Co v County Tailoring Co* (1916) 86 LJKB 448 (payment cash (ie cash against documents, meaning the amount invoiced to be paid on presentation of the bill of lading) on arrival of steamer)); *Arnhold Karberg & Co v Blythe, Green, Jourdain & Co* [1916] 1 KB 495, CA; *Re Denbigh, Cowan & Co and R Atcherley & Co* (1921) 90 LJKB 836, CA (where the price was payable against the documents or the delivery order not later than the arrival of the vessel, but provision was made for the contract to be void as regards all or any portion of the goods not arriving because of the loss of the vessel or other unavoidable cause). Parties may also agree that the price is payable on out-turn quantity or on landed quality, or that the goods will actually arrive at destination by a certain date; and all of these terms seek to alter the usual incidence of risk: see PARA 346 post. There are also circumstances where the seller finds it necessary to tender a bill of lading providing for payment of the freight by the buyer direct to the carrier. As to so-called 'freight collect' bills of lading see PARA 332 post.

6 As to the general principles of incorporation of standard terms into contracts see CONTRACT vol 9(1) (Reissue) PARAS 688-689.

7 Where an international contract for the sale of goods seeks to incorporate terms from a charterparty yet to be concluded for the purpose of the carriage of the goods sold, it is not clear whether incorporation is effective. For the view that a sale contract could effectively incorporate terms from a charterparty yet to be concluded see *Gill & Duffus SA v Rionda Futures Ltd* [1994] 2 Lloyd's Rep 67 at 73; *Ceval Alimentos SA v Agrimpex Trading Co Ltd, The Northern Progress (No 2)* [1996] 2 Lloyd's Rep 319 at 326-328; and for the contrary view, namely that 'where the incorporated contract does not exist when the incorporating contract is entered into' see *OK Petroleum AB v Vitol Energy SA* [1995] 2 Lloyd's Rep 160. For a similar view expressed in the context of the incorporation of terms from a charterparty into a bill of lading see *Partenreederei M/S Heidberg and Vega Reederei Friedrich Dauber v Grosvenor Grain and Feed Co Ltd, Union Nationale des Co-opératives Agricoles de Céréales and Assurances Mutuelles Agricoles, The Heidberg* [1994] 2 Lloyd's Rep 287 at 310-311.

8 As to the buyer's right to tender of a charterparty from which terms are incorporated into an international contract for the sale of goods see PARA 340 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/329. Duties of seller.

(ii) Legal Incidents of the Contract

329. Duties of seller.

A seller under a contract of sale on cif terms must:

- 296 (1) ship at the port of shipment goods of the description contained in the contract¹ or procure such goods already afloat² and bound for the destination contemplated by the contract;
- 297 (2) procure a contract of carriage under which the goods will be delivered at the destination contemplated by the contract³;
- 298 (3) arrange for an insurance on the terms current in the trade, which will be available for the benefit of the buyer⁴;
- 299 (4) make out an invoice debiting the buyer with the agreed price (or the actual cost, commission, insurance premiums and freight, if the contract is on this basis) and giving him credit for the amount of any freight which he will have to pay to the shipowner on actual delivery, or in some similar form⁵; and
- 300 (5) tender these documents⁶ to the buyer as soon as is reasonably possible.

The buyer must be ready and willing to pay the price against tender of the shipping documents, that is (subject to special contractual provision or custom), the bill of lading, invoice, policy of insurance and any other document required, which then completes delivery in accordance with the agreement⁷.

1 For the meaning of 'shipment', and as to the time and route of shipment see PARAS 330-331 post. See also *Hindley & Co Ltd v East Indian Produce Co Ltd* [1973] 2 Lloyd's Rep 515. International contracts for the sale of goods on cif terms will commonly also contain terms which impose on the seller a duty to pass to the buyer information regarding the shipment of the goods within a stipulated time from as soon as possible after shipment, a duty often referred to as the duty to send a 'declaration of shipment' or a 'notice of appropriation'. This is not, however, an absolutely universal practice (see eg *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA, The Playa Larga and The Marble Islands* [1983] 2 Lloyd's Rep 171 at 185, CA); and it would appear that there is not in every cif contract an implied term to this effect.

2 See PARA 330 text and note 3 post.

3 As to the procuring of a contract of carriage see PARA 332 post.

4 As to insurance see PARAS 336-337 post.

5 As to the form of invoice see PARA 338 post.

6 As to other documents sometimes required see PARA 339 post. As to the duty to obtain import and export licences see PARA 363 post; and CONTRACT vol 9(1) (Reissue) PARA 908. It is sometimes stipulated that the buyer will accept a tender even though some documents are missing, provided that the seller provides an appropriate guarantee of performance: see eg Form 100 (contract for the shipment of feedingstuffs in bulk) cl 11 of the Grain and Feed Trade Association; and *SIAT di dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep 53, CA.

7 *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 214 at 220 per Hamilton J; affd sub nom *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL. See also *Johnson v Taylor Bros & Co Ltd* [1920] AC 144 at 155, HL, per Lord Atkinson; *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 at 70, HL, per Lord Wright.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/330. Meaning of 'shipment'.

330. Meaning of 'shipment'.

Shipment of the goods normally means putting the goods on board a ship¹; and evidence of usage to the contrary cannot be given to contradict the express terms of the contract². The seller may, however, also perform his contract by purchasing goods afloat which have been shipped during the contract period³. Generally speaking, in a cif contract the time of shipment is a condition of the contract and not merely a warranty⁴; and a breach of a term as to date of shipment entitles the buyer to repudiate the contract.

1 *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL, following *Re Comptoir Commercial Anversois and Power, Son & Co* [1920] 1 KB 868 at 878, CA. See also *PT Putrabali Adyamulia v Enrico Webb James Snc, The Intan 6 V.360A SN* [2003] 2 Lloyd's Rep 700, [2003] All ER (D) 24 (Jul); and PARA 348 post. If the contract permits tender of a 'received for shipment' bill of lading, the goods must still be shipped on board within any 'shipment' date which it also contains: see *Suzuki & Co v Burgett and Newsam* (1922) 10 Ll L Rep 223, CA. As to whether or not, in the absence of an express clause in the contract permitting tender of such a bill of lading, the buyer is obliged to accept such a bill see PARA 332 post; and as to 'received for shipment' bills of lading see PARA 333 post.

2 *Mowbray, Robinson & Co v Rosser* (1922) 91 LJB 524, CA. The language of the particular contract may, however, indicate a wider meaning.

3 *JH Vantol Ltd v Fairclough Dodd and Jones Ltd* [1955] 2 All ER 516 at 519, [1955] 1 WLR 642 at 646; affd sub nom *Fairclough Dodd and Jones Ltd v JH Vantol Ltd* [1956] 3 All ER 921, [1957] 1 WLR 136, HL. See also

Ross T Smyth & Co Ltd v TD Bailey, Son & Co [1940] 3 All ER 60 at 68, HL, per Lord Wright; *Lewis Emanuel & Son Ltd v Sammut* [1959] 2 Lloyd's Rep 629.

4 *Bowes v Shand* (1877) 2 App Cas 455, HL. See also the cases cited in PARAS 47 note 10, 68 note 7 ante. Time is generally of the essence in mercantile contracts: see *Bunge Corpn v Tradax Export SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL (fob contract); *Gill & Duffus v Société pour l'Exportation des Sucres SA* [1986] 1 Lloyd's Rep 322, CA. The restriction imposed by the Sale of Goods Act 1979 s 15A (as added) on the buyer's right to terminate the contract of sale for breach of condition is not intended to affect this position: see PARAS 63-64, 68 ante; and *Sale and Supply of Goods* (Law Com no 160) PARA 4.24. See also PARA 356 note 5 post.

UPDATE

330-331 Meaning of 'shipment', Time and route of shipment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/331. Time and route of shipment.

331. Time and route of shipment.

Where no time for shipment is stated, the goods must be shipped within a reasonable time¹. In the absence of express agreement as to the route of shipment², the goods must be shipped by a usual route³ or, where that route becomes impracticable, by some alternative route which may be reasonable and practicable in the circumstances⁴. The goods must be shipped by the vessel or type of vessel stipulated in the contract⁵, or, if the contract is silent on this point, by a type of vessel customary in the trade⁶, and the vessel must be bound for the contractual destination⁷ and capable of reaching it⁸. Breach by the seller of any of these terms, whether express or implied, entitles the buyer to treat the contract as repudiated⁹.

1 *Thomas Borthwick (Glasgow) Ltd v Bunge & Co Ltd* [1969] 1 Lloyd's Rep 17 (contract providing for 'shipment per 'Bristol City' expected to load 3/5 January 1968, or substitute from a Canadian port'). See also *Koninklijke Bunge v Compagnie Continentale d'Importation* [1973] 2 Lloyd's Rep 44.

2 Where the parties agreed in the contract of sale that shipment would be direct to the destination stipulated for in the contract, the buyer was entitled to reject goods shipped on a vessel scheduled to call at several intermediate ports: *Bergerco USA v Vegoil Ltd* [1984] 1 Lloyd's Rep 440 at 443.

3 *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 616, HL. Cf *Evans, Sons & Co v Cunard Steamship Co* (1902) 18 TLR 374. See also *Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd, The Indian City* [1939] AC 562, [1939] 3 All ER 444, HL. Cf *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL, overruling *Carapanayoti & Co Ltd v ET Green Ltd* [1959] 1 QB 131, [1958] 3 All ER 115. The time of the performance, not of the making of the contract, is the time at which the usual route must be ascertained: see *Carapanayoti & Co Ltd v ET Green Ltd* supra at 146 and 119; *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* supra at 113, 118, 123, 128, 132 and 183, 186, 189, 192, 194-195. As to whether or not the seller can tender a bill of lading seeking to give the carrier a liberty to deviate from the voyage agreed in the contract of sale see PARA 334 post.

4 See *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1960] 2 QB 348, [1960] 2 All ER 160, CA; affd [1962] AC 93, [1961] 2 All ER 179, HL.

5 Cf *Ashmore & Son v CS Cox & Co* [1899] 1 QB 436 at 441. Terms are often agreed as to the age of the ship used or as to the type of cargoes which it had carried on previous voyages. See eg *PT Putrabali Adyamulia v Enrico Webb James Snc, The Intan 6 V.360A SN* [2003] 2 Lloyd's Rep 700, [2003] All ER (D) 24 (Jul).

6 *Ranson Ltd v Manufacture d'Engrais* (1922) 13 Ll L Rep 205, considered in *PT Putrabali Adyamulia v Enrico Webb James Snc, The Intan 6 V.360A SN* [2003] 2 Lloyd's Rep 700, [2003] All ER (D) 24 (Jul).

7 *Acme Wood Flooring Co v Sutherland Innes Co* (1904) 9 Com Cas 170 ('cif to buyers' wharf'); *SIAT di dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep 53, CA; *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA, The Playa Larga and The Marble Islands* [1983] 2 Lloyd's Rep 171 at 184, CA; *Ceval Alimentos SA v Agrimpex Trading Co Ltd, The Northern Progress (No 2)* [1996] 2 Lloyd's Rep 319 at 330-331.

8 *Sargant & Sons v East Asiatic Co Ltd* (1915) 85 LJB 277; cf *Marshall, Knott and Barker Ltd v Arcos Ltd* (1933) 44 Ll L Rep 384 (where the ship was too large to get into the dock). See also *Eurico SpA v Philipp Bros, The Epaphus* [1986] 2 Lloyd's Rep 387; affd [1987] 2 Lloyd's Rep 215, CA.

9 *Ashmore & Son v CS Cox & Co* [1899] 1 QB 436 at 441; *Ranson Ltd v Manufacture d'Engrais* (1922) 13 Ll L Rep 205. It remains to be seen whether the restriction imposed by the Sale of Goods Act 1979 s 15A (as added) (see PARAS 63-64 ante) on the buyer's right to terminate the contract of sale for a breach of condition which is so slight as to make rejection unreasonable alters the position regarding terms in the contract of sale regarding the destination and the route of the ship engaged by the seller. As these terms are likely to be reflected in the documents tendered by the seller, it is suggested that they should be interpreted as conditions of the contract, breach of which gives the buyer the option to treat the contract as repudiated, even if so slight as to make rejection unreasonable: see *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398 at 402-403.

UPDATE

330-331 Meaning of 'shipment', Time and route of shipment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/332. Requirements for acceptable tender of a bill of lading.

332. Requirements for acceptable tender of a bill of lading.

The duty of the seller to procure a contract of carriage is satisfied if he procures a contract of carriage which conforms with any stipulations agreed in the contract of sale¹ and which is otherwise reasonable and acceptable in the trade at the time when it is made². This duty has been examined in the courts in the context of a number of requirements listed in heads (1) to (8) below:

301 (1) in the absence of a stipulation or custom in the particular trade³ to the contrary, the contract of carriage must be one which will give the holder a right of action⁴ against the carrier⁵ in respect of the goods from the time of shipment until arrival at destination⁶;

302 (2) the document tendered must be a bill of lading in transferable form, that is to say in such a form as to allow the buyer to transfer the right to claim delivery of the goods from the carrier through transfer of the bill⁷;

303 (3) the bill of lading must cover only the goods which are the subject matter of the contract of sale⁸;

304 (4) the bill of lading must be a clean bill, that is to say it must be free from any annotation or clause qualifying the statement 'shipped in good order and condition'⁹;

305 (5) whether or not a bill of lading stating that the goods have been 'received for shipment' and issued before the goods are placed on board by the carrier who is to

- carry them is a bill of lading within the requirements of a cif contract is still a matter of some doubt¹⁰;
- 306 (6) whether or not a bill of lading stating that the carrier can deviate from the voyage stipulated for in the contract of carriage is also still doubtful¹¹;
- 307 (7) whether or not a clause in the bill of lading stating that the goods will or may be transhipped is valid will depend on the terms of the contract of carriage and arguably on whether or not the bill of lading imposes liability on the contractual carrier from the port of loading to the port of discharge under the contract of carriage¹²;
- 308 (8) a bill of lading stating that freight has yet to be paid at destination¹³ constitutes good tender so long as the contract of sale does not prohibit tender of such a document and so long as the sum of the freight payable at destination is deducted from the commercial invoice¹⁴.

The bill of lading must not only comply with the requirements set out above but it must also accurately evidence the contract of carriage¹⁵. The bill of lading must be procured on shipment, that is to say as soon as is reasonably possible after the goods have been delivered to the carrier for carriage to the agreed destination¹⁶.

No other document, for example a delivery order¹⁷, a non-transferable bill of lading¹⁸ or a sea waybill¹⁹ or a ship's release²⁰, will, in the absence of special provision or custom²¹, amount to a good tender under the contract.

1 See eg *Bergerco USA v Vegoil Ltd* [1984] 1 Lloyd's Rep 440 at 443 (cited in PARA 331 note 2 ante). See also *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398 at 400-402. For examples of special terms agreed between the parties regarding the documents to be tendered see PARA 328 ante.

2 *Finska Cellulosaforeningen v Westfield Paper Co Ltd* [1940] 4 All ER 473 at 479; *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL.

3 *Arnold Otto Meyer NV v Aune* [1939] 3 All ER 168; cf *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 at 389 per McNair J. As to the general requirements for the proof of custom see *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 at 444, PC.

4 The seller's duty is not so extensive as to guarantee the buyer success in a cargo claim against the carrier; it is simply to procure for the buyer a document which provides the buyer with a contractual link through which he can bring a cargo claim against the carrier on terms of carriage reasonable in the trade: see *M Golodetz & Co Inc v Czarnikow-Rionda Inc, The Galatia* [1979] 2 All ER 726 at 739-740, [1980] 1 WLR 495 at 510-511 per Donaldson J; affd [1980] 1 All ER 501, [1980] 1 WLR 495 at 516, CA. In practice, it is suggested that this now means that the seller must tender to the buyer a document which provides the buyer with a contract of carriage through the operation of the Carriage of Goods by Sea Act 1924 s 2: see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 338 et seq, 364-365.

5 There appears to be no authority as to whether the seller is, in the absence of any express term to this effect in the contract of sale, under a duty to tender a bill which clearly identifies the carrier, although it is clear that the buyer may well have an interest in the identity of the carrier on whom the care of goods at buyer's risk depends. Whom the buyer can sue on the contract of carriage contained in the bill of lading tendered by the seller will depend largely on the manner in which the bill of lading is signed, on its terms and, on occasion, on the terms of the charterparty: see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 213, 356; and *Scrutton on Charterparties and Bills of Lading* (20th Edn, 1996) art 41. In practice, given the requirements of the Uniform Customs and Practice for Documentary Credits (1993 Revision; ICC Publication No 500) as to the identification of the carrier and the tenor of the signature on the face of a bill of lading (see art 23), documents are more likely now than they may have been in the past to make it clear who the buyer's carrier is.

6 *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36, HL; *Colin and Shields v W Weddel & Co Ltd* [1952] 2 All ER 337, CA; *SIAT di dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep 53, CA (holding that the seller's duty to tender a bill of lading, evidencing on its face such a contract, is a condition of a cif contract). See also *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398 at 402-403. But see PARA 328 ante; and Incoterms 2000 which allow the seller to tender a non-negotiable sea waybill.

7 *Soproma SpA v Marine & Animal By-Products Corp* [1966] 1 Lloyd's Rep 367.

8 *Re Keighley, Maxted & Co and Bryan, Durant & Co (No 2)* (1894) 70 LT 155, CA. See also *Imperial Ottoman Bank v Cowan* (1874) 31 LT 336, Ex Ch. In the absence of an express term in the contract of sale stipulating for the tender of more than one bill of lading, it is suggested that the seller is both entitled and bound to tender one bill of lading, at any rate when the goods sold are all of the same type. A concession to this effect was approved of by the court in *Mendala III Transport v Total Transport Corpn, Total International Ltd and Addax Ltd, The Wilomi Tanana* [1993] 2 Lloyd's Rep 41 at 45. Neither party to the contract of sale is, therefore, bound or entitled to tender or accept tender of multiple bills of lading where it would suit his commercial purposes, eg when the dates on bills of lading have an impact on the calculation of the price: see PARA 325 note 4 ante.

9 *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1980] 1 All ER 501, [1980] 1 WLR 495 at 516, CA. See also CARRIAGE AND CARRIERS vol 7 (2008) PARAS 318-319.

10 See PARA 333 post.

11 See PARA 334 post.

12 See PARA 335 post.

13 Such bills of lading are known as 'freight collect' bills of lading and a cif seller may find himself constrained to tender such a bill where he purchases goods afloat to satisfy a sale contract concluded before such purchase in circumstances where he receives from his seller a 'freight collect' bill of lading. As to the practice of tendering 'freight collect' bills of lading see *Ireland v Livingston* (1872) LR 5 HL 395 at 406 per Blackburn J; *Norsk Bjergningskompagni A/S v Pantanassa (Owners), The Pantanassa* [1970] P 187 at 194, [1970] 1 All ER 848 at 855 per Brandon J.

14 See *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 309, [1949] 1 All ER 269 at 275, HL, per Lord Porter.

15 The buyer is not obliged to investigate, or to accept assurances about, the contract of carriage outside the bill of lading. Nor is he obliged to accept a bill varied after issue, or, it seems, one altered before issue other than to correct a minor clerical error: see *SIAT di dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep 53, CA. See also *Re Salomon & Co and Naudszus* (1899) 81 LT 325, 8 Asp MLC 599. As to the effect of the bill of lading on the passing of the property see PARAS 368-369 post. As to bills of lading generally see PARA 366 et seq post; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 313 et seq.

16 *Landauer & Co v Craven and Speeding Bros* [1912] 2 KB 94 at 105 per Scrutton J; *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 47, HL; *Foreman and Ellams Ltd v Blackburn* [1928] 2 KB 60. See also *Scrutton on Charterparties and Bills of Lading* (20th Edn, 1996) art 189.

17 *Re Denbigh, Cowan & Co and R Atcherley & Co* (1921) 90 LJBK 836, CA. While a ship's delivery order would give the buyer contractual rights of suit against the carrier through the operation of the Carriage of Goods by Sea Act 1924 s 2(1)(c) (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 365), it would not normally be transferable in the sense of affording the buyer the power of transferring that right to an on-buyer through mere indorsement, the document not typically being made out 'to order'. On occasion, however, a ship's delivery order is made out 'to order': see the orders issued in *Sterns Ltd v Vickers Ltd* [1923] 1 KB 78 at 79, CA; *Inglis v Robertson and Baxter* [1898] AC 616 at 620, HL; and *Cremer v General Carriers SA* [1973] 2 Lloyd's Rep 366 at 369. In *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146, Kerr J even contemplated, at 155, a ship's delivery order made out 'to bearer'. It is suggested that, where a ship's delivery order is made out 'to order', an on-buyer named on the document would have a contractual right as against the carrier to the delivery of the goods and it would consequently be difficult to justify rejection by the first buyer or by an on-buyer on the ground that the document was non-transferable. Where, however, such a ship's delivery order is indorsed in blank, it is suggested that rejection is justifiable, there being no person 'identified in the document' as entitled to delivery of the goods such as to bring the document within the definition of 'ship's delivery order' in the Carriage of Goods by Sea Act 1924 s 1(4)(b) (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 365).

18 See *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 at 60, PC; *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC.

19 See the Carriage of Goods by Sea Act 1924 ss 1(3), 2(1)(b); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 364. Although such documents give the party named as consignee rights of suit against the carrier, the consignee cannot pass such rights on through indorsement of the document. See also note 7 supra.

20 *Heilbut, Symons & Co Ltd v Harvey, Christie-Miller & Co* (1922) 12 Ll L Rep 455.

21 See PARA 328 ante; and see eg *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 309, [1949] 1 All ER 269 at 274-275, HL, per Lord Porter (delivery order for bill of lading). See also *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1

Lloyd's Rep 146 (meaning of ship's delivery order). Cf *Arnold Otto Meyer NV v Aune* [1939] 3 All ER 168; *Colin and Shields v W Weddel & Co Ltd* [1952] 2 All ER 337, CA (delivery order allowed, but defective).

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333. 'Received for shipment' bills of lading.

A 'received for shipment' bill of lading is one which states that the goods have been received by the carrier for shipment on board but does not state that the goods have actually been shipped on board¹. It is a matter of some doubt whether such a bill of lading² can validly be tendered by a cif seller. It is clear that such tender is valid if sanctioned by the agreement of the parties or by usage of the particular trade³. It is equally clear that, where the contract expressly prohibits the tender of such a document, the seller is bound to tender a bill of lading stating that the goods have been shipped on board⁴. In cases where the contract of sale is silent as to the tender of 'received for shipment' bills, it is not yet clear whether the seller is entitled to tender such a document, given that, save for a trade custom to the contrary, the seller is bound to tender a bill of lading in transferable form⁵ and given that a 'received for shipment' bill of lading has been held not to be transferable⁶. It is suggested that, given the common currency of 'received for shipment' bills of lading in international trade, and, given that such bills of lading are now arguably recognised as transferring to the buyer rights of suit against the carrier under a contract of carriage⁷, which rights must presumably include the right to demand delivery of the goods at destination, such bills of lading constitute good tender under cif contracts which do not prohibit such tender, at any rate where the goods were actually shipped by the date or within the period agreed in the contract⁸.

1 Such bills of lading are commonly, though not exclusively, used where the goods sold are carried in containers which are placed in the custody of the carrier at an inland point rather than at the loading port.

2 Where a bill of lading states that the goods were received for shipment on the date of issue of the bill, but also states the date on which the goods were actually shipped, such a bill becomes a 'shipped' bill of lading, in which case there is no doubt as to the validity of its tender under a cif contract. A cif seller who is also the shipper of the goods in circumstances where the Carriage of Goods by Sea Act 1971 applies is entitled to demand the issue of a bill stating the date of shipment: see the Hague-Visby Rules art III r 7; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 382. For the meaning of 'the Hague-Visby Rules' see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 206, 367 et seq.

3 *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 312, [1949] 1 All ER 269 at 276, HL, per Lord Porter.

4 *Yelo v SM Machado & Co Ltd* [1952] 1 Lloyd's Rep 183 (where in an fob contract stipulating for payment of the price through a letter of credit requiring the tender of a 'shipped' bill of lading, tender of a 'received for shipment' bill of lading was held inadequate).

5 See PARA 332 ante.

6 The judicial history of the proposition in the text is not free from doubt. In support of the proposition see *Diamond Alkali Export Corp'n v FI Bourgeois* [1921] 3 KB 443 (where McCardie J based his view on *Lickbarrow v Mason* a case which went through long and protracted litigation: (1787) 2 Term Rep 63; revsd (1790) 1 H Bl 357, Ex Ch; restored (1793) 2 H Bl 211, HL; second trial reported at (1794) 5 Term Rep 683; and see the note to *Newsom v Thornton* (1805) 6 East 17, 20n for the opinion of Buller J advising the House of Lords, all the judgments in the case being reproduced at 1 Smith's Leading Cases 703). Judicial doubts survive in more modern judgments: see *MB Pyramid Sound NV v Briese Schifffahrts GmbH & Co KGMS Sina and Latvian Shipping Association Ltd, The Ines* [1993] 2 Lloyd's Rep 492 at 493. See, however, *The Marlborough Hill v Alex Cowan & Sons Ltd* [1921] 1 AC 444, PC, particularly at 451, where Lord Phillimore expressly acknowledges, and later refutes, counsel's submission that a 'received for shipment' bill of lading lies outside the Bills of Lading Act 1855 (repealed by the Carriage of Goods by Sea Act 1924 s 6(2)): see *Weis & Co v Produce Brokers' Co* (1921) 7 Ll L

Rep 211 at 212, CA (where Bankes LJ clearly read Lord Phillimore's words in this sense); but for a different reading of Lord Phillimore's words see *Diamond Alkali Export Corp'n v FI Bourgeois* supra at 452 per McCardie J. Whatever Lord Phillimore meant, his words were clearly obiter: see *Diamond Alkali Export Corp'n v FI Bourgeois* supra at 452 per McCardie J. See also *United Baltic Corp'n Ltd v Burgett and Newsam* (1921) 8 LI L Rep 190, CA; *Hugh Mack & Co Ltd v Burns & Laird Lines Ltd* (1944) 77 LI L Rep 377 at 383, NI CA (where Andrews LCJ suggested that 'received for shipment' bills of lading were 'similar document[s] of title' for the purposes of the Carriage of Goods by Sea Act 1924 (repealed by the Carriage of Goods by Sea Act 1971 s 6(3))). See also *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 47, HL, per Lord Sumner; *Ishag v Allied Bank International, Fuhs and Kotalimbora* [1981] 1 Lloyd's Rep 92 (where Lloyd J held that a bill of lading with the word 'shipped' deleted and a typed clause confirming that the goods were at the disposal of the ship's agents and intended to be shipped on a particular vessel was a document of title within 'the custom as found proved in *The Marlborough Hill*').

7 See the Carriage of Goods by Sea Act 1992 s 1(2)(b), which states that references in the 1992 Act to bills of lading are to be taken to include references to a received for shipment bill of lading; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 338. Section 1(2)(b) is, however, subject to the exclusion of documents which are incapable of transfer by indorsement: see s 1(2)(a); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 338. A strict construction of s 1(2) would seem to exclude 'received for shipment' bills of lading from the ambit of the 1992 Act, but would also frustrate the stated purpose of s 1(2)(b): see *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com no 196) PARA 2.48.

8 *Suzuki & Co v Burgett and Newsam* (1922) 10 LI L Rep 223, CA.

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334. Bills of lading giving the carrier a liberty to deviate.

Bills of lading commonly seek to give the carrier a liberty to deviate from the voyage agreed in the contract of carriage¹. Where a cif buyer with rights of suit against the carrier transferred to him by the seller² suffers loss as a result of the deviation by the carrier from the voyage agreed in the contract of carriage between the buyer and the carrier, it is clear that the buyer may pursue any remedies against the carrier afforded by that contract rather than against the seller under the contract of sale³.

It is doubtful, however, whether a buyer can reject a bill of lading against the seller simply on the ground that it seeks to give the carrier a liberty to deviate. Where the contract of sale stipulates that shipment must be direct, it would seem that a buyer can reject a bill of lading containing a liberty to deviate clause⁴. Where the contract of sale fails to stipulate as much, or where it expressly envisages that shipment may be direct or indirect, it is clear that the buyer can reject a bill of lading granting the carrier a liberty to deviate where the extent of the liberty is uncertain because the clause itself is not printed on the bill⁵. In similar circumstances, where the extent of the liberty is certain and wide, it has been said that the buyer can reject the bill of lading⁶. Given the currency of wide liberty to deviate clauses in bills of lading and given the protection afforded to the buyer by the rules regulating the contract for the carriage of goods by sea⁷, it would seem, however, equally arguable that a buyer could not reject a bill of lading in such circumstances⁸.

1 See generally CARRIAGE AND CARRIERS vol 7 (2008) PARA 250.

2 Ie through the operation of the Carriage of Goods by Sea Act 1992: see PARA 332 ante; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 338.

3 See *Burstall & Co v Grimsdale & Sons* (1906) 11 Com Cas 280 at 291.

4 See *Bergerco USA v Vegoil Ltd* [1984] 1 Lloyd's Rep 440 (where Hobhouse J held that the buyer was entitled to reject goods shipped on a vessel scheduled to call at several intermediate ports where the parties

had agreed in the contract of sale that shipment would be direct to the destination agreed in that contract). It would take only a short step from this judgment to the proposition that the buyer could reject documents which depart similarly from the route agreed in the contract of sale.

5 See *Spillers Ltd v JW Mitchell Ltd* (1929) 33 Ll L Rep 89.

6 See *Shipton, Anderson & Co v John Weston & Co* (1922) 10 Ll L Rep 762 at 763 per Greer J.

7 See *Glynn v Margetson & Co* [1893] AC 351, HL; *Connolly Shaw Ltd v A/S Det Nordenfjeldske D/S* (1934) 49 Ll L Rep 183; the Hague-Visby Rules art IV r 4; and CARRIAGE AND CARRIERS vol 7 (2008) PARAS 250, 378. For the meaning of 'the Hague-Visby Rules' see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 206, 367 et seq.

8 See *Burstall & Co v Grimsdale & Sons* (1906) 11 Com Cas 280 at 291 per Kennedy J (not cited in *Shipton, Anderson & Co v John Weston & Co* (1922) 10 Ll L Rep 762).

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335. Bill of lading and transhipment.

Where the contract of sale prohibits transhipment of the goods, it appears clear that, given the expressed intention of the parties to the contract, the tender by a cif seller of a bill of lading stating that the goods will be transhipped, or stating that the carrier has a liberty to tranship the goods, will constitute a bad tender. Where, however, the contract of sale expressly allows transhipment, the tender of such a bill of lading constitutes good tender, at any rate where the bill of lading does not seek to exclude the carrier's responsibility after the goods are transhipped. Where the contract of sale is silent as to whether or not transhipment is allowed, it is clear that the tender of a bill of lading stating that the goods will¹ be transhipped constitutes good tender where the carrier does not seek to exclude his responsibility after the goods are transhipped. In the absence of contrary agreement in the contract of sale, it would appear that tender of a bill of lading stating that the goods will or may be transhipped is also valid where the carrier excludes his liability after transhipment, at any rate where the carrier has not exercised his liberty at the time of tender².

1 Where the bill of lading simply gives a liberty to tranship to a carrier who does not disclaim responsibility for the goods after transhipment, it would seem that this constitutes bad tender: see *LM Fischel & Co v Knowles Spencer* (1922) 12 Ll L Rep 36 (a case best justified by reference to a custom in a particular trade). Failing a custom in a particular trade, it would be difficult to see why a buyer would be justified in rejecting such a bill of lading in these circumstances.

2 *Soproma SpA v Marine & Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 at 388-389. It is difficult to accept that the validity of the tender depends on whether or not the carrier has exercised his liberty at the time of tender, given that at the time of tender by the seller, the buyer is unlikely to know or have reasonable means of knowing whether the carrier has exercised his liberty to tranship. For a contrary view see *Holland Colombo Trading Society Ltd v Alawdeen* [1954] 2 Lloyd's Rep 45 at 53, PC (a case relating to a contract of sale on arrival terms, ie on terms whereby the seller guaranteed the arrival of the goods at destination).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/336. Terms of insurance policy.

336. Terms of insurance policy.

The insurance policy required to be tendered by the seller under a cif contract is one which complies with any terms regarding the policy agreed in the contract of sale¹ and which is otherwise current in the particular trade². The question whether the policy tendered fulfils this requirement is one of fact. In particular, it need not necessarily cover every risk included within the form of the policy scheduled to the Marine Insurance Act 1906³. The goods must be covered by the policy to an amount equal to their reasonable value on shipment⁴. The policy must be procured from responsible insurers and must be a valid policy⁵. It must cover only the goods sold⁶, and must cover them for the whole of the transit⁷. An English buyer is not entitled to demand an English policy from a foreign seller unless the contract so provides⁸.

1 Thus, where the contract of sale stipulated for an 'all-risks' policy, it was not satisfied by one containing the 'fc and s' clause, ie warranted free of capture, seizure and detention and their consequences: *Yuill & Co v Scott-Robson* [1907] 1 KB 685; affd [1908] 1 KB 270, CA. See also eg *Reinhart & Co v Joshua Hoyle & Sons Ltd* [1961] 1 Lloyd's Rep 346.

2 *Borthwick v Bank of New Zealand* (1900) 6 Com Cas 1; *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 214 at 220 (on appeal [1911] 1 KB 934 at 956, CA); *Vincentelli & Co v John Rowlett & Co* (1911) 16 Com Cas 310; *C Groom Ltd v Barber* [1915] 1 KB 316 at 324. See also *Oulu Osakayetio v Arnold Laver & Co* [1940] 1 KB 750, [1940] 2 All ER 243, CA; and PARA 325 note 4 ante. As to payment of compensation by the Secretary of State in respect of war risks where commercial insurance is not obtainable see INSURANCE vol 25 (2003 Reissue) PARA 816.

3 As to this statutory form of marine insurance policy, a new form of which was adopted in 1982, used in connection with the Institute Cargo Clauses issued by the Institute of London Underwriters see INSURANCE vol 25 (2003 Reissue) PARA 348.

4 *Johnson v Taylor Bros & Co Ltd* [1920] AC 144 at 149, HL. The insurance need not cover the freight (*Tamvaco v Lucas* (1862) 31 LJQB 296), nor the enhanced value of the goods at their destination. What is their reasonable value is a question of fact: *Tamvaco v Lucas* supra. It is common to make special provision in the contract for insurance at the enhanced price, or the buyer may cover the goods by a floating policy, but under a cif contract he is not entitled, in the absence of express stipulation, to receive notice from the seller to enable him to insure the goods during their transit: *Law and Bonar Ltd v British American Tobacco Co Ltd* [1916] 2 KB 605. Cf the Sale of Goods Act 1979 s 32(3) (see PARA 352 post); *Wimble Sons & Co v Rosenberg & Sons* [1913] 1 KB 279; affd [1913] 3 KB 743, CA (fob contract).

5 *Cantiere Meccanico Brindisino v Constant* (1912) 17 Com Cas 182 at 192 per Scrutton J; affd 17 Com Cas 332, CA. Thus, if the policy is an honour policy (see INSURANCE vol 25 (2003 Reissue) PARA 397) or avoided by the insurers, the buyer need not accept it: *Strass v Spillers and Bakers Ltd* [1911] 2 KB 759 at 768, 773.

6 *Hickox v Adams* (1876) 34 LT 404, CA.

7 *Landauer & Co v Craven and Speeding Bros* [1912] 2 KB 94 at 105 per Scrutton J; *Lindon Tricotagefabrik v White and Meacham* [1975] 1 Lloyd's Rep 384, CA (contract 'cif customer's warehouse' in Ealing).

8 *Malmberg v HJ Evans & Co* (1924) 29 Com Cas 235, the question being left open on appeal (see 30 Com Cas 107 at 115-116, CA). See also *AC Harper & Co Ltd v Mackechnie & Co* [1925] 2 KB 423.

UPDATE

336 Terms of insurance policy

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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337. Other insurance documents.

Unless there is provision in the contract or, probably¹, a custom of the particular trade to the contrary², nothing short of an actual insurance policy is a good tender under a cif contract³. For example, no broker's cover note or certificate of insurance or other document which does not include all the terms of the usual contract of insurance is good tender under the ordinary cif contract⁴. If, as is often the case, the shipper makes use of a floating policy of insurance⁵ or an open cover instead of a policy to insure the particular goods, it is doubtful whether, in the absence of provision in the contract or, probably, custom in the particular trade, the tender under such a policy or open cover of a certificate containing all the terms of the usual contract of insurance is an effective mode of implementing the contract of sale. Such a certificate might be regarded as equivalent to a marine policy⁶, but it would seem to be essential that the certificate should be one on which liability can be legally established against the insurer in case of a loss within the insurance. Under English law a contract of marine insurance is inadmissible in evidence unless embodied in a marine policy⁷. A marine policy may be assigned by indorsement or in other customary manner⁸.

1 See *Diamond Alkali Export Corp v Bourgeois* [1921] 3 KB 443 at 458; *Malmberg v HJ Evans & Co* (1924) 30 Com Cas 107 at 116.

2 See *Burstall & Co v Grimsdale* (1906) 11 Com Cas 280 (where a certificate of insurance was held to be sufficient). See also *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 309, [1949] 3 All ER 269 at 274-275, HL, per Lord Porter; *John Martin of London Ltd v AE Taylor & Co Ltd* [1953] 2 Lloyd's Rep 589. If a certificate of insurance is accepted by the buyer, there is an implied warranty by the seller that the policy will be issued: *AC Harper & Co Ltd v Mackechnie & Co* [1925] 2 KB 423.

3 *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 KB 198; *Wilson, Holgate & Co Ltd v Belgian Grain and Produce Co Ltd* [1920] 2 KB 1; *Diamond Alkali Export Corp v Bourgeois* [1921] 3 KB 443; *Donald H Scott & Co v Barclays Bank Ltd* [1923] 2 KB 1, CA. See also *Malmberg v HJ Evans & Co* (1924) 30 Com Cas 107 at 113, CA (propriety of tendering a policy incorporating conditions or rules in some other document).

4 *Wilson, Holgate & Co Ltd v Belgian Grain and Produce Co Ltd* [1920] 2 KB 1 (broker's note); *Diamond Alkali Export Corp v Bourgeois* [1921] 3 KB 443 (certificate of insurance); *Promos SA v European Grain and Shipping Ltd* [1979] 1 Lloyd's Rep 375 (brokers' cover note). See also the cases cited in note 2 supra.

5 As to floating policies see INSURANCE vol 25 (2003 Reissue) PARAS 222, 290-291.

6 See the references to 'American certificates' in *Wilson, Holgate & Co Ltd v Belgian Grain and Produce Co Ltd* [1920] 2 KB 1 at 7 per Bailhache J; and *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1 at 11, CA, per Bankes LJ.

7 See the Marine Insurance Act 1906 s 22; and INSURANCE vol 25 (2003 Reissue) PARAS 220, 270.

8 See *ibid* s 50(3); and INSURANCE vol 25 (2003 Reissue) PARA 389.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/338. Form of invoice.

338. Form of invoice.

The invoice is the written account of the particulars of goods delivered to the buyer with the value or prices or charges annexed¹. Under a cif contract the invoice must be made out debiting the buyer with the agreed price and giving him credit for the amount of any freight which he may have to pay to the carrier on actual delivery². A provisional invoice, if sent, is no

more than an intimation of the way in which the seller intends to perform his contract, and may merely be an intimation of the way in which he is willing, as a concession, to perform³.

1 See Wharton's Law Lexicon (14th Edn) 536.

2 See PARA 332 notes 13-14 ante.

3 *Ross F Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 71, HL, per Lord Wright.

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339. Other documents.

Various other documents, in addition to the three previously mentioned¹, may be required by custom or contract to be tendered to the buyer by the seller. Such documents include export licences, which in a cif contract it is ordinarily the seller's duty to obtain², consular invoices³ and certificates of origin or of inspection, quality or fitness⁴. Whether or not the contract of sale calls for the tender of such certificates with the other documents stipulated, it is very common to find contractual clauses making such certificates final as to their subject matter⁵.

1 The bill of lading, policy of insurance and invoice: see PARAS 332, 336, 338 respectively ante.

2 As to restrictions on export and licences generally see PARA 363 post.

3 For the purpose of assessing customs duties, consular invoices are signed by the consul of the state to which the goods are consigned. They are used in the United States of America and in South American States.

4 See eg *Re Reinhold & Co and Hansloh's Arbitration* (1896) 12 TLR 422, DC (chamber of commerce certificates as to shipment); *Foreman and Ellams Ltd v Blackburn* [1928] 2 KB 60 (freezing certificates for rabbits); *Yelo v SM Machado & Co Ltd* [1952] 1 Lloyd's Rep 183 (phytopathological certificates for fruit); *Mideastra Ltd v Cargo Superintendents (London) Ltd* [1959] 2 Lloyd's Rep 324 (inspection certificates of cargo superintendents); *H Glynn (Covent Garden) Ltd v Wittleder* [1959] 2 Lloyd's Rep 409 (potatoes).

5 See PARA 107 ante; and *Agroexport Entreprise d'Etat pour le Commerce Extérieur v Goorden Import Cy SA NV* [1956] 1 Lloyd's Rep 319; *WN Lindsay & Co Ltd v European Grain and Shipping Agency Ltd* [1963] 1 Lloyd's Rep 437, CA; *Toepfer v Continental Grain Co* [1974] 1 Lloyd's Rep 11, CA; *Kollerich & Cie SA v State Trading Corp'n of India* [1980] 2 Lloyd's Rep 32, CA (where it was held on an fob contract that certificates issued by the agent or sub-contractor of the superintending organisation named in the contract were not binding); *Bunge NV v Compagnie Noga d'Importation et d'Exportation SA, The Bow Cedar* [1980] 2 Lloyd's Rep 601 (where it was held on an fob contract that a certificate was final as to quality but not as to a matter of description affecting the nature of the goods); *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382, [1984] 1 All ER 438, HL (where it was held that the certificate was final as to quality and description in so far as these overlapped); *Ch Daudruy Van Cauwenberghe & Fils SA v Tropical Products Sales SA, Tropical Products Sales SA v Saudi Sabah Palm Oil Corp'n Sdn Bhd* [1986] 1 Lloyd's Rep 535 (where a certificate of weight and quality was held not to refer to the nature of the goods, so that where the goods were wrong in their nature, a claim was not prevented); *Apioil Ltd v Kuwait Petroleum Italia SpA, Apioil Ltd v Sociedade Nacional de Combustíveis de Angola SA* [1995] 1 Lloyd's Rep 124; *Veba Oil Supply and Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832, [2002] 1 All ER 703; *Exxonmobil Sales and Supply Corp'n v Texaco Ltd, The Helene Knutsen* [2003] EWHC 1964 (Comm), [2004] 1 All ER (Comm) 435, [2003] 2 Lloyd's Rep 686 (for an error to be manifest, it was not necessary to imply a term within the contract requiring the seller to have a sample retested by the inspector).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/340. Tender of the documents.

340. Tender of the documents.

It is the duty of the seller to tender the documents to the buyer at or by the time agreed for tender in the contract or, failing such agreement, as soon as possible after he has sent forward the cargo¹.

It would seem that, where the contract is silent as to the place of tender, the place of tender is prima facie the buyer's residence or place of business², but slight evidence of trade usage or of a course of business between the parties would be sufficient to rebut this presumption³. The tender of documents must be made at a reasonable hour⁴.

The documents tendered must be valid and effective at the time of tender⁵. It is, however, immaterial that at the time of the tender of the documents the goods are already lost or damaged in transit, and also immaterial if the seller knows this to be so⁶, as the cif contract contemplates that the risk should pass to the buyer on or as from shipment of the goods and that the buyer will accept that risk and have such rights of recourse as may be afforded against insurers and carriers under the shipping documents called for by the contract⁷.

The contract often specifies in detail the documents to be tendered, and, where this is so, all the documents called for by the contract⁸ must be tendered⁹ in proper form¹⁰. Where, however, the contract is silent, it is sufficient if the seller tenders the bill of lading, insurance policy and invoice; and, where bills of lading are issued in sets of three, the tender of one bill is sufficient in the absence of stipulation to the contrary¹¹. It is an implied term of a cif contract not only that the bill of lading tendered should conform on its face with the contract in the material statements which it contains, but that such statements should in fact be true and accurate¹². The seller's obligations in this respect are additional to and separate from his obligation to ship goods, or acquire afloat goods shipped by others, conforming with the contract¹³. The seller's obligations regarding documentation are, it seems, conditions of the contract¹⁴. An invalid tender which is rejected by the buyer may be withdrawn and another tender substituted which he will be bound to accept¹⁵.

1 *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 at 337, CA; *Landauer & Co v Craven and Speeding Bros* [1912] 2 KB 94 at 105; *Johnson v Taylor Bros & Co Ltd* [1920] AC 144 at 149, 156, HL; *Concordia Trading BV v Richco International Ltd* [1991] 1 Lloyd's Rep 475 (fob sales where the seller's duty promptly to tender documents was treated as commensurate with that of a cif seller). If, as prima facie is permissible, the seller acquires the contractual goods afloat, his duty is presumably to tender the documents as soon as possible thereafter. There is no absolute duty at common law to tender the documents before the vessel's arrival, or before charges are incurred on the goods at their destination: *Sanders Bros v Maclean & Co* supra. The contract may, however, introduce such a duty: see eg *Toepfer v Lenersan-Poortman NV*, *Toepfer v Verheijdens Veervoeder Commissiehandel* [1980] 1 Lloyd's Rep 143, CA; *Cerealmangimi SpA v Toepfer, The Eurometal* [1981] 3 All ER 533.

2 *Johnson v Taylor Bros & Co Ltd* [1920] AC 144 at 156, HL, per Lord Atkinson. See also *Stein, Forbes & Co v County Tailoring Co* (1916) 86 LJB 448; *Luis de Ridder Ltd v André & Cie SA (Lausanne)* [1941] 1 All ER 380.

3 Thus, where payment is to be made by a banker under a documentary letter of credit (see PARA 375 et seq post), the place of tender will be the banker's place of business.

4 See the Sale of Goods Act 1979 s 29(5); and PARA 168 ante.

5 *Cantieré Meccanico Brindisino v Constant* (1912) 17 Com Cas 332, CA (void policy of insurance); *Arnhold Karberg & Co v Blythe, Green, Jourdain & Co* [1916] 1 KB 495, CA (where a contract of affreightment was held to be void owing to the outbreak of war); *Hindley & Co Ltd v East Indian Produce Co Ltd* [1973] 2 Lloyd's Rep 515 (where a bill of lading was held not to be valid and effective because no goods were shipped at all). Cf *Re Weis & Co Ltd and Crédit Colonial et Commercial, Antwerp* [1916] 1 KB 346; *Baxter, Fell & Co Ltd v Galbraith and Grant Ltd* (1941) 70 Ll L Rep 142. See also *Tradax Export SA v André & Cie SA* [1977] 2 Lloyd's Rep 484 (where the burden of proving that the tender of notice of appropriation was within time was held to be on the seller).

6 *C Groom Ltd v Barber* [1915] 1 KB 316 at 324 per Atkin J; *Re Weis & Co Ltd and Credit Colonial et Commercial, Antwerp* [1916] 1 KB 346; *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 KB 198. Cf *Re an Arbitration between Olympia Oil and Cake Co Ltd and Produce Brokers Co Ltd* [1915] 1 KB 233 (not a cif contract) (revsd on proof of special custom sub nom *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314, HL); and as to the further proceedings see *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 2 KB 296, DC (custom of the trade held not to be unreasonable) (affd [1917] 1 KB 320, HL). It has been suggested that, in the case of goods lost, this principle should be limited to circumstances where the goods had been appropriated to the contract, so as to commit the seller to delivery of those particular goods, prior to the loss: see *Benjamin's Sale of Goods* (6th Edn, 2003) PARAS 19-079, 19-080, 19-109; but, contrary to this suggestion see also JD Feltham 'The Appropriation to a CIF Contract of Goods Lost or Damaged at Sea' (1975) JBL 273; and Debattista *The Sale of Goods Carried by Sea* (2nd Edn, 1998). No such suggestion is found in *Manbre Saccharine Co Ltd v Corn Products Co Ltd* supra, where the formulation of the law by McCardie J at 202-204 appears inconsistent with it and there also appears, on the facts, to have been no such appropriation (see especially at 199). The suggestion is not made in relation to deterioration: see *Mash and Murrell Ltd v Joseph I Emanuel Ltd* [1962] 1 All ER 77n, [1962] 1 WLR 16n, CA (where it was assumed that the risk of deterioration in transit even before the c & f contract for sale (see PARA 350 post) was made would nonetheless be on the buyer. If, at the time of contracting, goods had to a seller's knowledge already suffered loss or damage in transit but he nonetheless intended to seek, when the time came for performance, to tender under the contract the shipping documents relating to those goods, the buyer might well have remedies in misrepresentation.

7 The buyer will be able to recover under the insurance if the loss or damage has occurred by a peril agreed in the sale contract to be covered by insurance and under the contract of carriage if the loss or damage has occurred by breach of contract by the carrier by sea. Even if neither avenue of recourse is open, on the facts, the buyer must still accept the documents and the risk: see eg the cases cited in note 6 supra; and also *PT Putrabali Adyamulia v Enrico Webb James Snc, The Intan 6 V.360A SN* [2003] 2 Lloyd's Rep 700, [2003] All ER (D) 24 (Jul).

8 It would seem that, where a bill of lading seeks to incorporate terms from a charterparty, the seller is not bound, save for agreement in the contract to the contrary, to tender a copy of the charterparty: see *Finska Cellulosaforeningen v Westfield Paper Co Ltd* [1940] 4 All ER 473; cf *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep 470 at 492 per Donaldson J; affd [1980] 1 Lloyd's Rep 53 at 63, CA, per Megaw LJ.

9 *Hickox v Adams* (1876) 34 LT 404, CA; *Re Denbigh, Cowan & Co and Atcherley & Co* (1921) 90 LJKB 836, CA; *Donald H Scott & Co v Barclays Bank Ltd* [1923] 2 KB 1, CA. See also PARA 339 ante.

10 *Re Reinhold & Co and Hansloh's Arbitration* (1896) 12 TLR 422, DC; *Re Salomon & Co and Naudszus* (1899) 81 LT 325, 8 Asp MLC 599; *Re Goodbody & Co and Balfour, Williamson & Co* (1899) 82 LT 484, CA; *Aure v Cauwenberghe & Fils* [1938] 2 All ER 300, CA (invalid declaration); *Congimex Companhia Geral de Comercio Importadora e Exportadora SARL v Tradax Export SA* [1981] 2 Lloyd's Rep 687 (affd [1983] 1 Lloyd's Rep 250, CA); *Ceval International Ltd v Cefetra BV, Cefetra BV v Soules CAF* [1996] 1 Lloyd's Rep 464, CA. As to particular documents see also the cases cited in note 5 supra.

11 *Sanders Bros v Maclean* (1883) 11 QBD 327, CA. See also *Cederberg v Borries, Craig & Co* (1885) 2 TLR 201 (meaning of 'all shipping documents'); *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 214 at 220 per Hamilton J (on appeal [1911] 1 KB 934, CA; sub nom *E Clemens Horst & Co v Biddell Bros* [1912] AC 18, HL); *Finska Cellulosaforeningen v Westfield Paper Co Ltd* [1940] 4 All ER 473. See further PARA 366 post; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 313 et seq.

12 *James Finlay & Co Ltd v Kwik Hoo Tong Handel Maatschappij NV* [1929] 1 KB 400, CA; *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779; *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53, CA; *Hindley & Co Ltd v East Indian Produce Co Ltd* [1973] 2 Lloyd's Rep 515 (where the court refused to draw any distinction between sellers who made or procured the shipment and sellers who were merely intermediate parties in a string of sales). See also *Procter & Gamble Philippine Manufacturing Corp v Kurt A Becher GmbH & Co KG* [1988] 2 Lloyd's Rep 21, CA. As to the separate right to reject arising on breach of these obligations see further PARA 347 note 2 post.

13 See the cases cited in note 12 supra.

14 *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44 at 70, [1975] 3 All ER 739 at 755, CA, per Roskill LJ; *SIAT di dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep 53 at 62-63, CA; *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382, [1984] 1 All ER 438, HL; *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398 at 402-403. It is submitted that it is unlikely that the restriction imposed by the Sale of Goods Act 1979 s 15A (as added) (see PARAS 63-64 ante) on the buyer's right to terminate the contract of sale for a breach of condition which is so slight as to make rejection unreasonable will alter the position regarding terms in the contract of sale regarding the tender of documents.

15 *Borrowman, Phillips & Co v Free and Hollis* (1878) 4 QBD 500, CA; *Hindley & Co Ltd v General Fibre Co Ltd* [1940] 2 KB 517; *Waren Import Gesellschaft Krohn & Co v Alfred C Toepfer, The Vladimir Ilich* [1975] 1 Lloyd's Rep 322; *Getreide Import Gesellschaft mbH v Itoh & Co (America) Inc* [1979] 1 Lloyd's Rep 592; *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA, The Playa Larga and The Marble Islands* [1983] 2 Lloyd's Rep 171 at 186, CA; *Hyundai Merchant Marine Co Ltd v Karander Maritime Inc, The Niizuru* [1996] 2 Lloyd's Rep 66 at 70. Sed quare where the incorrect tender of documents is construed as a repudiation of the contract: see PARA 198 ante. Cf *Kleinjan and Holst NV Rotterdam v Bremer Handelsgesellschaft mbH Hamburg* [1972] 2 Lloyd's Rep 11 (where it was held that, once valid notice of appropriation had been given, the documents had to conform with that notice). Where the tender is made by a bank or 'buyer of exchange' to whom the seller has negotiated the bill of exchange drawn on the buyer, it is made by the bank or 'buyer of exchange' as agent for the seller, but the bank or 'buyer of exchange' tendering the documents does not warrant their validity so as to incur liability to the buyer in the event of the documents being invalid: see *The Prinz Adalbert* [1917] AC 586 at 589, PC, per Lord Sumner; *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623, CA. See also PARA 327 ante.

UPDATE

340 Tender of the documents

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/341. Price.

341. Price.

The price payable is that agreed on by the contract of sale. Where duties are payable on the goods, export duties, being part of the expenses of shipment, fall on the seller, but import duties are payable by the buyer in the absence of provision to the contrary and, if the seller is obliged to pay them, he can recover the amount from the buyer¹.

1 *American Commerce Co Ltd v Frederick Boehm Ltd* (1919) 35 TLR 224 (a case arising under the Finance Act 1901 s 10(1) (as originally enacted): see PARA 59 ante). As to export licences see PARA 363 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/342. Time of payment.

342. Time of payment.

In a cif contract, where there is no provision to the contrary¹, the buyer's obligation is to pay the price against tender of the documents². The term 'net cash' is equivalent to 'net cash against documents' and does not postpone the liability of the buyer to pay for the goods³. Payment must be made within a reasonable time of the tender of the documents⁴. What is a reasonable time is a question of fact⁵.

1 Contrary provision is not uncommon: see eg *Toepfer v Lenersan-Poortman NV, Toepfer v Verheijdens Veervoeder Commissiehandel* [1980] 1 Lloyd's Rep 143, CA (where payment was to be 'net cash against documents ... on arrival of the vessel at port of discharge but not later than 20 days after date of bill of lading';

and it was held that the sellers' obligation to tender the documents in time for the buyers to take them up and pay for them on the prescribed date was a condition of the contract); *Cerealmangini SpA v Toepfer, The Eurometal* [1981] 3 All ER 533, [1981] 1 Lloyd's Rep 337; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19, [1981] 2 Lloyd's Rep 695; *Enichem Anic SpA v Ampelos Shipping Co Ltd, The Delfini* [1990] 1 Lloyd's Rep 252, CA (where the contract contained an agreement providing for payment against a letter of indemnity should the shipping documents not be available at the time when they should have been tendered).

2 *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL (where the buyer was held not entitled to postpone payment until the physical arrival or inspection or acceptance of the goods).

3 *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 934 at 954, CA, per Kennedy LJ.

4 *Ryan v Ridley & Co* (1902) 8 Com Cas 105 (perishable goods).

5 Cf para 120 text and note 16 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/343. Payment by acceptance of bill of exchange.

343. Payment by acceptance of bill of exchange.

In commercial practice it is common for the contract to provide that, instead of payment becoming due in cash on tender of the documents, the buyer will accept a bill of exchange payable at a later date drawn on him by the seller. In such a case it is the buyer's duty, on tender of the bill of exchange together with the documents, to accept the bill of exchange, but, if he does not do so, he must return the bill of lading and the property in the goods does not pass to him¹. The general rule of the law of contract that payment by bill of exchange is prima facie conditional payment applies to a cif contract², and, accordingly, if the bill is subsequently dishonoured, the rights of the seller as an unpaid seller revive³. This is, however, subject to any rights lawfully acquired by third persons as a result of the defaulting buyer's dealings with the documents of title to the goods⁴.

1 See the Sale of Goods Act 1979 s 19(3); and PARA 373 post. See also *Shepherd v Harrison* (1871) LR 5 HL 116.

2 As to conditional payment see CONTRACT vol 9(1) (Reissue) PARAS 952-953.

3 See the Sale of Goods Act 1979 s 38(1)(b); and PARA 238 ante. Section 38(1)(b) proceeds on the basis that the passing of property is not to be regarded as conditional on the bill being met. In this respect it follows *Berndtson v Strang* (1868) 3 Ch App 588.

4 See the Sale of Goods Act 1979 s 47(2); and PARA 253 et seq ante.

UPDATE

343 Payment by acceptance of bill of exchange

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/344. Discharge of the goods, laytime and demurrage.

344. Discharge of the goods, laytime and demurrage.

Where a seller in a cif contract has chartered a vessel under a voyage charterparty¹ for the carriage of the goods sold, he may be responsible towards the party from whom he has chartered the vessel to ensure that the vessel loads and discharges the goods within a certain number of days, commonly known as 'lay days'². Such a seller will, moreover, typically be liable under the charterparty for payment of an agreed sum, commonly known as demurrage³. If discharge of the goods at the port of destination takes longer than the number of lay days available to the seller under his charterparty, the seller may find that he is liable under his charterparty for demurrage for delay caused in fact by the buyer at the port of destination. It is very common for the seller to protect himself against this risk⁴ by stipulating in the contract⁵ for the sale of goods that the buyer will have a certain number of days for discharge at the port of destination, beyond which period the buyer will be liable towards the seller for the payment of a fixed amount of money. Although, where such a term is agreed in the contract of sale, the relevant period is commonly known as laytime and the fixed amount demurrage, the number of lay days and the amount of demurrage may or may not be the same as the laytime and demurrage provided for in the charterparty concluded by the seller⁶.

1 See CARRIAGE AND CARRIERS vol 7 (2008) PARA 208.

2 See CARRIAGE AND CARRIERS vol 7 (2008) PARA 284.

3 See CARRIAGE AND CARRIERS vol 7 (2008) PARAS 284, 287 et seq.

4 Or indeed against liability for demurrage towards other parties in a string: see *Galaxy Energy International Ltd v Bayoil SA* [2001] 1 All ER (Comm) 289, [2001] Lloyd's Rep 512.

5 In the absence of an express term in the contract of sale, providing for the payment by the buyer of losses caused through delay in discharge, it would be difficult for the seller to recover from his buyer losses caused by liability for demurrage under the charterparty: *Congimex Companhia Geral de Comercio Importadora e Exportadora SARL v Tradax Export SA* [1981] 2 Lloyd's Rep 687 at 691 per Staughton J; affd [1983] 1 Lloyd's Rep 250, CA. See also *Etablissements Soules et Cie v Intertradex SA* [1991] 1 Lloyd's Rep 378, CA. See generally Debattista 'Laytime and Demurrage Clauses in Contracts of Sale - links and connections' [2003] LMCLQ 508.

6 See *Houlder Bros & Co Ltd v Public Works Comr* [1908] AC 276, PC; *Fina Supply Ltd v Shell UK Ltd, The Poitou* [1991] 1 Lloyd's Rep 452; *Gill & Duffus SA v Rionda Futures Ltd* [1994] 2 Lloyd's Rep 67. Cf *Tradax Internacional SA v R Pagnan and Fratelli* [1968] 1 Lloyd's Rep 244; *Mallozzi v Carapelli SpA* [1976] 1 Lloyd's Rep 407, CA; *Fal Oil Ltd v Petronas Trading Corp SDN BHD, The Devon* [2004] EWCA Civ 822, [2004] 2 All ER (Comm) 537, [2004] 2 Lloyd's Rep 282.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/345. Passing of property and reservation of rights of disposal.

345. Passing of property and reservation of rights of disposal.

The general statutory rules¹ as to the passing of property under a contract for the sale of goods do not greatly assist in ascertaining the moment at which the property passes where goods, whether specific or unascertained, are sold on cif terms. The provisions as to the passing of an

undivided share in goods which form part of a bulk should, however, be borne especially in mind, given the frequency with which goods sold on cif terms are shipped in bulk².

Likewise, special attention should be given in the context of cif sales to the provisions as to the right of disposal³. When an agreement is made for the sale of specific goods in a deliverable state on cif terms, it is not an unconditional contract⁴, because the commercial meaning of cif imports an undertaking by the seller to do something more, namely to put the goods on a ship, and this postpones the passing of the property until at least the goods are shipped by the seller⁵. Further, where, as is generally the case in a cif contract, the seller reserves the right of disposal of the goods until certain conditions laid down at the time of the contract or appropriation are fulfilled, the property does not pass until fulfilment of the conditions⁶, ordinarily when the seller transfers the bill of lading⁷. The presumption that property passes on shipment may also be rebutted where the facts of the case show that the seller never intended the mere act of shipment to operate as an appropriation of the goods to the contract either conditionally or at all⁸.

1 The rules contained in the Sale of Goods Act 1979 ss 16-20 (as amended): see PARA 109 et seq ante.

2 See *ibid* ss 20A, 20B (as added); and PARAS 134-136, 324 note 6 ante.

3 The provisions of *ibid* s 19: see PARA 137 ante; and see PARAS 370, 373 post.

4 The unconditional contract within *ibid* s 18 r 1: see PARA 113 ante. See also *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 66, HL.

5 *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 934 at 956, CA, per Kennedy LJ; *affd* sub nom *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL. Cf the Sale of Goods Act 1979 s 18 (as amended) (introductory words: see PARA 109 ante), s 55 (as amended) (see PARAS 12-13, 100 ante).

6 See *ibid* s 19(1); and PARA 137 ante. The conditions may be express or implied from the circumstances, eg the notice of appropriation under an ordinary cif contract is not intended to pass, and does not pass, the property: see *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 66, HL, per Lord Wright (where the notice of appropriation was conditional, property remaining in the seller until the transfer of the bill of lading); *Albacruz (Owners) v Albazero (Owners), The Albazero* [1974] 2 All ER 906 (*affd* on this point (although *revsd* on another ground) [1977] AC 774, [1976] 3 All ER 129, HL) (where there was a reservation of the right of disposal for reasons not of finance but of commercial flexibility; and property passed when the documents were posted to the buyer). See also PARAS 348, 368, 370-371 post.

7 See *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 68, HL, per Lord Wright; *Albacruz (Owners) v Albazero (Owners), The Albazero* [1974] 2 All ER 906 (*affd* on this point (although *revsd* on another ground) [1977] AC 774, [1976] 3 All ER 129, HL); *Karlshamns Oljefabriker v Eastport Navigation Corp'n, The Elafi* [1982] 1 All ER 208, [1981] 2 Lloyd's Rep 679. See also *Cremer v Brinkers' Groudstoffen BV* [1980] 2 Lloyd's Rep 605; para 324 note 6 ante; and PARAS 368, 370-371 post. As to the reversioning of property where goods are not in accordance with the contract see PARA 347 note 2 post.

8 Cf *Wait v Baker* (1848) 2 Exch 1; *Gabarron v Kreeft, Kreeft v Thompson* (1875) LR 10 Exch 274. See also *Michel Frères SA v Kilkenny Woollen Mills (1929) Ltd* [1961] IR 157.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/346. Incidence of the risk.

346. Incidence of the risk.

In a cif contract the incidence of the risk is divorced from the passing of the property¹. The risk passes to the buyer on or as from shipment of the goods². In a cif contract there is no warranty by the seller that at the time of the tender of the documents the goods are not lost³. Even where the seller knows at the time of tender that the goods are already lost, the buyer is still under an obligation to pay for them⁴. He has such remedies as may be afforded under the contract of carriage against the shipowners, or under the policy of insurance against the insurers, and this, under the cif contract, was what he bargained to get⁵.

Despite the general rule that risk passes to the buyer on or as from shipment of the goods, the parties to the contract of sale may by special term agree that the risk of certain losses occurring after shipment should remain with the seller. Thus, for example, the parties may agree on payment of the price on a 'landed weight' or 'out-turn quantity' basis, allowing for an adjustment to the agreed contract price by reference to the quantity of the goods actually discharged. While such a term leaves with the seller the risk of a decrease in the quantity of the goods in transit, it does not exempt the buyer from payment of the full price if none of the goods reach their destination⁶. Again, the contract of sale may stipulate not only for the time or period of shipment⁷, but for the time by which the goods must reach the contractual destination⁸. Such a term is construed restrictively by the courts to mean that the vessel was expected by the seller to reach her destination by the stipulated date, rather than that the seller guaranteed such arrival by that date⁹.

1 Cf the Sale of Goods Act 1979 s 20 (see PARA 142 ante), which does not apply to cif contracts: see *Stock v Inglis* (1884) 12 QBD 564 at 573, CA; affd sub nom *Inglis v Stock* (1885) 10 App Cas 263, HL. See also *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 309, [1949] 1 All ER 269 at 275, HL, per Lord Porter.

2 *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 934 at 956, CA, per Kennedy LJ (affd sub nom *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL); *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Lda, The Julia* [1949] AC 293 at 309, [1949] 1 All ER 269 at 274, HL, per Lord Porter. The words 'as from' recognise the fact that, unless there has been some prior appropriation, the contract goods will not be identified until tender of the documents: see *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1979] 2 All ER 726 at 738-739, [1980] 1 WLR 495 at 509-510; affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA. A buyer who has assumed the risk but has neither legal ownership nor possessory title cannot sue the carrier in negligence: *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL. Given the terms of the Sale of Goods Act 1979 ss 20(4), 32(4) (as added), it must be right, but in practice hardly ever relevant, to say that where a cif buyer deals as consumer, delivery to the carrier is not delivery to the buyer and that risk remains with the seller until the goods are delivered to the buyer. See PARA 188 ante.

3 *C Groom Ltd v Barber* [1915] 1 KB 316; *Re Weis & Co Ltd and Crédit Colonial et Commercial Antwerp* [1916] 1 KB 346; and see PARA 340 note 6 ante.

4 *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 KB 198. See further PARA 340 note 6 ante.

5 As to these remedies see further PARA 340 note 7 ante.

6 *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398 at 405.

7 See PARA 331 ante.

8 See eg *Cargill International SA v Bangladesh Sugar & Food Industries Corpn* [1998] 2 All ER 406 at 409, [1998] 1 WLR 461 at 465, CA.

9 *Vitol SA v Esso Australia Ltd, The Wise* [1989] 1 Lloyd's Rep 96 at 100-101 (case remitted to the Commercial Court on other grounds [1989] 2 Lloyd's Rep 451, CA). See also *Tregelles v Sewell* (1862) 7 H & N 574; affd (1863) 7 H & N 584, Ex Ch (where a clause 'delivered at Harburgh [the port of discharge], cost, freight

and insurance' was construed as simply describing the destination of the goods rather than defining the point at which risk passed); *Erg Petrolis SpA v Vitol SA, The Ballenita and The BP Energy* [1992] 2 Lloyd's Rep 455 at 464.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/347. Right of rejection.

347. Right of rejection.

By acceptance of the documents¹ the buyer does not thereby lose his right to reject the goods on actual delivery if the goods are not in accordance with the contract². A buyer who accepts documents which, whether or not he examines them, disclose that the goods were not shipped in conformity with the contract may, however, preclude himself from rejecting both documents and goods³.

The place of delivery is prima facie the proper place for inspection⁴ but the circumstances of the case may show some other place or later time to be appropriate. In particular, where goods to the knowledge of the seller are purchased by the buyer for delivery to a further destination, and the nature of the goods and the way in which they are packed makes it unreasonable to inspect immediately on delivery, the right to reject will be extended to the later date⁵. The right to reject is lost by unreasonable delay in rejecting, or by the buyer doing an act in relation to the goods inconsistent with the seller's ownership⁶. Resale of the goods before inspection is such an act⁷; but it would seem that a mere pledge, or even a sale, of the documents of title would not be such an act⁸.

1 The contract may, however, contain provisions as to the finality of certificates of quality etc which debar complaint about matters within their scope: see the cases cited in PARA 339 note 4 ante.

2 *Polenghi Bros v Dried Milk Co Ltd* (1904) 10 Com Cas 42; *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 934 at 960, CA. There are two distinct rights, namely to reject the documents and to reject the goods: see *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459 at 479-482, [1954] 1 All ER 779 at 790-792 per Devlin J, commenting on the judgment of Greer LJ in *James Finlay & Co Ltd v NV Kwik Hoo Tong Handelmaatschappij* [1929] 1 KB 400 at 413, CA. The property in the goods passes on the acceptance of the documents subject to the condition subsequent that the buyer may revert it if on examination the goods are not in accordance with the contract. This, it is considered, is the true view, rather than the alternative mentioned as a possibility by Atkin LJ in *E Hardy & Co (London) Ltd v Hillerns and Fowler* [1923] 2 KB 490, CA, which was that property does not pass until examination or an opportunity to examine. The first view was preferred in *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* supra at 487 and at 795-796 per Devlin J. Cf *Karlshamns Oljefabriker v Eastport Navigation Corp'n, The Elafi* [1982] 1 All ER 208 at 212-213, [1981] 2 Lloyd's Rep 679 at 682-683 per Mustill J.

3 *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53, CA. For an examination of the theoretical basis of this judgment see *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce (Lorico)* [1997] 2 Lloyd's Rep 386 at 395-398, CA. There is some doubt as to whether a buyer in this position would also be estopped from recovering damages from the seller for having been deprived of the opportunity to reject on the grounds of a documentary defect other than that which was apparent at the time of tender: see *Vargas Pena Apezteguia y Cia SAIC v Peter Cremer GmbH* [1987] 1 Lloyd's

Rep 394 at 399 per Saville J (for the view that the buyer would be so estopped); cf *Kleinjan and Holst NV Rotterdam v Bremer Handelsgesellschaft mbH Hamburg* [1972] 2 Lloyd's Rep 11 at 22 per Cooke J.

4 *Heilbutt v Hickson* (1872) LR 7 CP 438; *Perkins v Bell* [1893] 1 QB 193, CA; *Saunt v Belcher and Gibbons Ltd* (1920) 90 LJBK 541.

5 *Van den Hurk v R Martens & Co Ltd* [1920] 1 KB 850, as explained in *Saunt v Belcher and Gibbons Ltd* (1920) 26 Com Cas 115. See also *E Hardy & Co (London) Ltd v Hillerns and Fowler* [1923] 1 KB 658; affd [1923] 2 KB 490, CA.

6 See the Sale of Goods Act 1979 s 35 (as amended); and PARA 199 ante. See also *Graanhandel T Vink BV v European Grain & Shipping Ltd* [1989] 2 Lloyd's Rep 531.

7 *E Hardy & Co (London) Ltd v Hillerns and Fowler* [1923] 1 KB 658; affd [1923] 2 KB 490, CA.

8 See *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459 at 487, [1954] 1 All ER 779 at 796 per Devlin J. See also *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA, The Playa Larga and The Marble Islands* [1983] 2 Lloyd's Rep 171 at 187, CA; *Gill & Duffus SA v Berger Inc* [1984] 1 Lloyd's Rep 227 at 233. The proposition in the text depends on the view stated in note 2 supra as to the passing of the property. All dealings with the documents by the buyer are dealings merely with the conditional property in the goods: see *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* supra. The result is important in the case of a string of contracts, where the documents are passed down a line of successive buyers, the right to reject being, on this view, preserved. Further, in most cif contracts, when the shipping documents are taken up by a bank on the buyer's behalf, there is a pledge of such documents by the buyer to the bank, so that, if pledging the documents of title put an end to the right of rejection, there would never be a right of rejection in many cif contracts.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/348. Notice of appropriation.

348. Notice of appropriation.

'Appropriation', for these purposes, means a binding selection by the seller obliging him to deliver to the buyer particular goods, or goods on a particular ship or from a particular source, even though no property in such goods has passed to the buyer¹. Many cif contracts include provision for the seller to give to the buyer notice of such an appropriation and specify the particulars which the notice must contain². Where there is no such provision, a seller ordinarily remains free to tender to the buyer any goods which answer the contract description³. Strict compliance by the seller with the requirements of any provision for notice of appropriation will generally be of the essence of the contract⁴. Once a notice of appropriation, valid on its face and containing the specified particulars, has been given, the seller becomes contractually obliged⁵ to perform by delivering goods in accordance with those particulars, even if due to some error or other reason such performance is in reality impossible⁶. A seller who gives a notice of appropriation which is invalid on its face⁷ is free to substitute a fresh notice, provided that he can still do so within the contractually appointed time⁸.

1 For the different senses in which 'appropriation' is used in sale of goods see *Wait v Baker* (1848) 2 Exch 1 at 8 per Parke B; *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 65-68, HL, per Lord Wright. Whereas the Sale of Goods Act 1979 s 18 r 5 (as amended) (see PARAS 125, 127 ante) is concerned with unconditional appropriation sufficient to pass property in ascertained goods, there may be appropriation in the present sense, even though the seller reserves a right of disposal (so that property does not pass) or though the goods are an unascertained part of a larger bulk (so that property could not pass).

2 See *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 65-68, HL, per Lord Wright; and the cases cited in notes 4-7 infra. The word 'appropriation' may not itself be used: cf eg *Daulatram Rameshwarlall v European Grain and Shipping Ltd* [1971] 1 Lloyd's Rep 368 ('declaration of shipment'); *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19, [1981] 2 Lloyd's Rep 695 ('declaration of ship to be made to buyers in writing as soon as possible after vessel's sailing'); *Vitol SA v Phibro Energy AG, The Mathraki* [1990] 2 Lloyd's Rep 84.

3 See the dicta in *Harland and Wolff Ltd v J Burstall & Co* (1901) 17 TLR 338 at 339 per Bigham J; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1917] 1 KB 320 at 329, CA (where Scrutton LJ said 'the mere shipment of the cargo does not appropriate it to the contract', explaining on this basis the practice of making express contractual provision for notice of appropriation); *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 65-66, HL, per Lord Wright. There are apparently contrary dicta: see *Hoare v Dresser and Norrbom* (1859) 7 HL Cas 290 at 311, 318, 325; *Hollis Bros & Co Ltd v White Sea Timber Trust Ltd* [1936] 3 All ER 895 at 900 per Porter J. However, *Hollis Bros & Co Ltd v White Sea Timber Trust Ltd* supra concerned a contract made 'subject to shipment', so that it is understandable why, as a matter of business efficacy, the act of shipment with the intention of fulfilling the contract should be treated as an irrevocable appropriation. *Hoare v Dresser and Norrbom* supra (strictly a case of del credere agency) is probably explicable on the basis that transactions between the parties subsequent to the contract involved an undertaking by the sellers to deliver the particular goods. *Hoare v Dresser and Norrbom* supra was also the subject of adverse comment in *Re Wait* [1927] 1 Ch 606, CA, in so far as it held that the appropriation passed any equitable interest in the goods. There are other somewhat inconclusive dicta: see eg *James v Commonwealth* (1939) 62 CLR 339 at 377; *The Gabbiano* [1940] P 166 at 175.

4 *Compagnie Continentale d'Importation v Handelsvertretung der USSR in Deutschland* (1928) 138 LT 663 (time for giving notice of appropriation of the essence); *Dalgety & Co Ltd v TG Bradfield & Co Ltd* (1930) 46 TLR 274 (specified particulars of the essence); *Luis de Ridder Ltd v André & Cie SA (Lausanne)* [1941] 1 All ER 380 (where there was a clause requiring the notice of appropriation to be sent to the buyer's agent in Antwerp, and the notice being sent to the buyer personally in Lausanne was held to be invalid); *Kleinjan and Holst NV Rotterdam v Bremer Handelsgesellschaft mbH Hamburg* [1972] 2 Lloyd's Rep 11 at 20 per Cooke J (vessel's name of the essence). See also *V Berg & Sons v Landauer* (1925) 42 TLR 142 (clause requiring provisional invoice to state bill of lading date); *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19 (cited in note 2 supra). The sending of a notice by airmail instead of by cable, telex or telegram, as the contract required, was, however, not treated as entitling the buyer to terminate the contract when no loss of time at all resulted: *Daulatram Rameshwarlall v European Grain and Shipping Ltd* [1971] 1 Lloyd's Rep 368.

If the contractual requirements are otherwise satisfied, it may be possible, in some circumstances, to read two documents together as a notice of appropriation, at least where they refer to each other; but not where the one document is wholly inadequate and the other contains stipulations contrary to the contract: *Aure v Van Cauwenberghe & Fils* [1938] 2 All ER 300, CA. Cf *Waren Import Gesellschaft Krohn & Co v Alfred C Toepfer, The Vladimir Ilich* [1975] 1 Lloyd's Rep 322 at 328 per Donaldson J.

5 Commercial contracts commonly contain an express stipulation that notice of appropriation cannot be withdrawn. It is thought that, even without such express stipulation, this would be the position where the contract calls for notice of appropriation: see *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA, The Marine Star* [1993] 1 Lloyd's Rep 329 at 332, CA. Provisions allowing correction of minor errors, eg in transmission, are also found: see eg *Kleinjan and Holst NV Rotterdam v Bremer Handelsgesellschaft mbH Hamburg* [1972] 2 Lloyd's Rep 11; *Waren Import Gesellschaft Krohn & Co v Alfred C Toepfer, The Vladimir Ilich* [1975] 1 Lloyd's Rep 322 (which treated the phrase 'or better name' after a ship's name not as rendering the notice of appropriation conditional and so invalid on its face but as limited in scope to the correction of errors in transmission under a provision for such correction). The contract may, however, specifically reserve to the seller the right to substitute a notice of appropriation valid on its face: see *ERG Petroli SpA v Vitol SA, The Ballenita and The BP Energy* [1992] 2 Lloyd's Rep 455. Where, however, a purported right to substitute such notice was reserved not in the contract but in the notice itself, it was held such an option could only be exercised 'in immediate replacement' of the first valid notice of appropriation: *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA, The Marine Star* supra at 332.

6 *Kleinjan and Holst NV Rotterdam v Bremer Handelsgesellschaft mbH Hamburg* [1972] 2 Lloyd's Rep 11 at 20 per Cooke J; *Waren Import Gesellschaft Krohn & Co v Alfred C Toepfer, The Vladimir Ilich* [1975] 1 Lloyd's Rep 322. See also *Bremer Handelsgesellschaft mbH v Toepfer* [1980] 2 Lloyd's Rep 43 at 49, CA, per Megaw LJ. The validity of a notice of appropriation on its face depends on its compliance with the contract in form and timing and not on substance or factual accuracy: see *Waren Import Gesellschaft Krohn & Co v Alfred C Toepfer,*

The Vladimir Ilich supra at 329 per Donaldson J. Thus a notice of appropriation valid in form which declared shipment on a vessel which turned out to be uncontractual was nonetheless a valid notice of appropriation: *PT Putrabali Adyamulia v Enrico Webb James Snc, The Intan 6 V.360A SN* [2003] 2 Lloyd's Rep 700, [2003] All ER (D) 24 (Jul). It may nonetheless be possible for the buyer to treat as a breach of contract the giving of a notice which is incorrect having regard to the real facts: see *Dalgety & Co Ltd v TG Bradfield & Co Ltd* (1930) 46 TLR 274 at 275 per Wright J. See also *V Berg & Sons v Landauer* (1925) 42 TLR 142. However, in *Waren Import Gesellschaft Krohn & Co v Alfred C Toepfer, The Vladimir Ilich* supra Donaldson J proceeded on the basis that there would be no breach until documents were presented which failed to match the notice given. The inclusion in a notice of appropriation of information additional to the particulars specified by the contract is immaterial, even if such information is inaccurate, unless it 'contradicts or falsifies the information which has to be included' (in which case the notice is likely to be bad on its face) or 'the buyer is misled and suffers damage thereby': *Bremer Handelsgesellschaft mbH v Toepfer* [1978] 1 Lloyd's Rep 643 at 651 per Donaldson J; approved [1980] 2 Lloyd's Rep 43 at 49, CA, per Megaw LJ. Where the buyer is misled and suffers damage, it is unclear whether the seller is held to the additional information (perhaps by estoppel, although this usually operates as a shield not a sword) or whether the buyer's only remedy is in damages for misrepresentation.

7 Alternatively, a seller who gives a notice of appropriation which the buyer treats as invalid in circumstances precluding him from objecting to a fresh notice if served: see *Waren Import Gesellschaft Krohn & Co v Alfred C Toepfer, The Vladimir Ilich* [1975] 1 Lloyd's Rep 322.

8 *Borrowman, Phillips & Co v Free and Hollis* (1878) 4 QBD 500, CA; *Getreide Import Gesellschaft mbH v Itoh & Co (America) Inc* [1979] 1 Lloyd's Rep 592; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19 at 24 per Goff J.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(ii) Legal Incidents of the Contract/349. Remedies for breach of cif contracts.

349. Remedies for breach of cif contracts.

The normal rules as to the remedies of buyer and seller for breach by the other party of a contract for the sale of goods apply generally to cif contracts¹, but there are detailed points of difference. Thus, where the buyer claims damages for non-delivery and there is an available market for the purchase of substitute goods complying with the contract description, the measure of damage is prima facie² the difference between the contract price and the market price of similar goods on cif terms at the time at which the documents ought to have been delivered³. The date at which the goods themselves should have been delivered by the ship at their destination is irrelevant⁴. Similar principles probably apply to a claim by the seller for non-acceptance, damages⁵ being assessed by reference to any market for resale of the goods cif at the time when the documents ought to have been accepted or, failing any such market, by reference to the market at destination or reasonable conduct⁶ on the part of the seller. Where there is an anticipatory repudiation, the market price at the time when the documents ought to have been tendered or accepted remains the relevant prima facie measure whether or not the repudiation is accepted⁷. However, if and when the repudiation is accepted, the innocent party's duty of reasonable mitigation arises and may require him:

309 (1) if buyer, to purchase substitute goods⁸; or

- 310 (2) if seller, to resell the contract goods⁹, at an earlier date, in which case damages will be assessed on that basis¹⁰.

In an ordinary cif contract for the sale of unascertained goods the buyer's remedy of specific performance¹¹ will seldom be granted by the court¹². The unpaid seller of goods under a cif contract possesses the normal rights reserved by the Sale of Goods Act 1979, namely the right to withhold delivery, the unpaid seller's lien and the right of stoppage in transit¹³. Generally under a cif contract the position of the unpaid seller is safeguarded by his ability to withhold delivery so long as he retains the shipping documents; after that, as the goods themselves are not in his possession but in the possession of the shipowner, he is normally thrown back on his right of stoppage in transit¹⁴ if the buyer becomes insolvent¹⁵.

1 As to the remedies for breach of contract see PARA 285 et seq ante.

2 The existence and breach by the seller of a contractual condition due for performance prior to tender of the documents (such as an obligation to give notice of appropriation: see PARA 348 ante) may itself displace the prima facie measure: see *Produce Brokers Co v Weis & Co* (1918) 87 LJB 472 (where the date on which notice of appropriation should have been given, by delivery of a provisional invoice, was taken as the appropriate date for assessment of damages, rather than the (later) date when the shipping documents should have been tendered). Cf *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at 117, 129, 131, HL (meaning of 'date of default' in a contractual provision regarding damages). However, see also the reasoning of Kerr J in *Phoebus D Kyprianou Coy v Wm H Pim Jnr & Co Ltd* [1977] 2 Lloyd's Rep 570 at 580 (fob sale).

3 *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814; *Re Fl Bourgeois and Wilson Holgate & Co* (1920) 25 Com Cas 260; *Lesters Leather & Skin Co Ltd v Home & Overseas Brokers Ltd* (1948) 82 Ll L Rep 202, CA; *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 3 All ER 165 (no real market price). If there is no market on which similar goods shipped to the contract destination in the contract period could have been bought on cif terms, damages are to be assessed 'on the basis of reasonable conduct' on the part of the buyer: see the Sale of Goods Act 1979 s 51(2); and PARA 293 ante. See also *C Sharpe & Co Ltd v Nosawa & Co* supra. This may involve eg buying substitute goods on the spot at the contract destination and adding any additional storage charges to the claim against the defaulting seller.

4 *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814.

5 There is nothing to stop the seller from maintaining the presentation of the documents and suing for the price under the Sale of Goods Act 1979 s 49(1) if property has passed to the buyer, and under s 49(2) if it has not (see PARA 285 ante). What he cannot do is treat the contract as terminated by wrongful rejection, deal with the documents to mitigate his loss and sue for the price as well; if he deals with the documents, the seller's remedy sounds in damages: *PT Putrabali Adyamulia v Enrico Webb James Snc, The Intan 6 V.360A SN* [2003] 2 Lloyd's Rep 700, [2003] All ER (D) 24 (Jul).

6 As to reasonable conduct cf note 3 supra.

7 *Frost v Knight* (1872) LR 7 Exch 111; *Melachrino v Nickoll and Knight* [1920] 1 KB 693; *Millett v Van Heek & Co* [1920] 3 KB 535 (affd [1921] 2 KB 369, CA); *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130n at 1140, [1967] 2 All ER 353 at 360, HL, per Lord Pearson; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91, [1978] 1 All ER 515, PC. The provisions regarding 'refusal to deliver' in the Sale of Goods Act 1979 s 50(3) (cited in PARA 289 ante) and s 51(3) (cited in PARA 294 ante) do not apply to anticipatory repudiation: see *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* supra; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* supra. Cf para 300 ante.

8 Eg if the market is obviously rising: cf the cases cited in note 7 supra. See also *Nickoll and Knight v Ashton, Edridge & Co* [1900] 2 QB 298; on appeal [1901] 2 KB 126, CA.

9 Eg if the market is obviously falling: cf the cases cited in note 7 supra.

10 As to the measure of damages where the buyer claims for non-delivery and there is an available market for the purchase of substitute goods complying with the contract description see the text and notes 2, 3, 6 supra.

11 Ie under the Sale of Goods Act 1979 s 52: see PARA 305 ante.

12 *Re Wait* [1927] 1 Ch 606, CA.

13 See the Sale of Goods Act 1979 Pt V (ss 38-48) (as amended); and PARA 236 et seq ante.

14 As to stoppage in transit see PARA 256 et seq ante.

15 As to the measure of damages against the buyer on failure to provide an irrevocable letter of credit see PARA 376 post; and as to damages against a banker see PARAS 377-378 post.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(2) CIF CONTRACTS/(iii) C & F Contracts/350. Commercial nature of contract.

(iii) C & F Contracts

350. Commercial nature of contract.

The nature and consequences of a c & f (cost and freight) contract are in almost every respect the same as those of a cif contract, but without that obligation on the seller to effect and tender a document of insurance which is an integral element in the make-up of a cif contract and the price payable under it¹.

Under a c & f contract it is up to the buyer to effect any insurance which he requires². The contract may sometimes oblige him to effect insurance and relieve the seller of any liability to the extent of the insurance cover stipulated³. Alternatively, the contract may go further and oblige the buyer to effect insurance not only for his own protection but also for that of the seller before the transfer of the shipping documents⁴.

In contrast to a cif buyer, a c & f buyer is, it is thought, entitled to notice from his seller to enable him to insure the goods during their sea transit⁵.

1 See *Norsk Bjergningskompagni A/S v Pantanassa (Owners), The Pantanassa* [1970] P 187 at 194, [1970] 1 All ER 848 at 855 per Brandon J.

2 There may be a collateral agreement between a c & f seller and buyer whereby the buyer requests the seller, and the seller agrees to effect, or use his best endeavours to effect, insurance on the buyer's behalf. In this event, any fluctuations in the cost of insurance will, however, be for the buyer's account.

3 See eg *Reinhart Co v Joshua Hoyle & Sons Ltd* [1961] 1 Lloyd's Rep 346, CA (where there was a c & f sale, but the buyer was obliged to insure the goods before and after shipment in order to preclude argument about the origin of any damage, and it was held that the buyer was unable to have recourse to the seller for pre-shipment damage which should have been covered by such insurance).

4 See *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1979] 2 All ER 726 at 735-736, 741-742, [1980] 1 WLR 495 at 505-506, 513-514 per Donaldson J.

5 See the Sale of Goods Act 1979 s 32(3); and PARA 352 post. As to insurance under specific contracts see PARA 336 ante (cif contracts) and PARA 352 post (fob contracts). Where the buyer deals as consumer, the buyer

has no such right but this is because in this unlikely case, delivery to the carrier is not delivery to the buyer: see the Sale of Goods Act 1979 s 32(4) (as added); and PARA 188 ante.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(3) FOB, FAS, FOR AND EX-SHIP CONTRACTS/(i) FOB Contracts/351. Commercial nature of fob contracts.

(3) FOB, FAS, FOR AND EX-SHIP CONTRACTS

(i) FOB Contracts

351. Commercial nature of fob contracts.

Where goods are sold fob (free on board), the duty of the seller is to deliver the goods on board ship at the contractually appointed port¹ at his own expense for carriage to the buyer. The terms of the contract may specify the ship or line on which the goods are to be loaded or entitle the buyer to give subsequent instructions to the seller in regard to shipment², the time for giving any such instructions being of the essence³. Where the contract contains terms stipulating for certain requirements regarding the ship to be nominated by the buyer, breach of such terms would entitle the seller to terminate the contract for breach of condition⁴. The contract of carriage may be made by the buyer himself or by the seller on the buyer's behalf, and the buyer is liable for the freight and prima facie all charges subsequent to delivery on board⁵. If the fob contract does require the seller to make the contract of carriage or is silent as to who should make it, the seller's duty is then to give up possession of the goods to the ship on the terms of a reasonable and ordinary bill of lading or other contract of carriage⁶. Where the buyer is under a duty to tender a vessel for loading at a place of shipment and berth to be nominated by the seller, prima facie the buyer nevertheless remains responsible for tendering the vessel at that place and berth in time to load within the contract period⁷.

1 Where, in an fob contract, there is a range of ports, then prima facie if nothing else is agreed and where there is no custom of trade and no surrounding circumstances from which a contrary intention may be inferred, the port is at the buyer's option: *David T Boyd & Co Ltd v Louis Louca* [1973] 1 Lloyd's Rep 209 at 212-213 per Kerr J. As to the seller's duty to nominate the place for delivery of goods in the case of free on truck contracts, see *Zenziper Grains and Feed Stuffs v Bulk Trading Corp'n Ltd* [2001] 1 All ER (Comm) 385, CA.

2 In the classic fob contract the buyer is entitled to nominate a vessel or line and call for shipment at any time within and until the end of the shipping period: see *J and J Cunningham Ltd v Robert A Munro & Co Ltd* (1922) 28 Com Cas 42, DC. In other fob contracts arrangements and date for shipment may be the duty and responsibility of the seller: see *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 at 424, [1954] 2 All ER 158 at 166 per Devlin J (stating 'the fob contract has become a flexible instrument'); *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 QB 130 at 141-142, [1958] 1 All ER 542 at 547-548 per Diplock J, and the cases there cited; *Miserocchi and C SpA v Agricultores Federados Argentinos SCL*, *Miserocchi and C SpA v Bunge AG*, *The Sotir and Angelic Grace* [1982] 1 Lloyd's Rep 202. See also *James Laing, Son & Co (M/C) Ltd v Eastcheap Dried Fruit Co* [1961] 2 Lloyd's Rep 277, CA. See also PARA 356 post.

3 *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL. See also *Gill & Duffus SA v Société pour l'Exportation des Sucres SA* [1986] 1 Lloyd's Rep 322, CA (port of delivery to be nominated by a specified date 'at latest'); *Cie Commerciale Sucres et Denrées v C Czarnikow Ltd, The Naxos* [1990] 3 All ER 641, [1990] 1 WLR 1337, HL (obligation in respect of immediate loading of cargo condition of contract).

4 *Richco International Ltd v Bunge & Co Ltd, Bunge & Co Ltd v Tradax Ocean Transportation SA, The New Prosper* [1991] 2 Lloyd's Rep 93.

5 *Stock v Inglis* (1884) 12 QBD 564, CA (on appeal sub nom *Inglis v Stock* (1885) 10 App Cas 263, HL); *A-G v Leopold Walford (London) Ltd* (1923) 14 Ll L Rep 359; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce (Lorico)* [1997] 2 Lloyd's Rep 386 at 393-394, CA (fob buyer in breach of sale contract where he procured the opening of a letter of credit providing for the tender of freight prepaid bills of lading). Alterations in freight or subsequent charges are thus for the buyer's account, whether or not the seller pays such freight or charges in the first instance: see *The Parchim* [1918] AC 157 at 164, HL, per Lord Parker.

6 *Wimble, Sons & Co v Rosenberg & Sons* [1913] 3 KB 743 at 757, CA, per Hamilton LJ.

7 *Miserocchi and C SpA v Agricultores Federados Argentinos SCL, Miserocchi and C SpA v Bunge AG, The Sotir and Angelic Grace* [1982] 1 Lloyd's Rep 202 (where the vessel could not reach the berth due to congestion). Staughton J held that the seller was under no duty to nominate a berth which was or would be empty on the vessel's arrival, but stated that the seller must be under some implied duty possibly 'to act reasonably in regard to the nomination of a berth having regard to the requirements of the authorities and the priority of other ships': see at 209.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(3) FOB, FAS, FOR AND EX-SHIP CONTRACTS/(i) FOB Contracts/352. Insurance.

352. Insurance.

It is the fob seller's duty to give such notice to the buyer as may enable him to insure the goods during their sea transit¹ and, if the seller fails to do so, the goods are deemed to be at his risk during transit². However, the contract itself normally contains sufficient information to enable the buyer to insure the goods without any additional notice from the seller of actual shipment, and in such circumstances the seller is under no duty to give any further notice³. Fob contracts also often contain a clause instructing the seller to effect the insurance as agent for the buyer, and add the premium to the price.

1 There is no obligation on a forwarding agent to cover the goods from the seller's warehouse to the ship's rail, and it is the ordinary practice for the seller to cover the goods himself in any fashion that he thinks appropriate: see *WLR Traders (London) Ltd v British and Northern Shipping Agency Ltd* [1955] 1 Lloyd's Rep 554 at 557.

2 See the Sale of Goods Act 1979 s 32(3), which (like s 32(2): see PARA 190 ante) negatives in the particular case the ordinary presumption that risk attaches to property. See also *Wimble, Sons & Co v Rosenberg & Sons* [1913] 3 KB 743, CA; *Northern Steel and Hardware Co Ltd v John Batt & Co (London) Ltd* (1917) 33 TLR 516, CA. This rule does not, however, apply to a cif or ex-ship contract: see *Law and Bonar Ltd v British American Tobacco Co Ltd* [1916] 2 KB 605. See also PARA 336 note 4 ante; and PARA 362 post.

³ *Wimble, Sons & Co v Rosenberg & Sons* [1913] 3 KB 743, CA; *Northern Steel and Hardware Co Ltd v John Batt & Co (London) Ltd* (1917) 33 TLR 516, CA. Cf the judgment of Hamilton LJ in *Wimble, Sons & Co v Rosenberg & Sons* supra at 755-764, who dissented on the application of what is now the Sale of Goods Act 1979 s 32(3) to fob contracts.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(3) FOB, FAS, FOR AND EX-SHIP CONTRACTS/(i) FOB Contracts/353. Risk.

353. Risk.

Prima facie the risk passes to the buyer on shipment¹, whether the goods are at the time specific or unascertained, although the passing of the property may have been postponed².

¹ Shipment as between fob seller and buyer means prima facie shipment across the ship's rail: see *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 at 414, [1954] 2 All ER 158 at 161 per Devlin J. See also *The Subro Valour* [1995] 1 Lloyd's Rep 509 at 519. However, contrary definition is common, eg by use of the phrase 'fob ship's manifold' in oil trading. It is questionable whether risk is affected by provisions regulating the seller's contractual responsibilities for loading, such as the common provision 'fob stowed' or 'trimmed', or by a provision entitling the seller to tender a 'received for shipment' bill of lading. Given the terms of the Sale of Goods Act 1979 ss 20(4), 32(4) (as added), it must be right, but in practice hardly ever relevant, to say that where a cif buyer deals as consumer, delivery to the carrier is not delivery to the buyer and that risk remains with the seller until the goods are delivered to the buyer. See PARA 188 ante.

² *Cowas-Jee v Thompson* (1845) 5 Moo PCC 165; *Stock v Inglis* (1884) 12 QBD 564, CA (affd sub nom *Inglis v Stock* (1885) 10 App Cas 263, HL). The main ground of decision in *Stock v Inglis* supra also depended on the course of dealing. However, on appeal Lord Blackburn at least based himself on the buyer's acceptance of the shipping documents after the loss of the unascertained goods. Unless the contract otherwise provides, goods shipped fob must normally be or become specifically identifiable and ascertained on or before shipment. See also *J and J Cunningham Ltd v Robert A Munro & Co Ltd* (1922) 28 Com Cas 42, DC (where the buyers were to find freight-room during October, and the goods were at the seller's risk until such freight-room was found). As to insurance during sea transit see PARA 352 ante. As to a sale 'free on rail' see *Healey v Howlett & Sons* [1917] 1 KB 337, DC; and PARA 361 post.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(3) FOB, FAS, FOR AND EX-SHIP CONTRACTS/(i) FOB Contracts/354. When property passes.

354. When property passes.

Prima facie the property passes to the buyer on shipment¹, but as in a cif contract² the inference may be rebutted and the moment of the passing of the property postponed, as where the seller takes or deals with the bill of lading in such a form or manner as to show that he did not intend to appropriate the goods to the contract³, or that he has reserved a right of disposal until performance of the contract terms of payment, whether they are for payment in cash or by acceptance of a bill of exchange or under a letter of credit⁴.

1 *Browne v Hare* (1859) 4 H & N 822, Ex Ch; *Stock v Inglis* (1884) 12 QBD 564, CA (on appeal sub nom *Inglis v Stock* (1885) 10 App Cas 263, HL); *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240. See also the Sale of Goods Act 1979 s 18 r 5 (as amended); and PARA 125 et seq ante.

2 As to the passing of property in cif contracts see PARA 345 ante.

3 As to evidence of the seller's intention to reserve the right of disposal see PARAS 370-371 post.

4 As to the reservation of the right of disposal by the seller see PARAS 370-371 post. See also the Sale of Goods Act 1979 s 19(2); and PARA 370 post. Section 19(2) is applicable where by the bill of lading the goods are made deliverable to the order of the seller or his agent. See also *The Parchim* [1918] AC 157, PC. Some older cases contain statements to the effect that it would be a breach of contract for an fob seller to reserve title, other than by agreement: see eg *Browne v Hare* (1858) 3 H & N 484 (affd (1859) 4 H & N 822, Ex Ch); *Gabarron v Kreeft*, *Kreeft v Thompson* (1875) LR 10 Exch 274. These statements confused the seller's contractual duty to have goods shipped some part of which were intended for the buyer with the separate issue as to when the property in particular goods was to pass to the buyer; in any event, these statements can no longer be supported in the light of the decision in *Mitsui & Co Ltd v Flota Mercante Grancolombiana SA, The Ciudad de Pasto, The Ciudad de Neiva* [1989] 1 All ER 951, [1988] 1 WLR 1145, CA, particularly at 956, 959-960 and at 1151-1152, 1155-1156. In the context of an fas contract see *Transpacific Eternity SA v Kanematsu Corpn, The Antares III* [2002] 1 Lloyd's Rep 233, [2001] All ER (D) 33 (Aug). See also *Concordia Trading BV v Richco International Ltd* [1991] 1 Lloyd's Rep 475.

It is a question of fact in each case whether an fob seller, by taking a bill of lading to his order, retains only the possession of the goods (as held in *The Parchim* supra; *Napier v Dexters Ltd* (1926) 26 Ll L Rep 184, CA; *Frebold and Sturznickel (t/a Panda OHG) v Circle Products Ltd, Circle Products Ltd v Frebold and Sturznickel (t/a Panda OHG) and Schenkers Ltd* [1970] 1 Lloyd's Rep 499, CA), or retains thereby also the property in the goods (as held in *Wait v Baker* (1848) 2 Exch 1; *Turner v Liverpool Docks Trustees* (1851) 6 Exch 543, Ex Ch; *Ogg v Shuter* (1875) 1 CPD 47, CA; *Mitsui & Co Ltd v Flota Mercante Grancolombiana SA, The Ciudad de Pasto, The Ciudad de Neiva* supra). The decisions in *The Parchim* supra and *Frebold and Sturznickel (t/a Panda OHG) v Circle Products Ltd, Circle Products Ltd v Frebold and Sturznickel (t/a Panda OHG) and Schenkers Ltd* supra suggest that under an fob contract the inference of retention of property enacted by the Sale of Goods Act 1979 s 19(2) (see PARA 370 post) may not be difficult to rebut. By retaining possession only of the goods, an fob seller may secure himself in respect of the due payment of the price: see *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex D 164, CA; but cf the observations of Lord Wright in *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 68, HL, to the effect that the seller is only fully protected by retaining property as well as possession.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(3) FOB, FAS, FOR AND EX-SHIP CONTRACTS/(i) FOB Contracts/355. Payment.

355. Payment.

Although, if nothing is said, payment is due on delivery of the goods by the seller free on board the ship¹, in ordinary practice the fob contract contains special terms for payment analogous to those common in cif contracts. Thus, payment is often by 'cash against documents'², or by the acceptance by the buyer of a bill of exchange against tender of the bill of lading, or under a confirmed letter of credit³. Where terms of this kind are agreed with respect to payment, the effect may often be to postpone the passing of property until their performance⁴.

1 See the Sale of Goods Act 1979 s 28; and PARA 162 ante. See also *Green v Sichel* (1860) 29 LJCP 213.

2 Where the contract fails to stipulate a date or period by or within which the documents must be tendered, the seller is under a duty to tender documents promptly, in a manner commensurate with the duty of documentary tender applicable in cif contracts: *Concordia Trading BV v Richco International Ltd* [1991] 1 Lloyd's Rep 475; and see PARA 340 ante.

3 See eg *Ian Stach Ltd v Baker, Bosley Ltd* [1958] 2 QB 130, [1958] 1 All ER 542. As to confirmed credits and documentary letters of credit generally see PARA 375 et seq post.

4 As to the passing of property see PARA 354 ante; and as to its postponement see PARAS 370-371 post.

UPDATE

345-355 Passing of property and reservation of rights of disposal ... Payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(3) FOB, FAS, FOR AND EX-SHIP CONTRACTS/(i) FOB Contracts/356. Shipment.

356. Shipment.

The delivery contemplated by an fob contract is delivery on board ship, and not otherwise¹ at the place agreed in the contract². This is a condition which is not included solely for the benefit of the buyer and accordingly cannot be waived by him without the seller's consent³. Where the ship on which delivery is to be made by the seller is not expressly specified in the contract, the buyer is under a duty, which is a condition of the contract, to nominate an effective ship⁴ in time for the seller to ship the goods, that is to say, to bring the goods alongside and perform the shipper's part of the operation of loading, so as to enable the buyer to receive them within the contract time⁵. In the absence of a contractual stipulation to the contrary, the buyer can substitute a nominated ship⁶, so long as the substituted ship is effective in the sense described above, and so long as the second nomination itself complies with any formal requirements demanded by the contract⁷. Where, as is usual, the property does not pass until the goods are loaded on board ship, the seller cannot sue for the price until the goods are loaded, even

though his inability to load was caused by the buyer's failure to name an effective ship⁸. In such a case his remedy is in damages⁹.

1 *Stock v Inglis* (1884) 12 QBD 564, CA; *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240. Should the parties wish to provide for delivery as between them prior to shipment of the goods on board, other terms of sale are available, eg fas (free alongside ship: see PARA 361 post) or fca (free carrier named place) where Incoterms 2000 (ICC Publication No 560) are incorporated into the contract.

2 *Miserocchi and C SpA v Agricultores Federados Argentinos SCL, Miserocchi and C SpA v Bunge AG, The Sotir and The Angelic Grace* [1982] 1 Lloyd's Rep 202 at 207-208; *Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep 142 at 148-150 per Colman J.

3 *Maine Spinning Co v Sutcliffe & Co* (1917) 34 TLR 154.

4 *Inglis v Stock* (1885) 10 App Cas 263 at 271, HL, per Lord Blackburn; *HO Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784 at 795, CA. Cf *Handel My J Smits, Import-Export NV v English Exporters (London) Ltd* [1957] 1 Lloyd's Rep 517. Unless otherwise agreed, the choice of trading port is at the buyer's option: see *David T Boyd & Co Ltd v Louis Louca* [1973] 1 Lloyd's Rep 209. Where the contract contains terms stipulating for certain requirements regarding the ship to be nominated by the buyer, breach of such terms would entitle the seller to terminate the contract for breach of condition: *Richco International Ltd v Bunge & Co Ltd, Bunge & Co Ltd v Tradax Ocean Transportation SA, The New Prosper* [1991] 2 Lloyd's Rep 93.

5 *J and J Cunningham Ltd v Robert A Munro & Co Ltd* (1922) 28 Com Cas 42 at 45, DC; *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL; *Scandinavian Trading Co A/B v Zodiac Petroleum SA and William Hudson Ltd, The Al Hofuf* [1981] 1 Lloyd's Rep 81; *Tradax Export SA v Italgrani di Francesco Ambrosio, Italgrani di Francesco Ambrosio v Sosimage SpA* [1983] 2 Lloyd's Rep 109. It has been held that, where an fob contract applied and congestion at the port of loading delayed the ship's arrival, the buyers were obliged to pay to the sellers the 'carrying charges' stipulated to be payable in the event of the buyers' failure to load within the contractual delivery period: see *Miserocchi and C SpA v Agricultores Federados Argentinos SCL, Miserocchi and C SpA v Bunge AG, The Sotir and The Angelic Grace* [1982] 1 Lloyd's Rep 202. A seller's contractual right to 'carrying charges' was not affected by the lapse of the laytime under a term imposing on the seller a duty to load the goods on board within a certain number of 'lay days': see *Richco International Ltd v Alfred C Toepfer International GmbH, The Bonde* [1991] 1 Lloyd's Rep 136. As to 'lay days' see PARA 357 post. For an fob contract where the seller's contractual right to 'carrying charges' was restricted by special term see *Bunge AG v Sesostrad SA, The Alkeos C* [1984] 1 Lloyd's Rep 687. See also *Lusograin Comercio Internacional de Cereas Ltda v Bunge AG* [1986] 2 Lloyd's Rep 654.

6 *Agricultores Federados Argentinos Sociedad Cooperativa Ltda v Ampro SA Commerciale, Industrielle et Financière* [1965] 2 Lloyd's Rep 157; distinguished in *Texaco Ltd v Eurogulf Shipping Co Ltd* [1987] 2 Lloyd's Rep 541 at 544-545. It is unlikely that a buyer could substitute a nomination on which the seller could show that he had relied.

7 *Cargill UK Ltd v Continental UK Ltd* [1989] 2 Lloyd's Rep 290, CA.

8 *Colley v Overseas Exporters* [1921] 3 KB 302. Where the contract expressly or by implication through the existence of a trade usage authorises the seller to deliver to the ship's agent on land in exchange for a 'received for shipment' bill of lading, the fob point may be regarded as being the point of delivery to the agent, in which case the rules stated in the text will apply mutatis mutandis. See also PARA 353 note 1 ante.

9 As to the seller's remedy in damages generally see PARA 287 et seq ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(3) FOB, FAS, FOR AND EX-SHIP CONTRACTS/(i) FOB Contracts/357. Loading of the goods, laytime and demurrage.

357. Loading of the goods, laytime and demurrage.

Where a buyer in an fob contract has chartered a vessel under a voyage charterparty¹ for the carriage of the goods he has bought, he may be responsible towards the party from whom he has chartered the vessel to ensure that the vessel loads and discharges the goods within a certain number of days, commonly known as 'lay days'². Such a buyer will, moreover, typically

be liable under the charterparty for payment of an agreed sum, commonly known as demurrage³. If loading of the goods at the port of shipment takes longer than the number of lay days available to the buyer under his charterparty, the buyer may find that he is liable under his charterparty for demurrage for delay caused in fact by the seller at the port of shipment. It is very common for the buyer to protect himself against this risk by stipulating in the contract⁴ for the sale of goods that the seller will have a certain number of days for loading at the port of shipment, beyond which period the seller will be liable towards the buyer for the payment of a fixed amount of money. Although, where such a term is agreed in the contract of sale, the relevant period is commonly known as laytime and the fixed amount demurrage, the number of lay days and the amount of demurrage may or may not be the same as the laytime and demurrage provided for in the charterparty concluded by the buyer⁵. Moreover, whether or not laytime runs in favour of a shipowner under a charterparty, laytime does not run against an fob seller where the buyer fails to open a letter of credit as agreed in the sale contract⁶.

1 See CARRIAGE AND CARRIERS vol 7 (2008) PARA 208.

2 See CARRIAGE AND CARRIERS vol 7 (2008) PARA 284.

3 See CARRIAGE AND CARRIERS vol 7 (2008) PARAS 284, 287 et seq.

4 In the absence of an express stipulation in the contract of sale providing for the payment by the seller of losses caused through delay in loading, or where such a stipulation does not in terms apply, the buyer could recover damages from the seller: see *Kurt A Becher GmbH & Co KG v Roplak Enterprises SA, Roplak Enterprises SA v Tradax Ocean Transportation SA, The World Navigator* [1991] 2 Lloyd's Rep 23, CA, particularly at 30-31. In practice, however, fob buyers will typically guard themselves against their liability for demurrage as charterers through express stipulation in the contract of sale: see eg *Cargill Inc v Rionda de Pass Ltd, The Giannis Xilas* [1982] 2 Lloyd's Rep 511. In order to recover damages in addition to demurrage for breach of the seller's obligation to load within the laytime permitted by the contract of sale, the buyer would need to prove an additional loss different in character from the mere loss of use and arising from a breach of an additional and/or independent obligation of the seller: *Richco International Ltd v Alfred C Toepfer International GmbH, The Bonde* [1991] 1 Lloyd's Rep 136 at 142-143.

5 See *R Pagnan & Fratelli v Finagrain Compagnie Commerciale Agricole et Financière SA, The Adolf Leonhardt* [1986] 2 Lloyd's Rep 395 at 404 (where the relevant term in the contract was held to impose an independent obligation to pay demurrage under the contract of sale). Whether all such terms impose such an independent obligation is, however, a difficult question: see *SL Sethia Liners Ltd v State Trading Corp of India Ltd* [1986] 1 Lloyd's Rep 31, CA; and the cases cited in PARA 344 note 6 ante. Where an fob contract is part of a string of sale contracts, it is possible to make the obligation to pay demurrage under one contract in the string contingent on recovery under another contract: see *Socap International Ltd v Marc Rich & Co AG* [1990] 2 Lloyd's Rep 175.

6 *Kronos Worldwide Ltd v Sempra Oil Trading SARL* [2004] EWCA Civ 03, [2004] 1 All ER (Comm) 915.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(3) FOB, FAS, FOR AND EX-SHIP CONTRACTS/(i) FOB Contracts/358. Price.

358. Price.

The price quoted in an fob contract covers all expenses up to and including delivery on board the named ship. Thereafter all further expenses fall on the buyer¹. These expenses include freight² and import duties. Responsibility for obtaining any necessary export licence will depend on the terms of the contract, construed in the light of its surrounding circumstances³. Responsibility for export duties, it is thought⁴, depends on the nature of the duties and the construction of the particular fob contract in the light of its surrounding circumstances⁵.

1 *Glengarnock Iron and Steel Co Ltd v Cooper & Co* (1895) 22 R 672.

2 *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce (Lorico)* [1997] 2 Lloyd's Rep 386 at 393-394, CA (fob buyer in breach of sale contract where he procured the opening of a letter of credit providing for the tender of freight prepaid bills of lading).

3 As to restrictions on export and licences generally see PARA 363 post.

4 It was at one time thought that the cost of export duties rested on an fob buyer, a view also to be found in the American decision in *Krauter v Menchacatorre* 195 NYS 361, 202 App Div 200 (1922). This view was, however, based on the reasoning in *HO Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784, CA, which must now be read in the light of the flexible approach to the obligations of buyers and sellers under such a contract as explained in *AV Pound & Co Ltd v MW Hardy & Co Inc* [1956] AC 588, [1956] 1 All ER 639, HL.

5 Thus, in a Scottish case, where export tax was payable as a precondition to shipment on a foreign bound ship and the contract for sale stipulated that the goods had to be exported by the buyer, the sellers were held responsible for the tax: see *Bowhill Coal Co Ltd v Tobias* (1902) 5 F 262. The position might well be different under a contract where goods were not sold for export and the seller had no concern or knowledge whether the buyer was going to export them or ship them coastwise. The time when, and person by whom, duty is payable to the authorities would also be material factors. As to the effect of an alteration in export duty see *Compagnie Continentale d'Importation Zurich SA v Ispahani Ltd* [1961] 1 Lloyd's Rep 293; affd [1962] 1 Lloyd's Rep 213, CA.

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359. Right of rejection.

In the absence of a special term or usage, the buyer is not under any duty to inspect the goods before shipment, and there is no general law that the place of shipment is the place of inspection¹, although the buyer is entitled to reject even before shipment if he inspects the goods then and finds them not up to contract². The appropriate place for inspection by the buyer is a question of fact depending on the circumstances of the case³. It is normally the place of delivery of the goods in the buyer's country, but, if the goods are bought for resale and are of a kind which cannot without injury be opened and reclosed, the proper place may be the premises of the final buyer⁴. It is for the seller to show that the buyer has had a reasonable opportunity for inspection, and this means (unless perhaps, some particular defect is obvious) the reasonable opportunity of inspecting the whole consignment to establish its conformity with the contract⁵. Where an fob seller is bound by the contract to tender documents to the buyer, principles similar to those applying to a cif buyer's right to reject documents will apply to the fob buyer⁶.

1 *Boks & Co v JH Rayner & Co* (1921) 37 TLR 800, CA.

2 *J and J Cunningham Ltd v Robert A Munro & Co Ltd* (1922) 28 Com Cas 42. The contract may, however, contain provisions as to the finality of certificates of quality etc, which debar complaint about matters within their scope: see the cases cited in PARA 339 note 4 ante.

3 As to the time and place of examination see PARA 197 ante.

4 *Saunt v Belcher and Gibbons Ltd* (1920) 90 LJB 541; *Van den Hurk v Martens* [1920] 1 KB 850. See also PARA 197 ante; and *Molling & Co v Dean & Son Ltd* (1901) 18 TLR 217, DC.

5 *JW Schofield & Sons v Rownson, Drew and Clydesdale Ltd* (1922) 10 Ll L Rep 480, CA.

6 See PARA 347 ante.

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360. Remedies for breach of fob contract.

The normal rules regarding remedies for breach of contract¹ apply generally to fob contracts, but there are detailed points of difference arising from the nature of such contracts. Damages for non-delivery or non-acceptance will commonly be assessed by reference to the date when the goods ought to have been shipped², but, if an fob contract provides for the seller to arrange for shipment and thereafter to tender shipping documents to the buyer in a manner analogous to a cif contract, the relevant date might be the date when such documents ought to have been tendered³. In the event of anticipatory repudiation, the position is similar to that applying generally and to cif contracts⁴.

In the case of the seller's delay in loading the goods, as agreed, the buyer may recover loss incurred in respect of the carrying vessel. Conversely, the seller may recover loss sustained consequent on the buyer's delay in tendering a vessel to take delivery, as agreed⁵. This is subject, in each case, to the ordinary rules of remoteness⁶. Special contractual provision is often made for each circumstance⁷.

The unpaid fob seller has the normal right to withhold delivery, seller's lien and right of stoppage in transit⁸, subject to paying the carrier's freight⁹.

1 le the normal rules as to the remedies of buyer and seller for breach by the other party of a contract for the sale of goods: see PARA 285 et seq ante. As to remedies for breach of a cif contract see PARA 349 ante.

2 See the Sale of Goods Act 1979 s 50(3) (see PARA 289 ante) and s 51(3) (see PARA 294 ante). See also *Harlow and Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509; *Phoebus D Kyprianou Co v Wm H Pim Jnr & Co Ltd* [1977] 2 Lloyd's Rep 570. These cases indicate that, where the contract states a shipment period, the relevant date will be the end of that period, subject perhaps to the exercise by either party of any contractual option to make shipment at some earlier date during the period of the essence and the treatment by the innocent party of that earlier date as the date of final default: see *Phoebus D Kyprianou Co v Wm H Pim Jnr & Co Ltd* supra at 580 per Kerr J. The contract may itself specify a default date for the purposes of the calculation of damages either explicitly (see *Lusograin Comercio Internacional de Cereas Ltda v Bunge AG* [1986] 2 Lloyd's Rep 654) or implicitly (*Fleming & Wendeln GmbH & Co v Sanofi SA/AG* [2003] EWHC 561 (Comm), [2003] 2 Lloyd's Rep 473).

3 See *Concordia Trading BV v Richco International Ltd* [1991] 1 Lloyd's Rep 475 at 481.

4 *L Roth & Co v Taysen, Townsend & Co and Grant & Co* (1895) 1 Com Cas 240 (affd (1896) 1 Com Cas 306, CA); *Sudan Import and Export Co (Khartoum) Ltd v Société Générale de Compensation* [1958] 1 Lloyd's Rep 310, CA. As to the remedies for anticipatory repudiation in a contract for the sale of goods see PARA 300 ante; and as to such remedies in the case of a cif contract see PARA 349 ante.

5 *J and J Cunningham Ltd v Robert A Munro & Co Ltd* (1922) 28 Com Cas 42 at 46, DC.

6 As to the measure of damages in contract see DAMAGES vol 12(1) (Reissue) PARA 941 et seq.

7 See eg *Trading Society Kwik-Hoo-Tong v Royal Commission on Sugar Supply* (1923) 16 Ll L Rep 250, CA; affd (1924) 19 Ll L Rep 343 ('demurrage' or liquidated damages, payable for keeping vessel); *Fratelli Moretti SpA v Nidera Handelscompagnie BV* [1981] 2 Lloyd's Rep 47, CA (carrying charges payable as the price of an option to extend shipment period); *Miserocchia and C SpA v Agricultores Federados Argentinos SCL, Miserocchi and C SpA v Bunge AG, The Sotir and Angelic Grace* [1982] 1 Lloyd's Rep 202; *Bunge AG v Sesostrad SA, The Alkeos C* [1984] 1 Lloyd's Rep 687; *Lusograin Comercio Internacional de Cereas Ltda v Bunge AG* [1986] 2 Lloyd's Rep 654; *Esteve Trading Corpn v Agropec International, The Golden Rio* [1990] 2 Lloyd's Rep 273; *Richco International Ltd v Alfred C Toepfer International GmbH, The Bonde* [1991] 1 Lloyd's Rep 136.

8 As to the rights of an unpaid seller generally see PARA 236 et seq ante.

9 As to the carrier's right to freight see PARA 275 ante. See also *Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 KB 570, CA.

UPDATE

360 Remedies for breach of fob contract

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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(ii) FAS and FOR Contracts

361. Commercial nature of contract.

Under a free alongside contract (fas) the seller undertakes to deliver the goods alongside the ship¹ at his own expense. It is the buyer's duty to engage shipping space and to give the seller adequate notice, in so far as the contract does not itself indicate, when, within the contract period, and where the goods are to be ready and alongside what ship². Fas contracts differ from the ordinary inland contract of sale in respect of the place at which delivery is to be made, which puts on the seller an item of cost over and above that of the goods themselves, and also prima facie fixes the point at which the property passes and the risk falls on the buyer and the price becomes payable³.

Under a free on rail contract (for)⁴ the seller undertakes to deliver the goods into railway wagons or at the station (depending on the practice of the railway) at his own expense, and (commonly) to make such contract with the railway on behalf of the buyer as is reasonable in the circumstances⁵. Prima facie the time of delivery on for terms fixes the point at which property and risk pass to the buyer and the price becomes payable⁶.

1 To be delivered into the possession of the employees or agents of the shipowners. The seller does this on behalf of the buyer, not on his own behalf, as otherwise he might become liable as shipper vis-à-vis shipowners: see generally *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429 at 443-447, [1938] 2 All ER 285 at 290-293, PC; but cf the contract described as fas in *Gill and Duffus Landauer Ltd v London Export Corp'n GmbH* [1982] 2 Lloyd's Rep 627.

2 *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep 81 at 92 per Megaw J; affd [1962] 1 Lloyd's Rep 610 at 615, 618, CA; cf at 623 per Diplock LJ.

3 Cf *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429, [1938] 2 All ER 285, PC. As to export licences see PARA 363 post.

4 Although it is still perfectly possible to conclude contracts for the sale of goods on for terms, it is now more common for parties who might previously have contracted on such terms to incorporate the fca (free carrier named place) from Incoterms 2000 (ICC Publication No 560). This term was first introduced in Incoterms 1990 (ICC Publication No 460), replacing the for/fot (free on rail/free on truck named departure point) contained in Incoterms 1980. The fca term has been retained in Incoterms 2000.

5 *Thomas Young & Sons Ltd v Hobson & Partners* (1949) 65 TLR 365, CA (where it was held to be unreasonable to send goods forward by rail 'at owner's risk' rather than at 'company's risk'). As to contracts made with carriers generally see PARAS 188-190 ante.

6 *Thomas Young & Sons Ltd v Hobson & Partners* (1949) 65 TLR 365 at 366, CA. See also *Underwood Ltd v Burgh Castle Brick and Cement Syndicate* [1922] 1 KB 343, CA (where the risk and expense involved in dismantling and delivering the engine in question safely on rail was emphasised). Cf *Healy v Howlett & Sons* [1917] 1 KB 337, DC (where there was no appropriation of specific goods at the time of delivery on rail, and it was held that property and risk did not pass).

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(iii) Ex-ship Contracts

362. Commercial nature of contract.

Under the ordinary ex-ship contract the seller undertakes to cause delivery to be made¹ to the buyer from a ship which has arrived at the port of delivery and has reached a place within the port which is usual for delivery of goods of the kind in question². The seller has to pay the freight or otherwise release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver, and, until this is done, the buyer is not bound to pay for the goods³. Neither the risk nor the property passes to the buyer until the goods are over the ship's rail at the port of delivery⁴. In other respects this form of contract does not differ in its incidents from an ordinary inland contract of sale of goods providing for a particular place of delivery.

1 He unless prevented by some event for which he can claim to be excluded from responsibility by the contract. The words 'to arrive' or 'on arrival' were themselves held sufficient to make the sale conditional on arrival and even on shipment of the goods, fraud apart, in a number of older cases: see *Boyd v Siffkin* (1809) 2 Camp 326; *Hawes v Humble* (1809) 2 Camp 327n; *Lovatt v Hamilton* (1839) 5 M & W 639; *Johnson v Macdonald* (1842) 9 M & W 600. These cases were referred to as good law in *Hollis Bros & Co Ltd v White Sea Timber Trust Ltd* [1936] 3 All ER 895 at 900 per Parker J, where 'sold subject to shipment' was held to denote an option whether to ship; but cf *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd* [1960] AC 684, [1960] 2 All ER 100, PC. Present commercial conditions make it doubtful to what extent the older cases may assist now. Ultimately the obligations undertaken must depend on the construction of the particular contract.

2 *Yangtze Insurance Association Ltd v Lukmanjee* [1918] AC 585 at 589, PC. Such a sale is not, therefore, to be performed by tendering shipping documents.

3 *Yangtze Insurance Association Ltd v Lukmanjee* [1918] AC 585, PC.

4 *Yangtze Insurance Association Ltd v Lukmanjee* [1918] AC 585, PC.

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(4) RESTRICTIONS ON IMPORT OR EXPORT

363. Licences.

Where the requirement of a licence either exists at the time of contract or is subsequently imposed, the rights and duties of the parties depend on the express or implied terms of the contract, construed in the light of all relevant surrounding circumstances¹. If a licence is required and the contract contains no express provision as to who must apply for it, the duty is usually thrown on the party best qualified, by knowledge of the necessary facts or otherwise, to

obtain the licence². In a cif³ or c & f⁴ contract, the seller is, therefore, normally responsible for seeking any export licence⁵ and the buyer for seeking any import licence⁶. In an fob⁷ or fas⁸ contract, the duty will be placed on the seller⁹ or the buyer¹⁰ according to the circumstances.

The duty may be an absolute duty to obtain any necessary licence¹¹, but, in the absence of contrary indication in the contract, it is a duty to exercise reasonable diligence to obtain any necessary licence¹². Where the duty is one of reasonable diligence, and the party on whom it lies fails to exercise such diligence¹³, he may nonetheless excuse himself from liability if he can establish clearly¹⁴ that any such steps or further steps as could reasonably have been (but were not) taken to obtain a licence would (if taken) have been fruitless¹⁵.

1 *AV Pound & Co Ltd v MW Hardy & Co Inc* [1956] AC 588, [1956] 1 All ER 639, HL, explaining *HO Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784, CA. See also *Re an Arbitration between the Anglo-Russian Merchant Traders Ltd and John Batt & Co (London) Ltd* [1917] 2 KB 679, CA; *Peter Cassidy Seed Co Ltd v Osuustukkukauppa IL* [1957] 1 All ER 484, [1957] 1 WLR 273; *Walton (Grain & Shipping) Ltd v British Italian Trading Co Ltd* [1959] 1 Lloyd's Rep 223; *Atisa SA v Aztec AG* [1983] 2 Lloyd's Rep 579; *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565, [1987] 2 Lloyd's Rep 342, CA; *Bangladesh Export Import Co Ltd v Sucden Kerry SA* [1995] 2 Lloyd's Rep 1, CA. As to contracts made subject to licence see further CONTRACT vol 9(1) (Reissue) PARA 908.

2 See the cases cited in note 1 supra.

3 As to cif contracts see PARA 324 et seq ante.

4 As to c & f contracts see PARA 350 ante.

5 See eg *Re an Arbitration between the Anglo-Russian Merchant Traders Ltd and John Batt & Co (London) Ltd* [1917] 2 KB 679, CA.

6 See eg *Mitchell Cotts & Co (Middle East) Ltd v Hairco Ltd* [1943] 2 All ER 552, CA.

7 As to fob contracts see PARA 351 et seq ante.

8 As to fas contracts see PARA 361 ante.

9 See eg *AV Pound & Co Ltd v MW Hardy & Co Inc* [1956] AC 588, [1956] 1 All ER 639, HL; *Peter Cassidy Seed Co Ltd v Osuustukkukauppa IL* [1957] 1 All ER 484, [1957] 1 WLR 273. Where Incoterms 2000 (ICC Publication No 560) are incorporated, the duty is expressly placed on the seller.

10 See eg *HO Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784, CA; *McMaster & Co v Cox McEuen & Co* 1921 SC (HL) 24. As to the position where Incoterms 2000 (ICC Publication No 560) are incorporated see note 9 supra.

11 See eg *Partabmull Rameshwar v KC Sethia (1944) Ltd* [1951] 2 All ER 352n, HL; *Peter Cassidy Seed Co Ltd v Osuustukkukauppa IL* [1957] 1 All ER 484, [1957] 1 WLR 273; *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98 at 101, 107-108 per Robert Goff J (affd [1979] 2 Lloyd's Rep 98 at 112, CA); *C Czarnikow Ltd v Centrala Handlu Zagranicznego Rolimpex* [1979] AC 351, [1978] 2 All ER 1043, HL. See also *Congimex Companhia Geral de Comercio Importadora e Exportadora SARL v Tradax Export SA* [1981] 2 Lloyd's Rep 687 (affd [1983] 1 Lloyd's Rep 250, CA), where Staughton J considered, obiter, that the presence in the contract of elaborate prohibition and force majeure clauses to protect the seller indicated that any duty on the buyer to obtain an import permit was absolute. Cf *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep 560 at 563, DC per Lloyd J, indicating that the presence of a force majeure clause is only one relevant factor. See also *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565 at 572-575, [1987] 2 Lloyd's Rep 342 at 348-351, CA (where a seller's contractual duty to obtain an export certificate, in a contract allowing for cancellation of the contract in case of prohibition of export, was construed as an absolute obligation despite the prohibition of export clause).

12 *Re an Arbitration between the Anglo-Russian Merchant Traders Ltd John Batt & Co (London) Ltd* [1917] 2 KB 679; *AV Pound & Co Ltd v MW Hardy & Co Inc* [1956] AC 588, [1956] 1 All ER 639, HL; *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep 560, DC (where Lloyd J restated the general principles to be derived from the authorities on licences).

A provision making the contract 'subject to licence' is regarded as confirmation of the application of the more limited duty to exercise reasonable diligence to obtain such a licence: see *Peter Cassidy Seed Co Ltd v Osuustukkukauppa IL* [1957] 1 All ER 484, [1957] 1 WLR 273. See also *Charles H Windschuegl Ltd v Alexander Pickering & Co Ltd* (1950) 84 Ll L Rep 89; *Société d'Avances Commerciales (London) Ltd v A Besse & Co*

(London) Ltd [1952] 1 Lloyd's Rep 242; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497, CA.

13 The onus normally lies on him to establish that he exercised reasonable diligence: *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497, CA (contract made 'subject to any Brazilian export licence'); *Vidler & Co (London) Ltd v R Silcock & Sons Ltd* [1960] 1 Lloyd's Rep 509; *Oversea Buyers Ltd v Granadex SA* [1980] 2 Lloyd's Rep 608 (contracts with prohibition clauses). See also *Charles H Windschuegl Ltd v Alexander Pickering & Co Ltd* (1950) 84 Ll L Rep 89. Reasonable diligence may involve appealing or re-applying after a complete or partial rejection of a licence application and may not be satisfied simply by acting in accordance with 'normal local practice': *Agroexport State Enterprise for Foreign Trade v Compagnie Européenne de Céréales* [1974] 1 Lloyd's Rep 499; *Malik Co v Central European Trading Agency Ltd* [1974] 2 Lloyd's Rep 279.

14 See the cases cited in note 11 supra. It is thought that the additional onus indicated by the word 'clearly' reflects the general presumption against a party who is in default in not having used reasonable diligence: see eg *Coldman v Hill* [1919] 1 KB 443 at 457-458, CA, per Scrutton LJ; *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 at 367, [1958] 3 All ER 66 at 88, HL, per Lord Denning; *Heywood v Wellers (a firm)* [1976] QB 446 at 459, [1976] 1 All ER 300 at 307, CA, per Lord Denning MR.

15 *Charles H Windschuegl Ltd v Alexander Pickering & Co Ltd* (1950) 84 Ll L Rep 89; *Société d'Avances Commerciales (London) Ltd v A Besse & Co (London) Ltd* [1952] 1 Lloyd's Rep 242; *Vidler & Co (London) Ltd v R Silcock & Sons Ltd* [1960] 1 Lloyd's Rep 509; *Agroexport State Enterprise for Foreign Trade v Compagnie Européenne de Céréales* [1974] 1 Lloyd's Rep 499 (where the government decision not to issue further export licences occurred after a period of time during which the seller could have sought such a licence); *Malik Co v Central European Trading Agency Ltd* [1974] 2 Lloyd's Rep 279 (where the seller failed to seek a licence for some months although he did everything possible thereafter); *Provimi Hellas AE v Warinco AG* [1978] 1 Lloyd's Rep 67 (affd [1978] 1 Lloyd's Rep 373, CA); *Overseas Buyers Ltd v Granadex SA* [1980] 2 Lloyd's Rep 608. It is thought that the fruitfulness or otherwise of further steps is relevant in two different contexts: (1) it is a factor in considering whether reasonable diligence has been used; but (2) if reasonable diligence has not been used, the party in default may still show that its exercise would, in the particular circumstances, have been fruitless. In the second case, where this is shown, there is no causative link between the absence of a licence and the default. These two contexts are not always clearly separated: see eg *Provimi Hellas AE v Warinco AG* supra. In *Overseas Buyers Ltd v Granadex SA* supra at 612, Mustill J stated that in the second context the party in default had to exclude the possibility that any steps (not merely any reasonable steps) would have been successful. There seems no reason, however, why failure to use reasonable diligence in one respect should expose a party to the burden of showing that no conceivable step would have been fruitful.

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364. Prevention and hindrance of import and export.

Where the performance of a contract in the manner agreed is prevented by a prohibition or restriction on export or import or by the absence of a licence occurring without default of either party¹, the contract may be frustrated². The contract will in general not be frustrated if its terms permit performance in a number of ways and the prohibition only prevents one or some of these ways of performance³. A party who receives advance notice of a prohibition, and who with diligence could still perform in accordance with the contract before the prohibition comes into effect, cannot claim to be prevented from performance by the prohibition⁴.

Commercial contracts commonly make specific provision for the occurrence or consequences of events preventing, hindering or delaying export or import, whether or not these would otherwise have the effect of frustrating the contract⁵. The application and effect of such a provision will depend on its terms⁶. Such a provision qualifying a party's prima facie obligations will be construed strictly, and the party invoking its protection must establish the necessary facts⁷.

1 As to the necessity for a licence see PARA 363 ante.

2 *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287, CA. The prevention, where it is legal rather than physical, must be by the proper law of the contract or (at least where English law is the proper law) the law of the country of export or import: *Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 KB 678, [1939] 3 All ER 38, CA; *Toprak Mahsulleri Ofisi v Finagrains Compagnie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98, CA. As to the causes of frustration see also CONTRACT vol 9(1) (Reissue) PARA 902.

3 As to alternative performance see CONTRACT vol 9(1) (Reissue) PARA 893 and the cases there cited. See also *Warinco AG v Fritz Mauthner* [1978] 1 Lloyd's Rep 151, CA; *Exportelisa SA v Rocco Giuseppe & Figli Soc Coll* [1978] 1 Lloyd's Rep 433, CA. Even if the contract provides for performance in one particular way, eg by shipment by a particular route, prevention of performance in that way may not frustrate the rest of the contract which may, in that event, be read as requiring performance in some alternative way: *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93 at 112, [1961] 2 All ER 179 at 182-183, HL, per Viscount Simonds (effect of closure of the Suez Canal on cif contract); *Congimex Companhia Geral de Comercio Importadora e Exportadora SARL v Tradax Export SA* [1981] 2 Lloyd's Rep 687 (affd [1983] 1 Lloyd's Rep 250, CA). See also *HR and S Sainsbury Ltd v Street* [1972] 3 All ER 1127, [1972] 1 WLR 834. A frustrating event may leave a seller with enough goods to fulfil part but not all of his contractual commitments. In the absence of any relevant prohibition or force majeure clause (see PARA 365 text and notes 16-17 post) it is unlikely that the courts will regard the seller as entitled to appropriate goods which are available reasonably (whether proportionately or otherwise) and then treat his remaining contractual commitments as otherwise frustrated: see *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 at 9, 13-14, CA (not a sale of goods case).

4 See *Ross T Smyth & Co Ltd (Liverpool) v WN Lindsay Ltd (Leith)* [1953] 2 All ER 1064, [1953] 1 WLR 1280.

5 The provisions most often before the courts in recent years are the prohibition and force majeure clauses to be found in Form 100 (contract for the shipment of feedingstuffs in bulk) cll 18, 19 of the Grain and Feed Trade Association Limited, the purpose of which is to protect the seller against an action for non-delivery in certain stipulated circumstances. In some contracts, parties on occasion do the reverse, namely agree that certain circumstances will not trigger force majeure provisions in the contract: see *Bangladesh Export Import Co Ltd v Sucden Kerry SA* [1995] 2 Lloyd's Rep 1, CA (where a c & f buyer was under a contractual duty to obtain an import licence under terms which excluded the application of a force majeure clause in case it was impossible to obtain such licence, the buyer was in breach of his contractual duty to take and pay for delivery where an import licence could not be obtained).

6 As to specific provision for the occurrence or consequences of events preventing or hindering export or import see PARA 365 post.

7 See eg *Bremer Handelsgesellschaft mbH v Mackprang Jnr* [1979] 1 Lloyd's Rep 221, CA; *Bunge SA v Deutsche Conti Handelsgesellschaft mbH* [1979] 2 Lloyd's Rep 435, CA; *Bremer Handelsgesellschaft mbH v Raiffeisen Hauptgenossenschaft EG* [1982] 1 Lloyd's Rep 599, CA.

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365. Specific provision for the occurrence or consequences of prevention and hindrance.

Certain propositions may be drawn from the authorities on provisions in common use. Clauses covering 'hindrance' of performance by specified events apply if such an event occurs giving rise to obstacles which it would be very difficult to overcome¹. Clauses covering 'prevention' or 'prohibition' by specified events have been said to require proof of legal or physical impossibility of performance². The better view seems, however, to be that commercial impracticability may also constitute prevention or prohibition³.

Under a clause applying generally, as in the case of a prohibition of the export of goods of the contract description, the seller need not show that, but for the prohibition, he would have been able to perform⁴. He must, however, show that the prohibition prevented performance of the contract in any manner permitted by its terms which it would have been practicable and commercially sensible to adopt⁵. In commodity trading, where an embargo supervenes, purchase of goods already afloat is generally not expected⁶. The same applies to goods already

on lighters or in course of loading and excepted from the embargo⁷. The seller must establish that he did not in fact have available to him for performance goods already afloat or within any exceptions to the embargo⁸. Where he intended before the embargo to fulfil the contract using goods bought in, he must also show that the relevant shipper had no such goods available⁹. The identification of the relevant shipper (that person who was prevented by the embargo from shipping the goods which would otherwise have been appropriated by the seller to their contract with the buyer) is for the seller to establish as a matter of fact and probability¹⁰.

Under a clause dealing with the particular effects of an embargo or other force majeure event on the seller's intended performance, the seller must establish that delivery in accordance with his intended method of performance was prevented, hindered or delayed (depending on the clause) by an event specified in the clause. Thus, he may have to show that he (as the intended shipper) or the relevant shipper (if the seller intended to fulfil the contract using goods bought in) did not have available for delivery goods from the intended place or source of supply already afloat or for any other reason outside the scope of the force majeure event¹¹. The seller may also have to show that, but for the force majeure event, he could and would have been able to deliver goods in accordance with the contract¹². He need not, however, show that there was no or no practicable alternative way of performance to that intended¹³.

Where prior notice is received that an embargo will be imposed with effect part-way through the contractual shipment period, the seller must show that everything reasonable was done to ship before the embargo came into effect¹⁴. It is, however, a matter of degree whether the likelihood of such an embargo is sufficiently strong to oblige steps to accelerate shipment in this way¹⁵.

Where a seller has sufficient goods available to fulfil part but not all of his relevant commitments, he may appropriate the available goods to or between commitments¹⁶ in a way which the trade would consider to be proper and reasonable. This may be pro rata¹⁷, or according to chronological order of contracts or delivery or in some other way¹⁸.

1 *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495 at 510, HL, per Earl Loreburn; *Peter Dixon & Sons Ltd v Henderson Craig & Co Ltd* [1919] 2 KB 778, CA; *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1962] 1 QB 42, [1961] 2 All ER 577, CA (on appeal [1963] AC 691, [1963] 1 All ER 545, HL).

2 *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495 at 509, HL, per Lord Finlay LC. The fact that a clause is headed 'prohibition' does not mean that a clause can only be used in cases of total prohibition where the clause says in terms that the seller is discharged if the prohibition restricts export, whether totally or partially: *Agrokor AG v Tradigrain AG* [2000] 1 Lloyd's Rep 497.

3 See eg *Bremer Handelsgesellschaft mbH v Mackprang Jnr* [1979] 1 Lloyd's Rep 221, CA; *Bremer Handelsgesellschaft mbH v Continental Grain Co New York* [1983] 1 Lloyd's Rep 269, CA.

4 *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at 114, 121, 131, HL. It may be open to the buyer to prove to the contrary: see at 121 per Viscount Dilhorne.

5 *Ross T Smyth & Co Ltd (Liverpool) v WN Lindsay Ltd (Leith)* [1953] 2 All ER 1064, [1953] 1 WLR 1280; *Warnico AG v Fritz Mauthner* [1978] 1 Lloyd's Rep 151, CA (where sellers had undertaken to ship goods from one or other of a number of ports, they could not rely on an event included in an exception clause if that event happened but affected only one of the ports); *Exportelisa SA v Rocco Giuseppe and Figli Soc Coll* [1978] 1 Lloyd's Rep 433, CA (by failing to purchase goods from another supplier, the sellers had wholly failed to get themselves within any of the terms of the exemption clause); *Continental Grain Export Corp v STM Grain Ltd (Charles E Ford Ltd)* [1979] 2 Lloyd's Rep 460; *Tradax Export SA v Cook Industries Inc* [1981] 1 Lloyd's Rep 236 (on appeal [1982] 1 Lloyd's Rep 385, CA); *André & Cie SA v Tradax Export SA* [1983] 1 Lloyd's Rep 254, CA.

6 *Tradax Export SA v André & Cie SA* [1976] 1 Lloyd's Rep 416, CA; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL.

7 *Bunge SA v Kruse* [1979] 1 Lloyd's Rep 279; affd [1980] 2 Lloyd's Rep 142, CA.

8 *Tradax Export SA v André & Cie SA* [1976] 1 Lloyd's Rep 416, CA; *Bremer Handelsgesellschaft mbH v Mackprang Jnr* [1979] 1 Lloyd's Rep 221, CA; *André & Cie SA v Ets Michel Blanc & Fils* [1979] 2 Lloyd's Rep 427,

CA; *Continental Grain Export Corp v STM Grain Ltd (Charles E Ford Ltd)* [1979] 2 Lloyd's Rep 460; *Toepfer v Schwarze* [1980] 1 Lloyd's Rep 385, CA.

9 *Bremer Handelsgesellschaft mbH v Mackprang Jnr* [1979] 1 Lloyd's Rep 221, CA; *Bunge SA v Deutsche Conti Handelsgesellschaft mbH* [1979] 2 Lloyd's Rep 435, CA (where the seller at the date of the embargo had made no arrangements to buy in); *Tradax Export SA v Cook Industries Inc* [1982] 1 Lloyd's Rep 385, CA; *André & Cie SA v Tradax Export SA* [1983] 1 Lloyd's Rep 254, CA (where it was held that the position of the intermediate sellers in the string leading back to the relevant shipper was irrelevant).

10 *Tradax Export SA v Cook Industries Inc* [1982] 1 Lloyd's Rep 385, CA; *Bremer Handelsgesellschaft mbH v Continental Grain Co New York* [1983] 1 Lloyd's Rep 269, CA; *Bremer Handelsgesellschaft mbH v Bunge Corp* [1983] 1 Lloyd's Rep 476, CA; *Deutsche Conti-Handelsgesellschaft mbH v Bremer Handelsgesellschaft mbH* [1984] 1 Lloyd's Rep 447 at 449; *Vanden Avenne-Izegem PVBA v Finagrain SA* [1985] 2 Lloyd's Rep 99.

11 *European Grain & Shipping Ltd v JH Rayner & Co Ltd* [1970] 2 Lloyd's Rep 239; *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep 57; *Continental Grain Export Corp v STM Grain Ltd (Charles E Ford Ltd)* [1979] 2 Lloyd's Rep 460 at 473 per Robert Goff J; *Bremer Handelsgesellschaft mbH v C Mackprang Jnr* [1981] 1 Lloyd's Rep 292, CA; *André et Cie SA v Tradax Export SA* [1983] 1 Lloyd's Rep 254, CA. 'The seller must, on the balance of probabilities, establish that the shipper could not have benefited from the exceptions to the embargo, that is to say that he had not available what have become known as 'loophole' goods': *Bremer Handelsgesellschaft mbH v Continental Grain Co New York* [1983] 1 Lloyd's Rep 269 at 283, CA. See also *Cook Industries Inc v Tradax Export SA* [1985] 2 Lloyd's Rep 454, CA.

12 *Tradax Export SA v Cook Industries Inc* [1981] 1 Lloyd's Rep 236 at 242 per Robert Goff J; on appeal [1982] 1 Lloyd's Rep 385 at 391, CA, per Kerr LJ. See, however, *Bremer Handelsgesellschaft mbH v Mackprang Jnr* [1981] 1 Lloyd's Rep 292 at 297, 302, CA, disagreeing, it would seem, with the judge at first instance on this requirement.

13 See the cases cited in note 11 supra.

14 *Ross T Smyth & Co Ltd (Liverpool) v WN Lindsay Ltd (Leith)* [1953] 2 All ER 1064, [1953] 1 WLR 1280.

15 *Tradax Export SA v André & Cie SA* [1976] 1 Lloyd's Rep 416 at 424, 426, CA; *Continental Grain Export Corp v STM Grain Ltd (Charles E. Ford Ltd)* [1979] 2 Lloyd's Rep 460 at 474-475 per Robert Goff J.

16 In his prior contractual commitments: see *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep 304, CA.

17 To deliver pro rata will generally, although not automatically, be reasonable, and there may be more than one reasonable course of action open to a seller: *Bremer Handelsgesellschaft mbH v Continental Grain Co New York* [1983] 1 Lloyd's Rep 269, CA, approving the words of Robert Goff J in *Westfaelische Central Genossenschaft v Seabright Chemicals Ltd* (13 March 1979, unreported).

18 *Tradax Export SA v André & Cie SA* [1976] 1 Lloyd's Rep 416 at 423, CA, per Lord Denning MR; *Intertradex SA v Lesieur-Tourteaux SARL* [1977] 2 Lloyd's Rep 146 (on appeal [1978] 2 Lloyd's Rep 509, CA); *Bremer Handelsgesellschaft mbH v Mackprang Jnr* [1979] 1 Lloyd's Rep 221, CA; *Bremer Handelsgesellschaft mbH v Continental Grain Co New York* [1983] 1 Lloyd's Rep 269, CA.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(5) BILLS OF LADING/366. Meaning of 'bill of lading'.

(5) BILLS OF LADING

366. Meaning of 'bill of lading'.

A bill of lading¹ is a receipt for goods delivered to and received by² a ship, signed by the person who contracts to carry them, or his agent³, and evidencing the terms of the contract of carriage under which the goods have been so delivered and received⁴. During the period of transit and voyage the bill of lading is recognised by the law merchant as the symbol of the goods described in it, and the indorsement and delivery of the bill of lading operates as a symbolic

delivery of the goods⁵. Property in the goods passes by such indorsement whenever and to the extent that it is the intention of the parties that the property should pass, just as in similar circumstances the property would pass by actual delivery of the goods⁶. The holder of the bill of lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons⁷. He is thus in the same commercial position as if the goods were in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the shipowner, and that, in order to obtain actual delivery of the goods from the shipowner, he may be obliged to discharge the shipowner's lien for freight.

1 As to bills of lading in cif contracts see PARA 332 ante; and as to bills of lading generally see CARRIAGE AND CARRIERS vol 7 (2008) PARA 313 et seq. The provisions of the Factors Act 1889 (see PARAS 253-255 ante; and AGENCY vol 1 (2008) PARAS 148-149), and of the Sale of Goods Act 1979 s 47 (see PARA 251 ante), apply to bills of lading issued for the purpose of the terms of a cif and fob contract as they apply to all documents of title listed in the Factors Act 1889 s 1(4) (see PARA 157 ante).

2 Normally the bill of lading acknowledges that the goods have been shipped. As to 'received for shipment' bills of lading see PARA 333 ante. For the meaning of 'shipment' see PARA 330 ante.

3 This is commonly the master or the ship's agents at the port of loading, or, today, often the vessel's time charterers or their agents: see *SS Knutsford Ltd v Tillmanns & Co* [1908] AC 406, HL; *The Berkshire* [1974] 1 Lloyd's Rep 185; *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1979] AC 757, [1979] 1 All ER 307, HL.

4 *Sewell v Burdick* (1884) 10 App Cas 74 at 105, HL. As against a shipper or indorsee of the bill of lading who has chartered the ship from the person issuing the bill, the relevant contract normally remains the charterparty (the bill having effect merely as a receipt): *Love and Stewart Ltd v Rowtor Steamship Co Ltd* [1916] 2 AC 527, HL; *President of India v Metcalfe Shipping Co Ltd, The Dunelmia* [1970] 1 QB 289, [1969] 3 All ER 1549, CA. See CARRIAGE AND CARRIERS vol 7 (2008) PARAS 321, 353-356. Otherwise, as between shipper and shipowner, a bill is strong evidence and as between an indorsee and shipowner is conclusive evidence of the terms of the carriage contract. See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 320.

5 See *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 at 341, CA, per Bowen LJ. See also PARA 368 note 1 post; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 315.

6 *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 at 341, CA, per Bowen LJ. The rights of suit of lawful holders of bills of lading are conferred by the Carriage of Goods by Sea Act 1924 s 2: see CARRIAGE AND CARRIERS vol 7 (2008) PARA 338 et seq. By s 4, and by the Hague-Visby Rules art III r 4, the bill of lading in the hands of a consignee or indorsee for value is conclusive evidence against the shipowner of shipment of the goods: see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 316-317, 343, 380. The Carriage of Goods by Sea Act 1924 also confers rights of suit on persons named as consignees on sea waybills and on those in and to whom the carrier acknowledges a right to delivery of the goods in a ship's delivery order: see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 364-365; but as to the validity of tender of such documents under cif contracts see PARA 332 notes 17, 19 ante. For the meaning of 'the Hague-Visby Rules' see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 206, 367 et seq.

7 *Glyn, Mills, Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591, HL.

UPDATE

366 Meaning of 'bill of lading'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(5) BILLS OF LADING/367. Delivery of bill of lading.

367. Delivery of bill of lading.

Goods deliverable by bill of lading¹ are delivered by the issue or transfer to the buyer of a bill of lading duly indorsed² and effectual, if accompanied by the appropriate intention³, to pass the property in the goods⁴, representing goods which are in fact in accordance with the contract⁵, and made out in terms which are not inconsistent with the provisions of the contract of sale⁶. These terms must be such that the buyer will be enabled to receive possession of the goods at the appointed destination⁷.

1 The buyer may waive the delivery of the bill of lading, and, if the property and possession have passed to him, he is liable for the price: *Green v Sichel* (1860) 7 CBNS 747 (trade usage to pay against bill of lading). As to the transfer of a bill operating as a transfer of goods see CARRIAGE AND CARRIERS vol 7 (2008) PARA 350.

2 Where the bill of lading is issued to the shipper's order, it would appear that, for the buyer to acquire rights of suit against the carrier through the Carriage of Goods by Sea Act 1992 s 2, the bill of lading would need to be indorsed by the shipper, 'lawful holder' being defined in s 5(2)(b) as a 'person with possession of the bill as a result of the completion, by the delivery of the bill, of any indorsement of the bill ...': see CARRIAGE AND CARRIERS vol 7 (2008) PARA 338 head (2). Where a transferable bill of lading names the buyer as the consignee, no such indorsement by the seller who shipped the goods would appear to be necessary, such a buyer being covered by s 5(2)(a): see CARRIAGE AND CARRIERS vol 7 (2008) PARA 338 head (1). In either case, however, were the buyer to sell the goods on by transfer of the bill of lading, the sub-purchaser would need the buyer's indorsement on the bill of lading if the document is to transfer the buyer's rights of suit against the carrier. As to modes of indorsement generally see CARRIAGE AND CARRIERS vol 7 (2008) PARA 335.

3 See PARA 345 ante.

4 *Sanders Bros v Maclean & Co* (1883) 11 QBD 327, CA (bills in a set). As to the passing of property by a bill of lading see further PARA 368 post.

5 *Tamvaco v Lucas* (1859) 1 E & E 592 (bill of lading untruly representing contract quantity). It is an implied term of a cif contract that the bill of lading is true and accurate in all material respects: see the cases cited in PARA 340 note 12 ante.

6 *Tamvaco v Lucas* (1859) 1 E & E 581; *Re Keighley, Maxted & Co and Bryan, Durant & Co (No 2)* (1894) 70 LT 155, CA (bill of lading showing excessive quantity).

7 *Lecky & Co Ltd v Ogilvy, Gillanders & Co* (1897) 3 Com Cas 29, CA (bill of lading made out by mistake to wrong port). See generally para 332 ante. See also *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779 (where a partially forged bill of lading was held not to be a nullity as it was still both evidence of a contract of affreightment and a document of title).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(5) BILLS OF LADING/368. Transfer of property by bill of lading.

368. Transfer of property by bill of lading.

Where goods for which a bill of lading¹ has been signed have been shipped, the property in the goods may, so long as the voyage continues, be transferred by a transfer of the bill of lading, made according to its tenor², and with the intention of passing the property in the goods³. The transfer may, however, be made with the intention of passing the property conditionally, or for a specific purpose only, and not for the purpose of passing the property outright in the goods, as where the bill of lading is transmitted with a bill of exchange drawn on the buyer⁴.

The voyage is deemed to continue so long as the goods are in the custody of the master of the vessel, or of some person on his behalf, and until possession of the goods has been taken by or on behalf of the person entitled to demand it⁵.

1 A bill of lading is a symbol of the goods represented by it, and evidences possession, not property: *Sanders Bros v Maclean & Co* (1883) 11 QBD 327 at 341, CA, per Bowen LJ; *Burdick v Sewell* (1884) 13 QBD 159 at 171, CA, per Bowen LJ. It is not a symbol of the right of property, the passing of which depends on the contract. Thus, the issue by the master of a bill of lading without the seller's consent is ineffectual: *Craven v Ryder* (1816) 6 Taunt 433; *Ruck v Hatfield* (1822) 5 B & Ald 632; *Schuster v McKellar* (1857) 7 E & B 704.

2 If the bill of exchange is to order, then transfer is by indorsement and delivery: *Lickbarrow v Mason* (1794) 5 Term Rep 683, 1 Smith LC (13th Edn) 703, 748. If the bill of exchange is indorsed in blank, then transfer is by delivery: *Sewell v Burdick* (1884) 10 App Cas 74, HL. For modes of indorsement generally see CARRIAGE AND CARRIERS vol 7 (2008) PARA 335.

3 *Sewell v Burdick* (1884) 10 App Cas 74, HL. Where the bill of lading is transferred to the buyer, the property passes, strictly speaking, by the contract and not by the transfer of the bill: *Sewell v Burdick* supra at 105 per Lord Bramwell; *Jenkyne v Osborne* (1844) 7 Man & G 678 at 697. The transfer for value of a bill of lading is, however, prima facie evidence that the property passed thereby: *Dracachi v Anglo-Egyptian Navigation Co* (1868) LR 3 CP 190; *Trucks and Spares Ltd v Maritime Agencies (Southampton) Ltd* [1951] 2 All ER 982, CA. Even where the bill of lading has been signed, its transfer is not essential to the passing of property. The other facts of the case may show that property has passed: *Dick v Lumsden* (1793) Peake 189; *Meyer v Sharpe* (1813) 5 Taunt 74; *Nathan v Giles* (1814) 5 Taunt 558; *Fowler v Knoop* (1878) 4 QBD 299, CA; *The Prinz Adalbert* [1917] AC 586, PC. Cf *The Derfflinger (No 2)* (1918) 118 LT 521, PC. A lien may also be preserved by means of a bill of lading, even though the property passes: *London Joint Stock Bank Ltd v British Amsterdam Maritime Agency* (1910) 16 Com Cas 102. Cf *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429, [1938] 2 All ER 285, PC. As to the transfer of a bill of lading for goods at the time unascertained see *Hayman & Son v M'Lintock* 1907 SC 936. As to cif and fob contracts see PARAS 343, 345, 354-355 ante.

4 See the Sale of Goods Act 1979 s 19(3); and PARA 343 ante. See also *Bateman v Green and King* (1867) IR 2 CL 166; on appeal IR 2 CL 607. It may be shown that the transfer was by way of pledge (*Sewell v Burdick* (1884) 10 App Cas 74, HL; *Bristol and West of England Bank v Midland Ry Co* [1891] 2 QB 653, CA), or for another special purpose (*Hibbert v Carter* (1787) 1 Term Rep 745 (transfer to creditor to bind proceeds of goods); *Waring v Cox* (1808) 1 Camp 369; *Morison v Gray* (1824) 2 Bing 260 (transfer to agent to stop in transit) (explained in *Burgos v Nascimento (McKeand Claimant)* (1908) 100 LT 71 (indorsement to warehouseman to receive goods)); *Patten v Thompson* (1816) 5 M & S 350 (transfer to factor to receive cargo); *Bruce v Wait* (1837) 3 M & W 15 (transfer to agent for sale); *The Orteric* [1920] AC 724, PC). See generally paras 343, 345 ante, 373 post.

5 *Barber v Meyerstein* (1870) LR 4 HL 317 (goods landed at sufferance wharf); *Hayman & Son v M'Lintock* 1907 SC 936 (goods landed and stored in name of ship); *Barclays Bank Ltd v Customs and Excise Comrs* [1963] 1 Lloyd's Rep 81. Possession cannot be taken, nor can a wharfinger issue a warrant or accept a delivery order, where there is a stop for freight, without payment of freight: *Barber v Meyerstein* supra.

UPDATE

368 Transfer of property by bill of lading

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(5) BILLS OF LADING/369. Transfer of bills in a set.

369. Transfer of bills in a set.

When two or more parts¹ of a bill of lading are signed by or on behalf of the carrier by sea, and the parts are transferred to two or more transferees in good faith and for value, the property in the goods, if it was intended to pass, passes to the transferee who is first in point of time². No liability is, however, imposed on the carrier by sea or person having the custody of the goods who, in good faith and without notice of any prior claim, delivers the goods in exchange for that part of the bill of lading which is first presented to him³.

1 le a 'set' of bills of lading. Bills of lading are normally issued in sets. As to bills in a set and their transfer see CARRIAGE AND CARRIERS vol 7 (2008) PARA 334.

2 *Caldwell v Ball* (1786) 1 Term Rep 205; *Barber v Meyerstein* (1870) LR 4 HL 317. Cf *Gurney v Behrend* (1854) 23 LJQB 265; *The Argentina* (1867) 16 LT 743 (where one part of the bill of exchange was transferred under a contract voidable for fraud and was then re-transferred by the fraudulent buyer to a purchaser in good faith and for value). Sale contracts and letters of credit now commonly require the buyer to tender the full set of bills of lading. So far as concerns letters of credit see the Uniform Customs and Practice for Documentary Credits (1993 Revision; ICC Publication No 500) art 23(a)(iv); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 940.

3 *Glyn, Mills, Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591, HL. As to bills of lading see further CARRIAGE AND CARRIERS vol 7 (2008) PARA 313 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(5) BILLS OF LADING/370. Reservation of right of disposal.

370. Reservation of right of disposal.

Where goods¹ are shipped, and by the bill of lading the goods are deliverable to the order of the seller² or his agent, the seller is prima facie to be taken to reserve the right of disposal³. This inference, being prima facie only, may, however, be rebutted by other circumstances⁴. The same principle applies generally where the seller takes in his own name, or in that of his agent, a mate's receipt, boat-master's receipt or other document giving control of the goods⁵.

1 For the meaning of 'goods' see PARA 30 ante.

2 For the meaning of 'seller' see PARA 27 ante.

3 Sale of Goods Act 1979 s 19(2). See also *The Prinz Adalbert* [1917] AC 586 at 589-590, PC, per Lord Sumner; *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 at 67-70, HL, per Lord Wright. There was for some time some doubt as to whether the presumption in the Sale of Goods Act 1979 s 19(2) could apply to an fob contract, given that the seller was bound to place the goods free on board; but this doubt was removed in *Mitsui & Co Ltd v Flota Mercante Grancolombiana SA, The Ciudad de Pasto, The Ciudad de Neiva* [1989] 1 All ER 951, [1988] 1 WLR 1145, CA, particularly at 956, 959-960 and at 1151-1152, 1155-1156. In relation to an fas contract see *Transpacific Eternity SA v Kanematsu Corp*, *The Antares III* [2002] 1 Lloyd's Rep 233, [2001] All ER (D) 33 (Aug). See also *Concordia Trading BV v Richco International Ltd* [1991] 1 Lloyd's Rep 475; and PARA 354 note 4 ante. Cf the Sale of Goods Act 1979 s 19(1): see PARA 137 ante. The question of the seller's intention is one of fact: *Van Casteel v Booker* (1848) 2 Exch 691; *Falk v Fletcher* (1865) 18 CBNS 403. For circumstances from which the courts have inferred intention see PARA 371 post.

4 *The Parchim* [1918] AC 157 at 170-171, PC. Cf *Eastwood and Holt v Studer* (1926) 31 Com Cas 251 at 255 per Roche J. The following are examples concerning the reservation of the right of disposal: *Walley v Montgomery* (1803) 3 East 585 (bill of lading indorsed to buyer with advice of bill of exchange); *Ogle v Atkinson* (1814) 5 Taunt 759 (shipment on buyer's ship; bill of lading wrongfully taken by seller in blank); *Brandt v Bowlby* (1831) 2 B & Ad 932 (indorsed bill of lading sent to seller's agent, unindorsed to buyer); *Bruce v Wait* (1837) 3 M & W 15 (possession obtained by consignee after right of disposal reserved); *Ellershaw v Magniac* (1843) 6 Exch 570n (bill of lading pledged by seller; payment by buyer); *Wilmshurst v Bowker* (1844) 7 Man & G 882, Ex Ch (payment to be by banker's draft against bill of lading; bill sent to buyer); *Van Casteel v Booker* (1848) 2 Exch 691 (shipment in buyer's ship and bill of lading transferred to him); *Wait v Baker* (1848) 2 Exch 1 (bill of lading pledged by seller after buyer's tender of price); *Jenkyns v Brown* (1849) 14 QB 496; *Turner v Liverpool Docks Trustees* (1851) 6 Exch 543, Ex Ch (bill of lading transferred to purchasers of bills drawn on buyer); *Key v Cotesworth* (1852) 7 Exch 595 (transmission of bill of lading to buyer's agent with advice of bill of exchange); *Sheridan v New Quay Co* (1858) 4 CBNS 618 (cash against bill of lading in hands of seller's agent); *Browne v Hare* (1859) 4 H & N 822, Ex Ch (bill of lading indorsed by seller to buyer, and sent through seller's agent only to preserve lien); *Joyce v Swann* (1864) 17 CBNS 84 (bill of lading retained by seller without intention of reserving right of disposal); *Moakes v Nicolson* (1865) 19 CBNS 290 (cash against bill of lading in hands of seller's agent); *Shepherd v Harrison* (1871) LR 5 HL 116 (bill of lading and bill of exchange sent to buyer

through seller's agent); *Gabarron v Kreeft*, *Kreeft v Thompson* (1875) LR 10 Exch 274 (bill of lading to order of fictitious person and pledged by seller); *Ogg v Shuter* (1875) 1 CPD 47, CA (shipment free on board; cash against bill of lading; refusal to pay); *Re Tappenbeck, ex p Banner* (1876) 2 ChD 278, CA (bill of lading sent direct to buyer with advice of bill of exchange); *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex D 164, CA (bill of lading transferred to purchasers of bill of exchange drawn on buyer; tender of price by buyer (cf *Wait v Baker* supra)); *Rew v Payne, Douthwaite & Co* (1885) 53 LT 932 (bill of lading and bill of exchange sent through seller's agent; wrongful dealing by buyer with cargo); *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA (direct transmission to buyer of both documents); *König v Brandt* (1901) 84 LT 748, CA (direct transmission of bill of lading; advice of bill of exchange); *The Parchim* [1918] AC 157, PC (prize case; presumption of reservation under what is now the Sale of Goods Act 1979 s 19(2) rebutted); *Albacruz (Owners) v Albazero (Owners)*, *The Albazero* [1974] 2 All ER 906 at 923-926 per Brandon J (on appeal [1975] 3 All ER 21 at 30, [1975] 3 WLR 491 at 522, CA, per Roskill LJ; [1977] AC 774 at 840, [1976] 3 All ER 129 at 131, HL, per Lord Diplock) (sale cif between associated companies on credit terms; intention to reserve right of disposal only while there existed the possibility of supplying the cargo to another customer; property held to pass when seller put bill in the post to the buyer).

Where the intention to reserve the right of disposal is otherwise clear, such intention is not rebutted by the invoice stating the goods to have been shipped 'on account of and at the risk of the buyer', or, where they are shipped in the buyer's ship, by the bill of lading stating them to be 'freight free as buyer's property': *Turner v Liverpool Docks Trustees* supra; *Shepherd v Harrison* supra. Nor is the presumption rebutted simply by the fact that payment is to be effected by letter of credit: *HM Procurator-General v MC Spencer, Controller of Mitsui & Co Ltd, The Glenroy* [1945] AC 124 at 135, PC; *Mitsui & Co Ltd v Flota Mercante Grancolombiana SA, The Ciudad de Pasto, the Ciudad de Neiva* [1989] 1 All ER 951 at 957, [1989] 1 WLR 1145 at 1152, CA.

5 *Craven v Ryder* (1816) 6 Taunt 433; *Ruck v Hatfield* (1822) 5 B & Ald 632; *Schuster v McKellar* (1857) 7 E & B 704; *Falk v Fletcher* (1865) 18 CBNS 403 (all cases of mate's receipts). 'The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive, and its statements do not bind the shipowner as do statements in a bill of lading signed with the master's authority. It is, however, prima facie evidence of the quantity and condition of the goods received, and prima facie it is the recipient or possessor who is entitled to have the bill of lading issued to him. If, however, the mate's receipt acknowledges receipt from a shipper other than the person who actually receives the mate's receipt, and, in particular, if the property is in that shipper, and the shipper has contracted for the freight, the shipowner will prima facie be entitled, and indeed bound, to deliver the bill of lading to that person': *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429 at 445-446, [1938] 2 All ER 285 at 292, PC, per Lord Wright, following *Hathesing v Laing, Laing v Zeden* (1873) LR 17 Eq 92. See also *Bryans v Nix* (1839) 4 M & W 775 at 791 per Parke B. Thus, the retention of the mate's receipt by the seller after the property has passed to the buyer by shipment of the goods and a bill of lading made out in the buyer's name does not reserve to the seller any right in or over the goods (*Cowas-Jee v Thompson* (1845) 5 Moo PCC 165), although he may retain an equitable lien enforceable in personam against the buyer (*Nippon Yusen Kaisha v Ramjiban Serowgee* supra). Mate's receipts are now often dispensed with, shipment being eg arranged by forwarding agents for the shipper dealing with loading brokers: see *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1037 per Devlin J.

UPDATE

370 Reservation of right of disposal

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(5) BILLS OF LADING/371. Evidence of intention.

371. Evidence of intention.

Even where the bill of lading is made out to the buyer's order, if the seller retains possession of it until tender of the price, this also may be some evidence of an intention to reserve the right of disposal¹.

If the seller takes the bill of lading to his own order and parts with it to a third person (not the buyer) who, by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third person, notwithstanding that the seller's act was a clear breach of the contract². This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. If, however, the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the contract, he does nothing inconsistent with an intention to pass the property and, therefore, the property may pass either immediately, subject to the seller's lien, or conditionally on performance by the buyer of his part of the contract³. While the law recognises certain presumptions⁴, it is ultimately a question of fact in each case whether the passing of property takes place at once⁵ or is postponed until a later stage, for example until the buyer takes up and pays or tenders the price, or accepts a bill of exchange, against the shipping documents⁶.

1 *The Kronprinzessin Margareta, The Parana* [1921] 1 AC 486 at 511, PC. See also *Arnhold Karberg & Co v Blythe Green, Jourdain & Co* [1915] 2 KB 379 at 387; affd [1916] 1 KB 495, CA.

2 See *The Parchim* [1918] AC 157 at 170, PC, per Lord Parker of Waddington. See also *Wait v Baker* (1848) 2 Exch 1; *Gabarron v Kreeft, Kreeft v Thompson* (1875) LR 10 Exch 274.

3 See *The Parchim* [1918] AC 157 at 170, PC, per Lord Parker of Waddington. See also *Van Casteel v Brooker* (1848) 2 Exch 691; *Browne v Hare* (1858) 3 H & N 484 (affd (1859) 4 H & N 822, Ex Ch); *Joyce v Swann* (1864) 17 CBNS 84; *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex D 164, CA; *The Prinz Adalbert* [1917] AC 586 at 589-590, PC, per Lord Sumner; *Frebold and Sturznickel (t/a Panda OHG) v Circle Products Ltd, Circle Products Ltd v Frebold and Sturznickel (t/a Panda OHG) and Schenkers Ltd* [1970] 1 Lloyd's Rep 499, CA. See further PARAS 343, 345, 354 note 4 ante.

4 As to the passing of property and reservation of rights of disposal see PARA 345 (cif contracts), PARAS 354-355 (fob contracts) and PARA 370 (bills of lading) ante.

5 The facts may show that the seller intends property to pass to the buyer prior to payment against transfer of the bill of lading. Thus, where the bill of lading was made out to seller's order and the seller facilitated the discharge of the goods to the buyer through the issue of a letter of indemnity to the carrier in circumstances where it was contemplated that the ship would reach its destination before the documents, property was held to have passed on discharge of the goods: see *Anonima Petroli Italiana SpA and Neste Oy v Marlucidez Armadora SA, The Filiatra Legacy* [1991] 2 Lloyd's Rep 337 at 342-343, CA. See also *The Future Express* [1993] 2 Lloyd's Rep 542, CA.

6 See PARAS 345 notes 6-8, 354 note 4, 370 note 4 ante. The terms of the contract of sale may also assist in answering the question.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(5) BILLS OF LADING/372. Protection of title by buyer.

372. Protection of title by buyer.

Where the seller's dealing with the bill of lading is such as to warrant the inference that his intention was only to secure the contract price, the buyer can acquire or make good his title by tender of the purchase price, whether or not the seller is willing to hand over the documents¹. The buyer can accordingly bring an action for conversion against third persons who deal with the goods after tender of the purchase price², if such persons are unprotected by the Factors Act 1889³ or by the Sale of Goods Act 1979⁴.

1 *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex D 164, CA, distinguishing *Wait v Baker* (1848) 2 Exch 1; *Ogg v Shuter* (1875) 1 CPD 47 at 50, CA.

2 *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex D 164, CA. As to the protection of buyers and pledgees of documents of title see the Sale of Goods Act 1979 s 47; and PARAS 253-255 ante.

3 As to dispositions under the Factors Act 1889 see PARAS 157-160, 253-255 ante; and AGENCY vol 1 (2008) PARAS 148-149.

4 In the Sale of Goods Act 1979 s 24: see PARAS 157-160, 253-255 ante.

UPDATE

372-373 Protection of title by buyer ... Delivery in exchange for payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(5) BILLS OF LADING/373. Delivery in exchange for payment.

373. Delivery in exchange for payment.

Where the seller¹ of goods² draws on the buyer³ for the price, and transmits the bill of exchange and the bill of lading⁴ to the buyer together to secure⁵ acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange; and, if he wrongfully retains the bill of lading, the property⁶ in the goods does not pass to him⁷.

The indorsement and delivery of the bill of lading to the buyer being regarded as conditional only⁸ on acceptance of the bill of exchange⁹, he cannot keep the bill of lading¹⁰, or claim delivery of the goods as against the seller¹¹, without accepting the bill of exchange¹². If, however, he retains possession of the bill of lading, its transfer to a person who takes it in good faith and for value gives the transferee a good title to the goods as against the true owner, notwithstanding the buyer's failure to accept the bill of exchange¹³.

Where the bill of lading is directly transmitted to the buyer, the appropriation of the goods by the seller is not conditional on the acceptance of a bill of exchange merely because the buyer is advised that a bill of exchange has been or will be drawn on him for the price¹⁴.

1 For the meaning of 'seller' see PARA 27 ante.

2 For the meaning of 'goods' see PARA 30 ante.

3 For the meaning of 'buyer' see PARA 29 ante.

4 The language of the Sale of Goods Act 1979 s 19(3) is general. Its application should, it is thought, not be confined to cases under s 19(2) (see PARA 370 ante), ie where the bill of lading is taken to the order of the seller or his agent. Section 19(3) seems to enact a particular instance of the main rule in s 19(1): see PARA 137 ante. If the seller sends an unindorsed bill of lading, he in effect sends none: *Brandt v Bowlby* (1831) 2 B & Ad 932; *Shepherd v Harrison* (1869) LR 4 QB 196 at 204 per Cockburn CJ (affd (1871) LR 5 HL 116). The acceptance of the bill of exchange on the faith of a letter advising the consignee of a consignment of goods is not equivalent to the indorsement of the bill of lading: *Nichols v Clent* (1817) 3 Price 547.

5 'To secure' means 'in order to secure', and not 'so as to secure'. There is, therefore, a question of fact.

6 For the meaning of 'property', in relation to goods see PARA 27 ante.

7 Sale of Goods Act 1979 s 19(3). See *Rew v Payne, Douthwaite & Co* (1885) 53 LT 932 (acceptance of bill of exchange; an express condition); *Danish Dairies Co-operative Society v Midland Rly Co* (1892) 8 TLR 212, DC (bill of lading to buyer; bill of exchange to seller's agent; no condition); *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA (direct transmission of both documents). See also the cases cited in PARA 138 note 3 ante. As to passing of property in cif and fob contracts generally see PARAS 343, 345, 354-355 ante.

In cases under what was the Sale of Goods Act 1893 s 19(3) (repealed and re-enacted in the Sale of Goods Act 1979 s 19(3)), it was no longer imperative that the bill of lading should pass through the hands of the seller's agent: *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* supra. As a general rule, this was necessary before the Sale of Goods Act 1893 (*Key v Cotesworth* (1852) 7 Exch 595 at 607; *Re Tappenbeck, ex p Banner* (1876) 2 ChD 278 at 288, CA) and it was transmitted in this way in *Shepherd v Harrison* (1871) LR 5 HL 116, on which the Sale of Goods Act 1893 s 19(3) (repealed) was based; but cf *Bryans v Nix* (1839) 4 M & W 775 (where there was a direct transmission to the buyer of a bill of exchange and a boat receipt). The Sale of Goods Act 1893 s 19(3) (repealed) did not deal with the case where a bill of lading is sent to the buyer with advice only of the bill of exchange (see *Key v Cotesworth* supra; *Re Tappenbeck, ex p Banner* supra; *König v Brandt* (1901) 84 LT 748, CA), or where the buyer, on the receipt of the bill of lading, is to pay cash or to send a banker's draft (see *Wilmschurst v Bowker* (1844) 7 Man & G 882, Ex Ch), or to make a promissory note. In all these cases it would, it seems, be a question of fact whether the delivery of the document was intended to be in exchange for payment, and the property, and not merely a lien, was intended to be secured. Cf paras 343, 345, 370-371 ante.

If the buyer wrongfully takes possession of and deals with the goods, the seller may recover their value, subject, however, to a deduction for expenses incurred by the buyer, and which the seller himself would have incurred, such as freight and landing charges: *Rew v Payne, Douthwaite & Co* supra; *Peruvian Guano Co v Dreyfus Bros & Co* [1892] AC 166 at 173-177, HL, per Lord Macnaghten and at 186 per Lord Watson; *New York Breweries Co v A-G* [1899] AC 62, HL. See also *Hiort v Bott* (1874) LR 9 Exch 86.

8 It is not necessary for the seller to give express notice that the indorsement is conditional: *Shepherd v Harrison* (1871) LR 5 HL 116. The indorsement is not to be regarded as conditional if the consignee is, as between the consignor and himself, under no duty to accept the bill of exchange: *Ogle v Atkinson* (1814) 5 Taunt 759; *Depperman v Hubbersty* (1852) 17 QB 766; *Key v Cotesworth* (1852) 7 Exch 595.

9 *Brandt v Bowlby* (1831) 2 B & Ad 932; *Shepherd v Harrison* (1871) LR 5 HL 116; cf *Walley v Montgomery* (1803) 3 East 585. Until acceptance the property remains in the seller, even though the buyer has promised to accept the bill of exchange and his promise has been acted upon: *Hoare v Dresser and Norrbom* (1859) 7 HL Cas 290. The property passes on the acceptance, notwithstanding that the bill of exchange is never honoured (*Re Tappenbeck, ex p Banner* (1876) 2 ChD 278, CA), unless there is a special stipulation that the bill of exchange is to be paid (*Barrow v Coles* (1811) 3 Camp 92). If the bill of lading is not handed over to the buyer after acceptance of the bill of exchange, he may sue for its wrongful detention: *Hoare v Dresser and Norrbom* supra; *Lutscher v Comptoir d'Escompte de Paris* (1876) 1 QBD 709, DC.

10 *Rew v Payne, Douthwaite & Co* (1885) 53 LT 932.

11 *Sheridan v New Quay Co* (1858) 4 CBNS 618; *Ogg v Shuter* (1875) 1 CPD 47, CA; *Rew v Payne, Douthwaite & Co* (1885) 53 LT 932; but see *Anderson v Clark* (1824) 2 Bing 20 (where on the facts it was held that the shipment was for the buyer's account).

12 Notwithstanding a refusal to accept the bill of exchange, he becomes entitled to the goods if he afterwards tenders the price: *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex D 164, CA.

13 *Gurney v Behrend* (1854) 3 E & B 622; *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, CA (distinguishing *Shepherd v Harrison* (1871) LR 5 HL 116). Cf *Pease v Gloahec, The Marie Joseph* (1866) LR 1 PC 219 (where after acceptance of the bill of exchange the buyer returned the bill of lading to the seller to hold as security, and afterwards obtained it from the seller by fraud). A sale of the goods without a transfer of the bill of lading is, however, not sufficient: *Sheridan v New Quay Co* (1858) 4 CBNS 618. The holder of the bill of exchange has no lien over the cargo in the absence of a specific appropriation of the cargo to meet the bill and a direction in the bill of exchange to charge it to the account of the cargo as advised, accompanied by a letter of advice, is not sufficient to create a lien: *Brown, Shipley & Co v Kough* (1885) 29 ChD 848, CA, criticising *Frith v Forbes* (1862) 4 De GF & J 409. See also *Robey & Co's Perseverance Ironworks v Ollier* (1872) 7 Ch App 695 at 699; *Re Suse, ex p Dever* (1884) 13 QBD 766, CA; *Phelps, Stokes & Co v Comber* (1885) 29 ChD 813, CA.

14 *Key v Cotesworth* (1852) 7 Exch 595; *Re Tappenbeck, ex p Banner* (1876) 2 ChD 278, CA; *König v Brandt* (1901) 84 LT 748, CA.

UPDATE

372-373 Protection of title by buyer ... Delivery in exchange for payment

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(5) BILLS OF LADING/374. Indorsement to bank.

374. Indorsement to bank.

Where the seller draws a bill of exchange for the price on the buyer and discounts it with a bank, at the same time indorsing the bill of lading to the bank as security¹, the buyer is not entitled to the bill of lading, and the property in the goods *prima facie*² does not pass to him, until he has repaid³ or tendered⁴ to the bank the amount due under the bill of exchange⁵.

1 *Turner v Liverpool Docks Trustees* (1851) 6 Exch 543, Ex Ch; *Re Howe, ex p Brett* (1871) 6 Ch App 838. If the bill of lading is made out to the bank's order, then transfer of the bill to the bank makes the bank a lawful holder for the purposes of the Carriage of Goods by Sea Act 1924 and the bank has rights of suit against the carrier in respect of the goods: see ss 2(1)(a), 5(2)(a). If the bill of lading is made out to shipper's order, or simply to order and is handed over to the bank, it would appear from the terms of s 5(2)(b) that for the bank to have rights of suit against the carrier in respect of the goods, the bill would need to be indorsed to the bank. As to the rights of the bank on a loss when the goods are insured and the policy is also handed over to it see *Latham v Chartered Bank of India* (1874) LR 17 Eq 205. If the bill of lading is in the buyer's name, the property has passed to the buyer, but the seller, by retaining physical possession of the bill of lading, retains his lien, and may transfer the lien to the bank: *London Joint Stock Bank Ltd v British Amsterdam Maritime Agency* (1910) 16 Com Cas 102.

2 As to the passing of property under cif contracts see PARAS 343, 345 ante; as to the passing of property under fob contracts see PARAS 354-355 ante; and as to the passing of property under bills of lading see PARAS 370-371 ante.

3 *Bristol and West of England Bank v Midland Rly Co* [1891] 2 QB 653, CA.

4 *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex D 164, CA, distinguishing *Wait v Baker* (1848) 2 Exch 1. A tender on the day when the bill of exchange falls due is, however, not sufficient if the buyer is subsequently unable to pay: *Jenkyns v Brown* (1849) 14 QB 496. As to tender generally see CONTRACT vol 9(1) (Reissue) PARAS 971-978.

5 By presenting the bill of exchange for acceptance, the bank does not warrant that the bill of lading is genuine: *Leather v Simpson* (1871) LR 11 Eq 398 (where the forgery was not discovered until after payment); *Baxter v Chapman* (1873) 29 LT 642 (where the forgery was discovered before payment and it was held that the acceptor was bound to pay).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(6) DOCUMENTARY LETTERS OF CREDIT/375. In general.

(6) DOCUMENTARY LETTERS OF CREDIT

375. In general.

It is often made a condition of an international sale contract that the buyer must pay for the goods by means of a confirmed¹, irrevocable² letter of credit³. It is then his duty to procure his

bank, known as the issuing or originating bank, to issue an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country known as the correspondent or negotiating bank, to pay an agreed sum of money⁴ against tender by the seller of the shipping documents. The contractual relationship between the issuing bank and the buyer is defined by the terms of the agreement between them under which the letter opening the credit is issued⁵. As between the seller and the bank, the issue of the credit duly notified to the seller⁶ creates a new contractual link and renders the bank directly liable to the seller to pay the purchase price or to accept the bill of exchange on tender of the documents⁷. The contract thus created between the seller and the bank is, by reason of the bank's absolute undertaking to the seller, separate from the original contract between the buyer and the seller⁸. Having undertaken to pay the seller under the letter of credit, the bank will protect itself against non-payment by the buyer either by taking security from the buyer or by retaining the document of title, typically the bill of lading, tendered by the seller under the letter of credit⁹.

1 The word 'confirmed' describes the capacity in which the correspondent bank, normally a bank in the seller's country, acts. Where the letter of credit is confirmed, the correspondent bank, known as the confirming bank, adds its own undertaking under the letter of credit to that of the original undertaking made by the issuing bank, normally in the buyer's country.

2 Where a letter of credit is 'irrevocable', it cannot be cancelled or amended without the seller's consent.

3 As to letters of credit generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 923 et seq. See also *Jack's Documentary Credits* (3rd Edn, 2000); and *Gutteridge and Megrah's The Law of Bankers' Commercial Credits* (8th Edn, 2001). The type of documentary letter of credit dealt with in the text, which is issued by a bank at the buyer's request in favour of the seller, must be distinguished from another form of 'letter of credit' issued by a bank in favour of its own customer and given to him for the purpose of being shown to third persons. Most documentary letters of credit are expressly made subject to the Uniform Customs and Practice for Documentary Credits (1993 Revision; ICC Publication No 500): see eg *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 2 All ER 400, [1986] 1 WLR 631, CA. See generally para 376 post.

4 The sum to be paid to the seller, known as the beneficiary of the credit, will typically correspond to the price due under the contract of sale. The sum due is, however, rarely expressed in the letter of credit as the price of the goods, the letter of credit being a contract independent from the sale contract.

5 As to the contractual relationship between buyer, known in the context of the letter of credit as the applicant, and the issuing bank see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 929.

6 As to the contractual relationship between bank and seller see PARA 377 post.

7 *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623 at 659, CA, per Scrutton LJ. See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 926.

8 See *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318; *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL.

9 Banks on occasion insist in the letter of credit that the bill of lading tendered by the seller should either name the bank as consignee or that it should be indorsed to the bank, such that the bank becomes a 'lawful holder' of the bill of lading for the purposes of the Carriage of Goods by Sea Act 1992, giving it rights of suit against the carrier of the goods. See PARA 374 note 1 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(6) DOCUMENTARY LETTERS OF CREDIT/376. Terms of credit and time of issue.

376. Terms of credit and time of issue.

In practice, documentary letters of credit are almost always issued and made by their terms expressly subject to the code entitled the Uniform Customs and Practice for Documentary Credits¹. The credit must be opened within the time, in a form and subject to conditions complying with the requirement of the sale contract, failing which the seller is entitled to treat the contract of sale as repudiated by the buyer's breach². The issue at the behest of the buyer, and acceptance³ by the seller, of a letter of credit in terms differing from or supplementing those specified in the sale contract may be held either to constitute a binding variation of the parties' contractual rights and obligations under such a contract, or to be no more than a temporary forbearance by one party from insisting on his strict contractual rights, such forbearance being capable of withdrawal on reasonable notice to the other party⁴. Where no time is expressly stipulated by the sale contract, the credit must be opened and confirmed within a reasonable time, and in any case within such time as will enable the seller to ship at any moment of his permissible period⁵. The measure of damages for a failure to procure a letter of credit within the proper time may be the seller's loss of profit on the transaction⁶.

A seller who waives a condition requiring a credit may not later rely on the buyer's failure to comply with the condition unless he has given reasonable notice that he requires compliance⁷.

1 The Uniform Customs and Practice for Documentary Credits (1993 Revision; ICC Publication No 500), which are set out in full in *Jack's Documentary Credits* (3rd Edn, 2000) Appendix 1. A number of publications explaining the workings of the Uniform Customs and Practice for Documentary Credits and giving opinions interpreting the text of the rules have been published by the International Chamber of Commerce and have been referred to in the courts on several occasions: see *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 at 148, CA; *Bayerische Vereinsbank Aktiengesellschaft v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59 at 63; *Kredietbank Antwerp v Midland Bank plc*, *Karaganda Ltd v Midland Bank plc* [1999] 1 All ER (Comm) 801 at 807, CA; *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm), [2002] 2 All ER (Comm) 427.

2 See eg *State Trading Corpn of India Ltd v Compagnie Française d'Importation et de Distribution* [1983] 2 Lloyd's Rep 679 (sale contract stipulated for 'immediate' opening of letter of credit; sellers waived late opening); *Nichimen Corpn v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep 46, CA; *State Trading Corpn of India Ltd v M Golodetz Ltd (now Transcontinental Affiliates Ltd)* [1989] 2 Lloyd's Rep 277, CA (letter of credit not opened at all); *Transpetrol Ltd v Transol Olieprodukten Nederland BV* [1989] 1 Lloyd's Rep 309; *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588, CA (letter of credit opened after time stipulated in sale contract); *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce (Lorico)* [1997] 2 Lloyd's Rep 386 at 393-394, CA (fob buyer in breach of sale contract where he procured the opening of a letter of credit providing for the tender of freight prepaid bills of lading). Laytime does not run against an fob seller where the buyer fails to open a letter of credit as agreed in the sale contract: *Fal Oil Ltd v Petronas Trading Corp SDN BHD, The Devon* [2004] EWCA Civ 822, [2004] 2 All ER (Comm) 537, [2004] 2 Lloyd's Rep 282.

3 This does not apply to acceptance under protest: see *Astro Exitto Navigacion SA v Southland Enterprise Co Ltd (No 2) (Chase Manhattan Bank NA intervening)* [1982] QB 1248 at 1252, [1982] 3 All ER 335 at 338, CA, per Ackner LJ; affd [1983] 2 AC 787, [1983] 2 All ER 725, HL. Cf *Newman Industries Ltd v Indo-British Industries Ltd (Govindram Bros Ltd, third parties)* [1956] 2 Lloyd's Rep 219.

4 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA; *Ets Soules & Cie v International Trade Development Co Ltd* [1979] 2 Lloyd's Rep 122 (on appeal [1980] 1 Lloyd's Rep 129, CA); *Ficom SA v Sociedad Cadex Lda* [1980] 2 Lloyd's Rep 118; *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388 at 392; *Nichimen Corpn v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep 46, CA.

5 *Pavia & Co SpA v Thurmman-Nielsen* [1951] 2 All ER 866 at 868 (affd [1952] 2 QB 84, [1952] 1 All ER 492, CA); *AE Lindsay & Co Ltd v Cook* [1953] 1 Lloyd's Rep 328; *Sinason-Teicher Inter-American Grain Corpn v Oilcakes and Oilseeds Trading Co Ltd* [1954] 2 All ER 497, [1954] 1 WLR 935 (affd [1954] 3 All ER 468, [1954] 1 WLR 1394, CA) applying similar principles in respect of a bank guarantee (which under the cif sale contract the buyers were obliged to procure) that the documents would be taken up on first presentation. This rule applies to cif and fob contracts in general: see *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 QB 130, [1958] 1 All ER 542. See also *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce (Lorico)* [1997] 2 Lloyd's Rep 386, CA.

6 *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA; *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 QB 130, [1958] 1 All ER 542.

7 *Panoutsos v Raymond Hadley Corpn of New York* [1917] 2 KB 473, CA; *Plasticmoda SpA v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, CA; *State Trading Corpn of India Ltd v Compagnie Française d'Importation et de Distribution* [1983] 2 Lloyd's Rep 679. As to waiver and promissory estoppel generally see CONTRACT vol 9(1) (Reissue) PARAS 1025-1035.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(6) DOCUMENTARY LETTERS OF CREDIT/377. Contract between bank and seller.

377. Contract between bank and seller.

The notification by the bank, whether the issuing or the negotiating bank¹, to the seller of the credit in his favour creates² an enforceable contract between the seller and bank by which the bank contracts to make payment or to honour drafts drawn on it, in accordance with the terms of the credit³. The proper law of this contract is that of the place where the bank is to make payment or honour drafts⁴. The contract between the bank and the seller must be read by itself. It does not, without express words, incorporate the terms of the contract between the buyer and the seller⁵. The bank is bound vis-à-vis the seller⁶ to pay on presentation under the credit of documents which appear on their face to be in accordance with the terms of the credit⁷, even though there may have been a breach by the seller of the sale contract entitling the buyer to reject the goods⁸ and even though the documents contain statements of fact which are materially inaccurate⁹. The bank is not ordinarily entitled in either case to a stay of execution of any judgment against it¹⁰. The best established exception to the bank's duty to pay exists where the seller is party to the fraudulent presentation to the bank of documents that contain material representations of fact that to his knowledge are inaccurate¹¹. It is also clear that where it is shown that the purpose of procuring a letter of credit is to commit an illegality then the letter of credit is unenforceable on public policy grounds¹². A further possible exception may exist where documents presented are forged and of no legal effect even though the seller is innocent of involvement in the forgery¹³.

The buyer is not entitled to an injunction restraining the seller from dealing with, or the bank from paying under, the letter of credit on the grounds of any breach of contract by the seller, other than in a case of clearly established fraud by the seller¹⁴ or, possibly, in other very exceptional circumstances¹⁵.

1 As to the relationship between issuing and negotiating banks see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 949.

2 The question whether the bank is bound by its undertaking (and therefore unable unilaterally to alter it) before the seller, by acting on it and presenting the documents, indicates his acceptance of the terms of the credit gives rise to difficult problems. The better view is that the bank is bound as soon as it communicates the credit to the beneficiary. See *Bunge Corpn v Vegetable Vitamin Foods (Pte) Ltd* [1985] 1 Lloyd's Rep 613 at 617. For discussion of the problem see *Jack's Documentary Credits* (3rd Edn, 2000) PARAS 2.11, 5.3; and *Gutteridge and Megrah's Law of Bankers' Commercial Credits* (8th Edn, 2001) PARAS 4-47-4-48. Cf also *General Reinsurance Corpn v Forsakringsaktiebolaget Fennia Patria* [1982] QB 1022 at 1037-1039, [1982] 2 WLR 518 at 523, 533 per Staughton J.

3 The bank is not bound or entitled to pay the sum due under the credit or to honour drafts presented under it unless the documents and any accompanying drafts comply strictly with the terms of the letter: see *JH Rayner & Co Ltd v Hambro's Bank Ltd* [1943] KB 37, [1942] 2 All ER 694, CA, applying *English, Scottish and Australian Bank Ltd v Bank of South Africa* (1922) 13 Ll L Rep 21, and *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL. See also *Credit Agricole Indosuez v Generale Bank (No 2)* [2000] 1 Lloyd's Rep 123, [1999] 2 All ER (Comm) 1016. The bank is not concerned with why any particular documents are called for but simply with whether the document tendered matches its description in the credit; it is entitled to put a reasonable interpretation on any ambiguity in its mandate (see *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 Lloyd's Rep 275, [2000] 1 All ER (Comm) 172), but, if the mandate is clear, it must be complied with: *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279, [1972] 3 WLR 566, PC. At

common law, the description of goods in the bill of lading must comply precisely with that given in the letter, the bank being under no duty to know the trade customs and terms of its customers: *JH Rayner & Co Ltd v Hambro's Bank Ltd* supra at 41 and at 701. Where, however, the Uniform Customs and Practice for Documentary Credits (1993 Revision; ICC Publication No 500) are incorporated into the letter of credit (see PARA 376 note 1 ante), it is enough if the description of the goods in the invoice corresponds with that in the letter of credit and if that in all other documents is not inconsistent with such description: see *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 at 153-154, CA. There must, however, be no doubt that all the documents tendered relate to the same parcel of goods: see *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711, [1983] 1 All ER 1137, CA (payment by bank 'under reserve' recoverable on demand). While it remains true that the doctrine of strict compliance excludes the application of the maxim *de minimis non curat lex* (the law takes no account of very trifling matters), it is also true that the courts will not sanction a rejection of documents based on what was clearly a typographical error: see *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's Rep 236 at 240, CA. The bank is, however, entitled to pay when the set of documents tendered together contains all the information required by the letter of credit: *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147. Documents have to be taken up or rejected promptly and without opportunity for prolonged inquiry: *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36, HL. Thus, a tender which invites further inquiry or litigation is bad: *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1980] 1 All ER 501, [1980] 1 WLR 495, CA. Where the Uniform Customs and Practice for Documentary Credits are incorporated into the letter of credit, the bank must decide whether or not to pay against the documents tendered within a reasonable time not to exceed seven days from the day of receipt of the documents: see *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443, CA; *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* supra. The bank must, moreover, where the Uniform Customs and Practice for Documentary Credits are incorporated into the credit, notify the beneficiary of its decision to reject the documents 'without delay': *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36, CA. As to the tender of documents under letters of credit generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 937-947.

4 *Offshore International SA v Banco Central SA* [1976] 3 All ER 749, [1977] 1 WLR 399; *European Asian Bank AG v Punjab and Sind Bank* [1982] 2 Lloyd's Rep 356, CA; *Bank of Credit & Commerce Hong Kong Ltd (in liquidation) v Sonali Bank* [1995] 1 Lloyd's Rep 227. The situs of the bank's obligation is the same place: *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA.

5 *Stein v Hambro's Bank of Northern Commerce* (1921) 9 Ll L Rep 507; *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318 at 323; *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1 at 14, CA. Cf *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA.

6 Correspondingly, the bank is entitled to be reimbursed under its contract with the buyer: *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL.

7 In *Astro Exitto Navigacion SA v Southland Enterprise Co Ltd (No 2) (Chase Manhattan Bank NA intervening)* [1982] QB 1248, [1982] 3 All ER 335, CA (affd [1983] 2 AC 787, [1983] 2 All ER 725, HL) the seller's ability to present documents complying with the terms of the credit depended (unusually) on the buyer's furnishing an appropriate signature to one of the documents. The court, by interlocutory mandatory injunction, ordered the buyer to sign the document and, when the buyer did not sign, ordered a master of the Supreme Court to do so on the buyer's behalf. See also *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711, [1983] 1 All ER 1137, CA; and the cases cited in note 3 supra.

8 *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318; *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL.

9 Eg the date or place of shipment in the bill of lading or the nature or quantity of the goods. Where payment is made by the bank against fraudulent tender of documents, the bank has remedies against both the beneficiary and the other parties to the fraud: see *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [2002] UKHL 43, [2003] 1 AC 959, [2002] 2 All ER (Comm) 931.

10 *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA.

11 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 182-188, [1982] 2 All ER 720 at 724-729, HL, per Lord Diplock. See also *Sztejn v J Henry Schroder Banking Corpn* 31 NYS 2d 631 (1941) (NY Ct App), cited with approval in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA. As it is the fraud of the beneficiary in presenting documents he knows to be fraudulent, rather than the fraud in the documents themselves, which triggers the exception, it is thought that this exception might not apply to a seller who was himself deceived by his supplier into taking up the documents and only then discovered their falsity. It would not be fraudulent for him, at least if he disclosed the position, to present them to the bank. See also *SAFA Ltd v Banque du Caire* [2000] 2 All ER (Comm) 567, [2000] 2 Lloyd's Rep 600, CA.

12 *Mahonia Ltd v JP Morgan Chase Bank* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd's Rep 911. See also *Alexander v Rayson* [1936] 1 KB 169.

13 The point was left open in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 187, [1982] 2 All ER 720 at 728, HL, per Lord Diplock. See further *Re Salomon & Co and Naudszus* (1899) 81 LT 325, 8 Asp MLC 599; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; and the dicta in *Etablissement Esekfa International Anstalt v Central Bank of Nigeria* [1979] 1 Lloyd's Rep 445, CA. Where, however, a bank, acting in good faith and without negligence, accepts and pays against forged documents appearing on their face to conform with the credit, the bank is entitled to be reimbursed by its customer: *Gian Singh & Co Ltd v Banque de L'Indochine* [1974] 2 All ER 754, [1974] 1 WLR 1234, PC.

14 *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA; *Discount Records Ltd v Barclays Bank Ltd* [1975] 1 All ER 1071, [1975] 1 WLR 315; *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161, CA; *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 182-188, [1982] 2 All ER 720 at 724-729, 1039, HL; *Tukan Timber Ltd v Barclays Bank plc* [1987] 1 Lloyd's Rep 171; *Deutsche Rückversicherung AG v Walbrook Insurance Co Ltd, Group Josi Reinsurance Co SA v Walbrook Insurance Co Ltd* [1995] 1 Lloyd's Rep 153; *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890. In appropriate circumstances a court would have power by freezing order (see CIVIL PROCEDURE vol 11 (2009) PARA 396 et seq; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 998 et seq) to restrain the seller from removing from the jurisdiction or otherwise dealing with the proceeds of a letter of credit payable within the jurisdiction, until after determination of a dispute between the buyer and the seller under the sale contract: *Montecchi v Shimco (UK) Ltd* [1979] 1 WLR 1180, CA; *Intraco Ltd v Notis Shipping Corp'n, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, CA.

15 See *Eliau and Rabbath v Matsas and Matsas, JD McLaren & Co Ltd and Midland Bank Ltd* [1966] 2 Lloyd's Rep 495, CA, which was said, however, in *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 at 165, CA, per Roskill LJ, to be a 'very special case' and to go 'further than the subsequent cases'.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(6) DOCUMENTARY LETTERS OF CREDIT/378. Breach of contract by bank.

378. Breach of contract by bank.

The basis and measure of recovery on a failure by the bank to make payment or accept drafts in exchange for shipping documents duly tendered under a credit involve some questions not conclusively settled by authority. It is considered that all such damages are recoverable as were, when the credit was issued, within the reasonable contemplation of both bank and seller as being a serious possibility¹ in the event of such a breach².

It is also considered that the seller has a choice open to him, which will affect the amount recoverable from the bank. He may claim the full amount which would have been due under the credit, or under drafts due for acceptance under it³, together with any further expense and loss incurred and within the parties' reasonable contemplation as the result of such a breach⁴. If, however, he adopts this course, he must remain prepared to hand over the documents representing the goods to the bank⁵. Alternatively, he may (and often will) decide to dispose of the goods elsewhere; and he may thus treat the bank's failure to make payment or accept drafts as a repudiation of the credit⁶. In these circumstances, the value of the retained documents will figure in the computation of damages as an offset against the amount unpaid or against the face value of the rejected draft⁷.

1 Ie on the basis of the decisions in *Hadley v Baxendale* (1854) 9 Exch 341; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; *Koufos v C Czarnikow Ltd, The Heron II* [1969]

1 AC 350, [1967] 3 All ER 686, HL; *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, [1978] 1 All ER 525, CA. Additional damages may be recoverable arising from special circumstances if known to both seller and bank when the bank issued its credit: see the cases cited supra; and *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA; *Wadsworth v Lydall* [1981] 2 All ER 401, [1981] 1 WLR 598, CA. As to the measure of damages in contract see further DAMAGES vol 12(1) (Reissue) PARA 941 et seq.

Having regard to the commercial significance of a letter of credit, it is submitted that it would not be correct to treat a bank's failure to accept drafts or make payment against documents as if it gave rise to a simple claim for non-payment of money: cf, by analogy, the reasoning in *Trans Trust SPRL v Danubian Trading Co Ltd* supra at 302, 305-306 and at 975, 977. This is so, despite the dicta in *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* (1919) 1 Ll L Rep 256 at 257, CA, and *Stein v Hambro's Bank of Northern Commerce* (1921) 9 Ll L Rep 507 (revsd without affecting this point (1922) 10 Ll L Rep 529, CA). In these last two cases, the court was concerned to establish the absolute nature of the bank's liability for any breach of its contract, rather than to place any limit on the damages which might be recoverable from the bank. In *Stein v Hambro's Bank of Northern Commerce* supra the bank was in fact left to pay warehousing charges incurred on the goods due to its default if it wanted the shipping documents representing the goods.

It is now in any event clear that even a claim for non-payment of money may include items of special damage which are pleaded and proved and not otherwise too remote on the principles in *Hadley v Baxendale* supra: *Wadsworth v Lydall* supra, applying dicta in *Trans Trust SPRL v Danubian Trading Co Ltd* supra. See also *Ozalid Group (Export) Ltd v African Continental Bank Ltd* [1979] 2 Lloyd's Rep 231.

2 *Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92. See also *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA (where there was a failure by the buyers to procure a letter of credit, the buyers being aware that the sellers could not obtain the goods unless credit was provided, and it was held that the sellers were entitled to damages representing loss of profit); *Ozalid Group (Export) Ltd v African Continental Bank Ltd* [1979] 2 Lloyd's Rep 231 (where the seller was entitled to recover exchange loss and extra expenses incurred following the bank's inexcusable delay in making payment under the letter of credit).

3 *Stein v Hambro's Bank of Northern Commerce* (1921) 9 Ll L Rep 507 (revsd without affecting this point (1922) 10 Ll L Rep 529, CA). See also *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* (1919) 1 Ll L Rep 256 at 257, CA, per Bankes LJ; *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542, [1958] 1 All ER 264.

4 See note 1 supra and the cases there cited.

5 See *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* (1919) 1 Ll L Rep 256, CA (where such a term was inserted in the order of the Court of Appeal). See also *Stein v Hambro's Bank of Northern Commerce* (1921) 9 Ll L Rep 507; revsd without affecting this point (1922) 10 Ll L Rep 529, CA. These two cases, together with *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542, [1958] 1 All ER 264, indicate that there is, ordinarily at least, no duty on a seller by way of mitigation to seek to dispose of the goods and documents elsewhere before claiming on the bank.

6 See *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318 (the reasoning in which was perhaps limited to a credit covering a number of future instalments, although there seems no reason why similar reasoning should not also apply to a credit covering a single payment); *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 at 302, [1952] 1 All ER 970 at 975, CA, per Somervell LJ.

7 *Re Barded's Banking Co, Coupland's Claim* (1869) 5 Ch App 167; *Re Barded's Banking Co, Leech's Claim* (1871) 6 Ch App 388; *Mitrovitch Bros & Co v Hickson & Partners Ltd* (1923) 14 Ll L Rep 164.

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379. Letter of credit primary method of payment.

Whether and in what circumstances the seller may look to the buyer direct for payment of the price¹ or for damages in the event of non-payment or other breach by a bank of its obligations under a letter of credit depends on the terms of the sale contract².

Prima facie a letter of credit constitutes the primary method of payment to which a seller must, if possible, look³ but it does not constitute absolute payment, unless the sale contract clearly so

provides⁴. If the seller, at least without its being due to his own fault⁵, does not obtain payment under the letter of credit, for example because the bank becomes insolvent⁶, he may look to the buyer direct unless the sale contract clearly provides to the contrary⁷.

1 Subject to contrary contractual provision, the price will normally only be due if property has passed: see the Sale of Goods Act 1979 s 49; and PARAS 285-286 ante. In many cases, therefore, where a bank fails to pay or accept drafts in exchange for the shipping documents presented under a credit, the seller's claim will be for damages against the bank and, it is thought, against the buyer, although he can only have damages once over: see *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA. However, property may have passed eg on shipment (as in *Newman Industries Ltd v Indo-British Industries Ltd (Govindram Bros Ltd, Third Parties)* [1956] 2 Lloyd's Rep 219; revsd on another point [1957] 1 Lloyd's Rep 211, CA), or on acceptance of time drafts, which may not subsequently be met by the bank, in exchange for the shipping documents (see *WJ Alan & Co Ltd v El Nasr Export and Import Co* supra). As to property passing on acceptance of a bill of exchange see PARA 343 ante.

2 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA. See also *Soproma SpA v Marine and Animal By-Products Corpn* [1966] 1 Lloyd's Rep 367; *Ng Chee Chong, Ng Weng Chong, Ng Cheng and Ng Yew (a firm t/a Maran Road Saw Mill) v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep 156; *ED and F Man Ltd v Nigerian Sweets and Confectionery Co Ltd* [1977] 2 Lloyd's Rep 50. Cf *Saffron v Société Minière Cafrika* (1958) 100 CLR 231, Aust HC.

3 In a case where (unusually) the seller's ability to utilise the credit depended on the buyer furnishing a signature to a particular document, the court ordered the buyer to sign the document: see *Astro Exito Navegacion SA v Southland Enterprise Co Ltd (No 2) (Chase Manhattan Bank NA intervening)* [1982] QB 1248, [1982] 3 All ER 335, CA; affd [1983] 2 AC 787, [1983] 2 All ER 725, HL. See also PARA 377 note 7 ante.

4 See the cases cited in note 2 supra.

5 See *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388 at 392 ('I know of no case where a seller who has failed to obtain payment under a credit because of failure on his part to comply with its terms has succeeded in recovering against a buyer personally'). See also *Saffron v Société Minière Cafrika* (1958) 100 CLR 231 at 245, Aust HC, where in a dictum the court appeared to contemplate that a seller who was 'solely responsible for the failure of the primary source of payment' could be defeated in his claim for the price against the buyer. It is, however, questionable, even in this case, whether a buyer could keep the goods without paying for them, although he would no doubt be entitled to offset against the seller's claim any loss he had sustained through the seller's failure to utilise the primary source of payment.

6 Or possibly in circumstances where the seller's inability to obtain payment through the letter of credit was due to the act of the buyer: see *Newman Industries Ltd v Indo-British Industries Ltd (Govindram Bros Ltd, third parties)* [1956] 2 Lloyd's Rep 219, CA; revsd on another point [1957] 1 Lloyd's Rep 211, HL. In that case the bank's refusal to pay was arguably justified under the terms of the credit, but those terms themselves departed from the sale contract and the buyer was under an obligation to adjust them as soon as possible. The buyer was held liable to the seller direct for the price.

7 See the cases cited in note 2 supra.

UPDATE

379 Letter of credit primary method of payment

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(7) PERFORMANCE BONDS AND INTERNATIONAL BANK GUARANTEES/380. Nature and effect.

(7) PERFORMANCE BONDS AND INTERNATIONAL BANK GUARANTEES

380. Nature and effect.

Some contracts for the international sale of goods include provision for one party, often the seller, to procure a so-called performance bond or an international bank guarantee from a bank or an insurance or other company in favour of the other contracting party, normally the buyer, the seller being known as the account party and the buyer the beneficiary of the bond or guarantee¹. A performance bond or guarantee commonly provides for payments to be made on the mere demand of the beneficiary, typically the buyer under the contract of sale, and consequently acts as an incentive to the seller to perform his obligations under the contract of sale². The contractual obligations arising under such guarantees or bonds are separate from, and not dependent on, those existing under the sale contract between the seller and the buyer³. Under a performance guarantee or bond payable on demand the legal position is similar to that under a letter of credit⁴. Thus, once the beneficiary has made a demand (within the time and in the form, if any, stipulated in the bond or guarantee⁵) the bank or other issuer is, apart from fraud on the part of the beneficiary, under a duty to pay, and the other party to the sale contract (at whose instance the bond or guarantee was issued) cannot prevent the bank from paying in any case other than one of clearly established fraud⁶, or where there was a lack of or breach of faith by the beneficiary in threatening a call⁷, or, possibly, other very exceptional circumstances⁸. Once payment has been made under the bond or guarantee, however, it is implicit in the nature of the bond or guarantee that, in the absence of clear stipulation to the contrary, there will be a financial adjustment between the parties, ensuring that the beneficiary retains so much of the funds paid under the bond or guarantee as represents the real loss arising from the breach of contract committed by the other party to the contract of sale⁹.

1 'Standby credits' are sometimes used to perform the same function. These are letters of credit under which the beneficiary may draw on presentation of the specified documents, in some cases limited to a certificate prepared by the beneficiary. They are typically used in international sale contracts involving the United States of America where banks do not have power to issue performance guarantees or bonds: see 12 USC para 24, 7th Power. 'USC' means the Code of the Laws of the United States of America.

2 Such a bond or guarantee may also go on to provide that such demand is itself conclusive evidence, as between bank and beneficiary, of the beneficiary's entitlement to recover under the guarantee or bond. Such a provision is valid: *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437, CA. However, the mere provision for payment on demand achieves a similar effect: see the cases cited in note 3 infra. Where, however, the bond or guarantee provides that the beneficiary is entitled to payment in certain stipulated circumstances, it has been held that the beneficiary must, when making the demand for payment, commit himself to claiming that the stipulated event has occurred (see *Esal (Commodities) and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA, Banque du Caire SA v Wells Fargo Bank SA* [1985] 2 Lloyd's Rep 546 at 550, CA); but, unless the bond expressly requires the beneficiary to specify the details of the alleged breach, it is enough, where the bond so requires, that the beneficiary describes the nature of that breach (*Odebrecht Oil and Gas Services Ltd v North Sea Production Co Ltd* [1999] 2 All ER (Comm) 405). See also the cases cited in note 5 infra. See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 927, 1271 et seq.

3 *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161, CA; *Intraco Ltd v Notis Shipping Corp'n, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, CA; *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep 146; *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19, CA; *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 All ER 1189, [1989] 1 WLR 1147, CA; *Themehelp Ltd v West* [1996] QB 84, [1995] 4 All ER 215, CA (doubted in *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890 and considered in *Britten Norman Ltd v State Ownership Fund of Romania* [2000] All ER (D) 935); *Wahda Bank v Arab Bank plc* [1996] 1 Lloyd's Rep 470, CA; *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 1 All ER (Comm) 257; *Consolidated Oil Ltd v American Express Bank Ltd* [2002] CLC 488; *Sunderland Association Football Club Ltd v Uruguay Montevideo FC* [2001] 2 All ER (Comm) 828; *Standard Bank London Ltd v Canara Bank* [2002] All ER (D) 340 (May).

4 See the cases cited in note 3 supra.

5 See *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496, CA (a demand required to state that it was based on a claim for damages for breach of contract is valid if it says so in substance but not in express words). The Court of Appeal differed from Leggatt J at first instance on the application of the law on this matter to the facts, but did not disapprove of the judge's dictum at [1989] 2 Lloyd's Rep 205 at 208 that the beneficiary must have done that which for the purpose of making a valid demand is required of him. See also *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2000] All ER (D) 1152 (demand did not comply with the requirements of the guarantee). The International Chamber of Commerce has published a standard set of rules, known as the Uniform Rules for Demand Guarantees (ICC Publication No 425), which may be incorporated into performance bonds and guarantees which require the beneficiary, normally the buyer, to support his demand by a written statement stating that the account party, typically the seller, is in breach of the contract of sale and indicating the respect in which the seller is in breach. It is, however, open for sellers to insist with their buyers that any performance bond they are prevailed on by their buyers to procure will incorporate those Rules.

6 *Kvaerner John Brown Ltd v Midland Bank plc* [1998] CLC 446 (certificate required to be tendered with demand for payment manifestly untrue; injunction granted); *Solo Industries (UK) Ltd v Canara Bank* [2001] EWCA Civ 1059, [2001] 2 All ER (Comm) 217, [2001] 1 WLR 1800 (bank did not assume the risk that a bond had been induced by conspiracy between or misrepresentation by customers; summary judgment for payment refused).

7 *TTI Team Telecom International Ltd v Hutchison 3G UK Ltd* [2003] EWHC 762 (TCC), [2003] 1 All ER (Com) 914 (interim injunctive relief not granted, but exhaustive list of examples of breach of faith given).

8 See *United Trading Corp'n SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 559n, CA (where Ackner LJ reported a dictum of Lord Denning MR in *State Trading Corp'n of India Ltd v ED & F Man (Sugar) and State Bank of India* [1981] Com LR 235, CA); *Turkiye IS Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611 (where Waller J, in refusing an injunction, held that for an injunction to be granted, 'the only realistic inference the bank could draw was that the demand was fraudulent'). See also the cases cited in note 3 supra; and PARA 377 ante.

9 See *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep 424 at 431, CA, per Potter LJ; *Cargill International SA v Bangladesh Sugar and Food Industries Corp'n* [1998] 2 All ER 406, [1998] 1 WLR 461, CA.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(8) CONFIRMING HOUSES/381. Status and functions.

(8) CONFIRMING HOUSES

381. Status and functions.

The interposition of a confirming house, usually carrying on business in the supplier's country and remunerated by commission agreed with the buyer, is a not uncommon method of providing the supplier with security of payment in an international sale. The precise status of a confirming house depends on the particular transaction, construed in the light of any relevant course of dealing or usage¹.

The usual function of a confirming house is to place an order with a supplier in its own name or to add its confirmation to, and then forward, an order prepared by the buyer; thus, the confirming house is or becomes, as regards the supplier, a principal party to the purchase².

As regards the buyer, the confirming house commonly acts as an agent, and is entitled as such to indemnity in respect of liability incurred to the supplier properly and without want of due skill and care on its part³. Where the confirming house acts as agent as regards the buyer, the buyer, as a disclosed or undisclosed principal to the purchase, may sue, or be sued by, the supplier⁴.

The confirming house may, however, lack the authority of the buyer to create any privity between the supplier and the buyer, but nonetheless be entitled as against the buyer to a

similar indemnity to that of an agent in the strict sense in respect of liability properly incurred to the supplier⁵.

A third possibility is that the confirming house acts as an intermediate seller, agreeing to resell to the buyer, at a price calculated by adding its commission, the goods which it agrees to buy from the supplier, and accepting responsibility to the buyer accordingly in the event of any failure to deliver or any defect in the goods whether or not due to its own or the supplier's fault⁶.

1 Confirming houses often undertake ancillary functions eg as forwarding agents: see *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep 610, CA.

2 *Rusholme and Bolton and Roberts Hadfield Ltd v SG Read & Co (London) Ltd* [1955] 1 All ER 180, [1955] 1 WLR 146; *Sobell Industries Ltd v Cory Bros & Co Ltd* [1955] 2 Lloyd's Rep 82. The position of the confirming house is on this basis very different from that of a del credere agent whose client is the seller and whose liability arises only in respect of the sum ascertained due to the seller following the buyer's insolvency: see *Hornby v Lacy* (1817) 6 M & S 166; *Thomas Gabriel & Sons v Churchill and Sim* [1914] 3 KB 1272, CA.

3 *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep 610, CA. As to an agent's right to reimbursement and indemnity against his principal see AGENCY vol 1 (2008) PARAS 71, 111-112.

4 *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545, [1968] 2 All ER 886, CA. The terms of the purchase contract may, however, exclude the buyer's right to sue, and protect him from suit by, the supplier: see AGENCY vol 1 (2008) PARAS 125, 130. The supplier must also be careful before electing whether to pursue the confirming house or the buyer: see AGENCY vol 1 (2008) PARA 131.

5 See *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep 610 at 619, CA, per Danckwerts LJ. The other judgments in this case do not touch on this possibility. Although the presumption that an agent for a foreign principal has no authority to create privity between the principal and a third person no longer exists (see AGENCY vol 1 (2008) PARA 129) see the useful analysis in *Bolus & Co Ltd v Inglis Bros Ltd* [1924] NZLR 164 at 174-176, NZ CA, per Salmond J; *Witt and Scott Ltd v Blumenreich* [1949] NZLR 806. In transferring to the buyer the goods, once acquired, the confirming house has in these circumstances been said to be acting also as a seller and has been held to have a right of stoppage in transit as if it were a seller: see *Feise v Wray* (1802) 3 East 93; *Ireland v Livingston* (1872) LR 5 HL 395. The governing relationship is, however, that of principal and agent: *Cassaboglou v Gibb* (1883) 11 QBD 797, CA. The buyer could not, therefore, hold the confirming house responsible as warranting the quality of the goods supplied, although the confirming house would no doubt be obliged to lend its name for the purpose of a claim on the supplier.

6 See *Brown and Gracie Ltd v FW Green & Co Pty Ltd* [1960] 1 Lloyd's Rep 289, HL; *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep 610, CA (where, on the facts, the proposition in the text was the favoured analysis of Diplock LJ, dissenting, although he expressed himself only tentatively on the extent of the confirming house's responsibility).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/7. INTERNATIONAL SALE CONTRACTS/(9) UNIFORM LAWS ON INTERNATIONAL SALES/382. Scope and operation.

(9) UNIFORM LAWS ON INTERNATIONAL SALES

382. Scope and operation.

The Uniform Laws on International Sales Act 1967 gives the force of law in the United Kingdom¹ to the 'Uniform Law on Sales'² and to the 'Uniform Law on Formation'³ of contracts⁴ for the international sale of goods.

Under the Uniform Laws on International Sales Act 1967, the Uniform Law on Sales applies to a contract of sale only if it has been chosen by the parties as the law of the contract⁵. Where so chosen, it governs their obligations arising from the contract of sale, but is not generally concerned with the formation of the contract, the effect which the contract may have on the

property in the goods sold or with the validity of the contract or any of its provisions or of any usage⁶. The terminology and provisions of the Uniform Law on Sales often differ, in some respects substantially, from those of the common law and the Sale of Goods Act 1979⁷.

The Uniform Law on Formation applies to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Uniform Law on Sales. Where applicable, its provisions also modify the common law position⁸.

At an international level, support, in so far as it existed for the Uniform Law on Sales and the Uniform Law on Formation, has shifted behind the United Nations Convention on Contracts for the International Sale of Goods⁹ ('the Vienna Convention'), which was produced by the United Nations Commission on International Trade Law and adopted at a United Nations' conference held in Vienna in March and April 1980. The Vienna Convention came into force on 1 January 1988; but the United Kingdom was not a signatory to that Convention and has not yet acceded to it.

1 See the Uniform Laws on International Sales Act 1967 ss 1(2), 2(2). Section 1(2) is made subject to s 1(3)-(7): see *infra*. Section 2(2) is made subject to s 2(3): see *infra*.

2 'The Uniform Law on Sales' means the Uniform law on the International Sale of Goods forming the Annex to the First Convention and set out, with the modification provided for by art III, in the Uniform Laws on International Sales Act 1967 Sch 1: s 1(1). 'The First Convention' means the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1 July 1964 to 31 December 1965; TS 74 (1972); Cmnd 5029): Uniform Laws on International Sales Act 1967 s 1(1).

3 'The Uniform Law on Formation' means the Law forming Annex I to the Second Convention as set out, with the modifications provided by art I para 3, in the Uniform Laws on International Sales Act 1967 Sch 2: s 2(1). 'The Second Convention' means the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1 July 1964 to 31 December 1965; TS 75 (1972); Cmnd 5030): Uniform Laws on International Sales Act 1967 s 2(1).

4 The Uniform Law on Sales and the Uniform Law on Formation do not apply to offers, replies and acceptance made before such date as Her Majesty may by Order in Council declare to be the date on which the First Convention and the Second Convention came into force in respect of the United Kingdom: Uniform Laws on International Sales Act 1967 ss 1(6), 2(3). The date specified for the purposes of both s 1(6) and s 2(3) is 18 August 1972: Uniform Laws on International Sales Order 1972, SI 1972/973, arts 2(a), 3. For the history and effect of these laws see Gunnar Lagergren in (1958) JBL 131 and (1966) JBL 22; Michael Aubrey in (1965) 14 ICLQ 1011; Alexander Szakats in (1966) 15 ICLQ 749; KR Simmonds in (1967) 111 Sol Jo 781; JD Feltham in (1967) 30 MLR 670; and Graveson, Cohn and Graveson on The Uniform Laws on International Sales Act 1967. Any Order in Council made under the Uniform Laws on International Sales Act 1967 ss 1, 2 must be laid before Parliament after being made: see ss 1(7), 2(4). As to the modification of the Uniform Laws see the Uniform Laws on International Sales Act 1967 s 3.

5 *Ibid* s 1(3). Section 1(3) applies while an Order of Her Majesty in Council is in force declaring that a declaration by the United Kingdom under the First Convention art V (application only by choice of parties) has been made and not withdrawn: see the Uniform Laws on International Sales Act 1967 s 1(3). Such a declaration has been made by the United Kingdom and has not been withdrawn: see the Uniform Laws on International Sales Order 1972, SI 1972/973, art 2(b). Under its own terms, the Uniform Law on Sales depends on arts 1, 4. The present Law applies to contracts of sale of goods entered into by parties whose places of business (or, if none, habitual residences: see art 1(2)) are in the territories of different contracting states in each of the following cases (art 1(1)(a)-(c)):

- 11 (1) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one state to the territory of another;
- 12 (2) where the acts constituting the offer and the acceptance have been effected in the territories of different states;
- 13 (3) where delivery of the goods is to be made in the territory of a state other than that within whose territory the acts constituting the offer and the acceptance have been effected.

For the purpose of determining whether the parties have their places of business or habitual residences in 'different states', any two or more states are not to be considered to be 'different states' if a valid declaration to

that effect made under art II of the First Convention relating to a Uniform Law on the International Sale of Goods is in force in respect of them: Uniform Law on Sales art 1(5). If Her Majesty by Order in Council declares what states are contracting states and in respect of what territories or what declarations under art II of the First Convention are for the time being in force, the Order is, while in force, conclusive for the purposes of the Uniform Law on Sales art 1(1) or, as the case may be, art 1(5); but any such Order in Council may be varied or revoked by a subsequent Order in Council: Uniform Laws on International Sales Act 1967 s 1(5). Belgium, Gambia, Germany, Israel, the Netherlands, San Marino and the United Kingdom have been declared contracting states for the purpose of the Uniform Law on Sales art 1: see the Uniform Laws on International Sales Order 1972, SI 1972/973, art 2(c), Schedule (substituted by SI 1987/2061). Provision is also made for the application of the Law where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different states and whether or not such states are parties to the First Convention relating to the Uniform Law on the International Sale of Goods, to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law: Uniform Law on Sales art 4. In determining the extent of the application of the Uniform Law on Sales by virtue of art 4:

- 14 (a) in relation to a contract made before 18 May 1973 (ie the date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3)), no provision of the law of any part of the United Kingdom is to be regarded as a mandatory provision within the meaning of the Uniform Law on Sales art 4;
- 15 (b) in relation to a contract made on or after 18 May 1973 and before 1 February 1978 (ie the date on which the Unfair Contract Terms Act 1977 came into force: see s 31(1)), no provision of that law is to be so regarded except for the Sale of Goods Act 1979 ss 12-15 (as amended), s 55 (as amended) and s 56 (see PARAS 6, 12-13, 39, 69 et seq ante);
- 16 (c) in relation to a contract made on or after 1 February 1978, no provision of that law is to be so regarded except ss 12-15B (as amended) (see PARA 69 et seq ante):

Uniform Laws on International Sales Act 1967 s 1(4)(a)-(c) (substituted by the Sale of Goods Act 1979 s 63(1), Sch 2 para 15; and amended by the Sale and Supply of Goods Act 1994 s 7(1), Sch 2 para 3).

6 Uniform Law on Sales art 8.

7 Eg the buyer must examine the goods, or cause them to be examined, promptly: see *ibid* art 38. Further, the buyer is debarred from relying on a lack of conformity with the contract if he has not given prompt notice of it to the seller after he has or ought to have discovered the lack of conformity: see art 39. In any event, the buyer loses the right to rely on a lack of conformity if he has not given notice of it to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period: see art 39. The seller is not entitled to rely on arts 38, 39, if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose: art 40. The buyer loses his right to rely on lack of conformity at the expiration of a period of one year after has given notice under art 39: see art 49. The relationship of this limit to art 40 is unclear.

The Uniform Law on Sales also employs the concept of fundamental breach, ie a breach such that the party in breach knew, or ought to have known, at the time of the conclusion of the contract that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects: art 10. In addition, the Law contains various provisions entitling 'avoidance' (often only if claimed promptly) or *ipso facto* avoiding the contract in the event of a fundamental breach or in the event of a lesser breach which remains unrectified after the giving and expiry of a reasonable time: see eg arts 24, 26-28, 30-32, 43-45, 51, 52, 55 (seller's obligations) and arts 61, 62, 66, 70 (buyer's obligations).

8 Eg in relation to the revocation and acceptance of offers. Revocation can be precluded if it is not made in good faith or in conformity with fair dealing or if the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable: see Uniform Law on Formation art 5(2). Acceptance, *prima facie*, consists of the declaration communicated to the offeror: see arts 6, 12(1). It may also consist of the dispatch of the goods or price or any other act considered to be equivalent to such a declaration by the offer or by course of dealing or usage. A reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance: art 7(2). Whether and how far this differs from the common law was left open in *Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd* [1979] 1 All ER 965 at 970, [1979] 1 WLR 401 at 406-407, CA, per Bridge LJ. Provision is also made with regard to the time for acceptance and delays in the course of transmission of such acceptance, which are excused unless the offeror has promptly informed the acceptor orally or by dispatch of a notice that he considers his offer has lapsed: see Uniform Law on Formation arts 8, 9.

⁹ See the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980; Misc 24 (1980); Cmnd 8074).

UPDATE

382 Scope and operation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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8. CONSUMER PROTECTION

(1) INTRODUCTION

383. In general.

The concept of consumer protection is a comparatively modern one. Laws which attempted to enforce fair trading have a very long history, but part of the motivation behind such laws was the legitimate desire of the honest trader to be protected from dishonest practices operated by competing traders. It has long been recognised, for example, that civilised trade cannot take place without a uniform system of weights and measures. In Magna Carta it is stated that there should be one measure for wine, ale and corn and one width for cloths¹. The Assize of Bread and Ale 1266 laid down a scheme to control the amount of bread or ale obtainable for a farthing or penny respectively, depending on the current price of wheat, barley or oats. There were similar attempts to control the sale of almost all primary commodities of everyday life, in particular grain, cloth, wine, cheese, fish, honey, coal, salt and butter, in many cases dating from the fourteenth and fifteenth centuries.

In recent years there has been increased intervention by both the courts and the legislature to protect the interests of the consumer in order to recognise the fact that, notwithstanding the general principle of freedom of contract, in many transactions there is a significant inequality between the buyer and the seller and that the buyer should not be forced to accept unreasonable terms.

There is no single statutory definition of 'consumer'²; and, whereas under European Union law the term 'consumer' is usually limited to any natural person³, under United Kingdom law the term 'consumer' is usually not so limited⁴.

¹ See Magna Carta (1215) cl 35 ('Let there be one measure for wine throughout our kingdom, and one measure for ale, and one measure for corn, namely 'the London quarter'; and one width for cloths whether dyed, russet or halberget, namely two ells with the selvedges. Let it be the same with weights and measures').

² In the Final Report of the Committee on Consumer Protection ('the Molony Report') (Cmnd 1781) (see PARA 384 post), the term 'consumer' was taken throughout to mean 'one who purchases (or hire-purchases) goods for private use or consumption': see PARA 2.

³ See eg the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 3(1); the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045; and PARAS 307 ante, 452 note 4 post.

⁴ See eg the Unfair Contract Terms Act 1977 s 12(1); and PARA 450 note 10 post. Paradoxically the Consumer Protection Act 1987 (see PARA 518 et seq post) contains no statutory definition of the term 'consumer'.

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384. The Molony Report.

In July 1962 the Final Report of the Committee on Consumer Protection ('the Molony Report') was published¹. The Committee's remit was to consider (inter alia) the then existing legislation and the need for further protection of the consumer public. The Committee considered consumer protection to be an amorphous concept that could not be defined. It was considered to consist of those instances where the law intervened to impose safeguards in favour of purchasers and hire-purchasers, together with the activities of a number of organisations, variously inspired, the object or effect of which was to procure fair and satisfying treatment for the domestic buyer. From another viewpoint, consumer protection was considered to be those measures which contributed, directly or indirectly, to the consumer's assurance that he would buy goods of suitable quality appropriate to his purpose, that they would give him reasonable use, and that, if he had just complaint, there would be a means of redress².

After considering standards and labelling³, marks, seals and comparative testing⁴, civil redress⁵, the Merchandise Marks Acts⁶, advertising and sales practices⁷ and major organisational reform⁸, the Committee made various recommendations, some of which led eventually to the repeal of the Merchandise Marks Acts and the passing of the Trade Descriptions Act 1968⁹.

- 1 le the Final Report of the Committee on Consumer Protection ('the Molony Report') (Cmnd 1781).
- 2 See the Final Report of the Committee on Consumer Protection para 21.
- 3 See the Final Report of the Committee on Consumer Protection paras 58-310.
- 4 See the Final Report of the Committee on Consumer Protection paras 311-393.
- 5 See the Final Report of the Committee on Consumer Protection paras 394-572.
- 6 See the Final Report of the Committee on Consumer Protection paras 573-725.
- 7 See the Final Report of the Committee on Consumer Protection paras 726-819.
- 8 See the Final Report of the Committee on Consumer Protection paras 887-913.
- 9 See the Final Report of the Committee on Consumer Protection Ch 22.

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385. Current legislation.

The first general Act dealing with false trade descriptions was the Merchandise Marks Act 1862. That Act was repealed and replaced by the more effective Merchandise Marks Act 1887, which, with its amending Acts, remained in force until 1968, when it was itself wholly repealed and replaced by the Trade Descriptions Act 1968¹.

In order to protect consumers, the Consumer Protection Acts 1961 and 1971 were passed, both of which were repealed by the Consumer Safety Act 1978², which, together with the Consumer Safety (Amendment) Act 1986, was itself repealed by the Consumer Protection Act 1987³.

The major areas of legislation currently relating to consumer protection deal with:

- 311 (1) unfair terms in consumer contracts⁴;
- 312 (2) trade descriptions⁵;
- 313 (3) product liability⁶;
- 314 (4) consumer safety⁷;
- 315 (5) unsolicited goods and services⁸;
- 316 (6) contracts concluded away from business premises following unsolicited visits by a trader⁹;
- 317 (7) prices¹⁰;
- 318 (8) timeshare agreements¹¹;
- 319 (9) advertisements and unsolicited calls¹²;
- 320 (10) bureaux de change¹³;
- 321 (11) consumer credit¹⁴;
- 322 (12) credit references¹⁵;
- 323 (13) energy efficiency¹⁶;
- 324 (14) energy labelling¹⁷;
- 325 (15) estate agency¹⁸;
- 326 (16) package travel¹⁹;
- 327 (17) packaging²⁰; and
- 328 (18) pyramid selling and similar trading schemes²¹.

Part 8 of the Enterprise Act 2002²² makes provision for the enforcement of certain consumer protection legislation²³.

In addition, the courts have played a role, albeit not a prominent one, in protecting the interests of consumers²⁴.

- 1 See PARA 471 post.
- 2 See the Consumer Safety Act 1978 ss 10(1), 12(2), Sch 3 (repealed).
- 3 See the Consumer Protection Act 1987 s 48(3), Sch 5.
- 4 See PARA 452 et seq post.
- 5 See PARA 471 et seq post.
- 6 See PARA 518 et seq post.
- 7 See PARA 528 et seq post.
- 8 See PARA 657 et seq post.
- 9 See PARA 663 et seq post.
- 10 See PARA 680 et seq post.
- 11 See PARA 867 et seq post.
- 12 See PARA 727 et seq post.
- 13 See PARA 756 et seq post.
- 14 See PARA 763 post.
- 15 See PARAS 768-771 post.
- 16 See PARAS 779-780 post.

- 17 See PARA 781 et seq post.
- 18 See PARA 789 et seq post.
- 19 See PARA 817 et seq post.
- 20 See PARA 844 et seq post.
- 21 See PARA 853 et seq post.
- 22 In the Enterprise Act 2002 Pt 8 (ss 210-236) (as amended).
- 23 See COMPETITION vol 18 (2009) PARAS 339-360.
- 24 See PARA 20 ante.

UPDATE

385 Current legislation

TEXT AND NOTES--Provision is also made for the regulation of the supply of services: see Provision of Services Regulations 2009, SI 2009/2999; and PARA 385A.

TEXT AND NOTE 9--Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(1) INTRODUCTION/385A. Provision of services.

385A. Provision of services.

For the purposes of implementing European Parliament and EC Council Directive 2006/123 on services in the internal market, the Provision of Services Regulations 2009, SI 2009/2999, have been made.

'Service' means any self-employed economic activity normally provided for remuneration (reg 2(1)), and specified services are excluded from the scope of the provisions (reg 2(2)). Service providers are under a duty to make prescribed information about themselves and their services available to recipients of the service (regs 7-11), and to deal with complaints from recipients (reg 12). Competent authorities having supervisory or regulatory functions in the United Kingdom in relation to service activities are subject to specified duties in relation to the authorisation of providers (regs 3, 12-20, 47(5)), and in relation to the requirements that they may impose on service activities (regs 21, 22). Competent authorities also have specified duties in relation to (1) providers from another EEA state (regs 23-28); (2) certificates and other documents (reg 31); (3) electronic procedures (reg 32); (4) insurance (reg 33); (5) commercial communications by regulated professions (reg 34); and (6) multi-disciplinary activities (reg 35). Recipients' usage of services from other EEA states must not be restricted by competent authorities (reg 29) and such authorities are prohibited from discriminating on the basis of recipients' nationality or place of residence (reg 30). Providers are also prohibited from discriminating in their general conditions of access to a service on the basis of recipients' place of residence: reg 30. Competent authorities must provide specified information to the Secretary of State (reg 36) and to providers and recipients on request (reg 37). The Secretary of State and the Commissioners for Revenue and Customs must establish a facility for the completion by electronic means of procedures and formalities relating to service activities and the

provision of information to providers and recipients: reg 38. Provision is also made for administrative co-operation between EEA states: regs 39-44.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/ (2) EU LEGISLATION/386. The EC Treaty.

(2) EU LEGISLATION

386. The EC Treaty.

The European Union has as its task to promote throughout the European Union a harmonious, balanced and sustainable development of economic activities, a high degree of competitiveness and convergence of economic performance, a high level of employment and of social protection, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member states¹. For those purposes, the activities of the European Union include:

- 329 (1) an internal market characterised by the abolition, as between member states, of obstacles to the free movement of goods, persons, services and capital;
- 330 (2) a system ensuring that competition in the internal market is not distorted;
- 331 (3) the approximation of laws of member states to the extent required for the functioning of the common market;
- 332 (4) the strengthening of economic and social cohesion;
- 333 (5) the strengthening of competitiveness of European Union industry;
- 334 (6) a contribution to the attainment of a high level of health protection;
- 335 (7) a contribution to the strengthening of consumer protection; and
- 336 (8) measures in the spheres of energy, civil protection and tourism².

In order to promote the interests of consumers and to ensure a high level of consumer protection, the European Union is to contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests³. The European Union is to contribute to the attainment of the above objectives through:

- 337 (a) measures adopted in the context of the completion of the internal market;
- 338 (b) measures which support, supplement and monitor the policy pursued by the member states⁴.

The EU Council, acting in accordance with the prescribed procedure⁵ and after consulting the Economic and Social Committee, must adopt the measures referred to in head (b) above⁶. Measures so adopted do not prevent any member state from maintaining or introducing more stringent protective measures, provided that such measures are compatible with the EC Treaty and the EU Commission is notified of them⁷.

Consumer protection requirements are to be taken into account in defining and implementing other Community policies and activities⁸.

1 Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 2 (substituted by the Treaty of Amsterdam (Amsterdam, 2 October 1997; OJ C340, 10.11.97, p 1) art 2(2)).

As to the substitution in most enactments of references to the European Economic Area for references to the Communities and the making of consequential modifications see the European Economic Area Act 1993 ss 2, 3.

The Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)) (the 'EEA Agreement') was made between the European Community and its member states and the states of the European Free Trade Association, namely Austria, Finland, Iceland, Liechtenstein, Norway, Switzerland and Sweden, and was intended to create an area of 19 countries throughout which the 'four freedoms' of the European Community, namely the free movement of goods, capital, services and people, would apply: see 539 HL Official Report (5th series) col 1315 et seq. The Protocol adjusting the Agreement had the effect of excluding from the Agreement on the European Economic Area Switzerland, which chose on 1 December 1992 not to participate, and Liechtenstein; enabled the Agreement to enter into force without being ratified by those two countries; and allowed for Liechtenstein to join the Agreement at a future date: see 230 HC Official Report (6th series) cols 441, 463. Austria, Finland and Sweden, who were formerly member states of the European Economic Area, became full members of the European Community on 1 January 1995. The European Free Trade Association was formed in 1960 by seven European states which, whilst wishing to promote free trade, sought a less structured and less politicised form of co-operation than that envisaged by the European Community: see the Convention establishing the European Free Trade Association (Stockholm, 4 January 1960; TS 30 (1960); Cmnd 1026). At the date at which this volume states the law there are 25 member states, namely Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, the Netherlands and the United Kingdom.

2 EC Treaty art 3(1)(c), (g), (h), (k), (m), (t), (u) (substituted by the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485) Title II art G(38); renumbered and amended by the Treaty of Amsterdam art 2(3)).

3 EC Treaty art 153(1) (added by the Treaty on European Union Title II art G(38); substituted and renumbered by the Amsterdam Treaty arts 2(27), 12).

4 le the procedure referred to in EC Treaty art 95 (as added and renumbered).

5 Ibid art 153(3) (added by the Treaty on European Union Title II art G(38); substituted and renumbered by the Amsterdam Treaty arts 2(27), 12).

6 EC Treaty art 153(4) (added by the Treaty on European Union Title II art G(38); substituted and renumbered by the Amsterdam Treaty arts 2(27), 12).

7 EC Treaty art 153(5) (added by the Treaty on European Union Title II art G(38); substituted and renumbered by the Amsterdam Treaty arts 2(27), 12).

8 EC Treaty art 153(2) (added by the Treaty on European Union Title II art G(38); substituted and renumbered by the Amsterdam Treaty arts 2(27), 12).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/ (2) EU LEGISLATION/387. Preliminary programme for a consumer protection and information policy.

387. Preliminary programme for a consumer protection and information policy.

When they met in Paris in October 1972, the heads of state or government confirmed the requirement of a consumer protection and information policy and fulfilment of the objectives set by the EC Treaty¹, and called on the institutions of the European Community to strengthen and co-ordinate measures for consumer protection and to submit a programme by January 1974². On 14 April 1975 the EC Council adopted a resolution on a preliminary four-year programme for a consumer protection and information policy³. The consumer was no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes but also as a person concerned with the various facets of society which might affect him either directly or indirectly as a consumer⁴. Consumer interests were summed up by a statement of five basic rights:

339 (1) the right to protection of health and safety;

- 340 (2) the right to protection of economic interests;
- 341 (3) the right to redress;
- 342 (4) the right to information and education; and
- 343 (5) the right of representation (the right to be heard)⁵.

All those rights were to be given greater substance by action under specific Community policies such as the economic, common agricultural, social, environment, transport and energy policies as well as by the approximation of laws, all of which affected the consumer's position⁶.

The programme dealt first with the protection of consumer health and safety⁷. It set out the principles on which measures for achieving that objective should be based⁸ and the priorities for the fields which were of special importance under that heading, namely:

- 344 (a) foodstuffs;
- 345 (b) cosmetics and detergents;
- 346 (c) utensils and consumer durables;
- 347 (d) cars;
- 348 (e) textiles;
- 349 (f) toys;
- 350 (g) dangerous substances;
- 351 (h) materials coming into contact with foodstuffs;
- 352 (i) medicines;
- 353 (j) fertilisers, pesticides and herbicides; and
- 354 (k) veterinary products and animal feeding-stuffs⁹.

The basic principles on which the legal measures were to be based were:

- 355 (i) goods and services offered to consumers were to be such that, under normal or foreseeable conditions of use, they presented no risk to the health or safety of consumers;
- 356 (ii) there were to be quick and simple procedures for withdrawing them from the market in the event of their presenting such risks;
- 357 (iii) consumers were to be informed in an appropriate manner of any risk liable to result from a foreseeable use of goods and services, taking account of the nature of the goods and services and of the persons for whom they were intended¹⁰;
- 358 (iv) the consumer was to be protected against the consequences of physical injury caused by defective products and services supplied by manufacturers of goods and providers of services¹¹;
- 359 (v) substances or preparations which might form part of, or be added to, foodstuffs were to be defined and their use regulated¹²;
- 360 (vi) machines, appliances and electrical and electronic equipment and any other category of goods which might prejudicially affect the health and safety of consumers either in themselves or by their use were to be covered by special rules and to be subject to a procedure recognised or approved by the public authorities, such as type approval or declaration of conformity with harmonised standards or rules, to ensure that they were safe for use¹³;
- 361 (vii) certain categories of new products which might prejudicially affect the health or safety of consumers were to be made subject to special authorisation procedures harmonised throughout the Community¹⁴.

The work was to proceed alongside the general programme for the elimination of technical barriers to trade in industrial products and foodstuffs resulting from disparities between the provisions laid down by law, regulation or administrative provisions in the member states¹⁵ and

the action programme on industrial and technological policy¹⁶. Consumers would want products to move freely and to be sold on fair terms in the Community.

The programme for a consumer protection and information policy also envisaged protection of the economic interests of the consumers¹⁷. Certain principles were set out for harmonisation at Community level, with priority being given to the harmonisation of the general conditions of consumer credit including those relating to hire purchase and the protection of the consumer against false or misleading advertising and from unfair commercial practices¹⁸. The EC Commission was required to organise studies to assist on consumer advice, help and redress¹⁹ and to formulate rules for the labelling of products and the giving of information concerning goods and services²⁰.

- 1 Ie by the EC Treaty (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 2 (as originally enacted).
- 2 See EC Council Resolution of 14 April 1975 (OJ C92, 25.4.75, p 1) 3rd, 4th recitals.
- 3 Ie EC Council Resolution of 14 April 1975. The programme is set out in the Annex to the resolution.
- 4 Ibid Annex para 3.
- 5 Ibid Annex para 3(a)-(e).
- 6 Ibid Annex para 4. Such action fell within the context of a policy for improving the conditions of life in the Community: Annex para 4.
- 7 See ibid Annex paras 15-17.
- 8 See ibid Annex para 15.
- 9 See ibid Annex para 16.
- 10 Ibid Annex para 15(a)(i).
- 11 Ibid Annex para 15(a)(ii).
- 12 Ibid Annex para 15(a)(iii).
- 13 Ibid Annex para 15(a)(iv).
- 14 Ibid Annex para 15(a)(v).
- 15 Ie the general programme laid down by EC Council Resolution of 28 May 1969 (OJ C76, 17.6.69, p 1), supplemented by EC Council Resolution of 21 May 1973 (OJ C38, 5.6.73, p 1).
- 16 See EC Council Resolution of 14 April 1975 Annex para 16. The action programme referred to was laid down by EC Council Resolution of 17 December 1973 (OJ C117, 31.12.73, p 1).
- 17 See EC Council Resolution of 14 April 1975 Annex paras 18-31.
- 18 See ibid Annex paras 20-25.
- 19 See ibid Annex paras 32, 33.
- 20 See ibid Annex paras 34-41.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/ (2) EU LEGISLATION/388. Second programme for a consumer protection and information policy.

388. Second programme for a consumer protection and information policy.

The second programme for a consumer protection and information policy was adopted by the EC Council on 19 May 1981¹. This five-year programme, like its predecessor², was designed to help establish conditions for improved consultation between consumers and manufacturers and to put the consumer in the position of being able to exercise the five basic rights³ so that the consumer could act with full knowledge of the facts and hold the balance between market forces⁴. The second programme was intended to enable the EC Commission to continue its work in this field. It mentioned, however, that the Community had developed two types of action with regard to foodstuffs, namely horizontal (general measures on additives, materials and objects coming into contact with foodstuffs and specific foods) and vertical (measures on specific products)⁵.

1 Ie EC Council Resolution of 19 May 1981 (OJ C133, 3.6.81, p 1). The programme is set out in the Annex to the resolution.

2 Ie EC Council Resolution of 14 April 1975 (OJ C92, 25.4.75, p 1): see PARA 387 ante.

3 Ie the rights mentioned in ibid Annex para 3(a)-(e): see PARA 387 heads (1)-(5) ante.

4 See EC Council Resolution of 19 May 1981 Annex para 2.

5 See ibid Annex para 15.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/ (2) EU LEGISLATION/389. Third programme for a consumer protection and information policy.

389. Third programme for a consumer protection and information policy.

A third consumer protection programme was recommended to the EC Council by the EC Commission in its paper of June 1985 entitled 'A New Impetus for Consumer Protection Policy'¹, which reviewed the first ten years of development and concluded that achievement of the Community in this field had fallen substantially short of expectations due to the impact of economic recession, the attitude of member states shouldering the implementation of individual legislation, the requirement of unanimity among member states leading to long delays in implementation and the practice of producing rules for a restricted range of products². Two reasons were put forward to justify the new proposed impetus³. First, the essential objective of the Community was the constant improvement of the living and working conditions of its peoples, and the promotion of a consumer protection policy had to be seen as an integral part of Community policy for the welfare of citizens. Secondly, goods which failed to give the consumer a reasonable return for his money were bad investments. By contrast, goods which satisfied a well-informed consumer and gave value for money inspired confidence. Goods with a reputation for safety and reliability captured markets both within and outside the Community, thereby maintaining the Community's share of trade against competing external producers. Therefore, these goods helped to sustain economic growth and the creation of jobs.

It was recommended that a third programme should aim at achieving three main objectives:

362 (1) products traded in the Community should conform to acceptable health and safety standards;

363 (2) consumers should be able to benefit from the common market; and

364 (3) consumer interests should be taken more into account in other Community policies⁴.

The essential components of the first objective would be a programme of legislation specifying health and safety levels, a programme of co-operative action between national authorities responsible for safety matters, the creation of Community facilities for surveillance and control as regards health and safety risks and campaigns for the information and education of consumers concerning the safe use of products⁵.

The second objective would be achieved by promoting measures⁶ to protect the economic interests of consumers, such as protection against unfair contract terms⁷, standardising the expression of the charge for credit, control of advertising⁸, control over economic fund transfers⁹, enforcement of warranties, indicating the prices of services¹⁰, harmonisation of legislation on package tours, standardisation of information on hotels, detailing rights of tourists¹¹, fire safety¹², satisfaction of the Convention¹³ on privacy and data protection¹⁴, and establishing a code of business practice¹⁵. This would be supported by publication of guides on consumers' rights, a Green Paper on consumer advice and redress, a report on the quality and efficiency of public services and reports of conferences¹⁶.

The third objective would be achieved by extending and reinforcing the work of the Consumers' Consultative Committee¹⁷.

Annexed to the third programme was a timetable for the execution of actions proposed. Under the new heading of 'Education' a draft EC Council Resolution concerning education in primary and secondary schools had to be submitted within the time stipulated, requiring competent authorities in the member states to ensure the gradual introduction of consumer education into curricula so that it was systematically provided throughout the period of compulsory education¹⁸.

By a resolution of 23 June 1986¹⁹ the EC Council:

- 365 (a) welcomed the submission of the EC Commission's paper;
- 366 (b) noted its analysis of the main problems encountered;
- 367 (c) acknowledged the foundations;
- 368 (d) indorsed the objectives of the 'new impetus' programme, notably those concerned with providing consumers with a high level of safety and health protection and an increased ability to benefit from the Community market;
- 369 (e) approved the objective of taking greater account of consumer's interests in other Community policies and invited the EC Commission to report to the EC Council on how it intended to achieve that objective;
- 370 (f) invited the EC Commission, having regard to the work programme contained in the paper, to draw up and submit proposals, in order to enable the EC Council, where appropriate, to take decisions in due time and to take any necessary action within the period envisaged for the completion of the internal market;
- 371 (g) considered that proposals should focus on those areas where there was a Community dimension; and
- 372 (h) indorsed the value of consumer education and information in protecting consumers' interests and enabling them to derive maximum benefit from the completion of the internal market²⁰.

1 le A New Impetus for Consumer Protection Policy (COM (83) 314 final of 27 June 1985).

2 See *ibid* paras 3-9.

3 See *ibid* paras 14-17.

4 See *ibid* para 18.

5 See *ibid* paras 19-28.

6 See *ibid* paras 29-42.

- 7 See EC Commission Consultative Document COM (84) final of 9 February 1984.
- 8 See EC Commission Green Paper 'Television without Frontiers'.
- 9 Legislation might be necessary regarding incorrect charges, non-delivery of goods, defective goods or unauthorised access to the consumer's bank account.
- 10 See A New Impetus for Consumer Protection Policy (COM (83) 314 final of 27 June 1985) PARA 35.
- 11 See *ibid* para 37.
- 12 On 17 January 1984 the EC Commission submitted a proposed recommendation on fire safety in existing hotels: see COM (83) 751 final; OJ C49, 21.2.84, p 7.
- 13 *Ie* the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28 January 1981; Misc 19 (1981); Cmnd 8341).
- 14 See A New Impetus for Consumer Protection Policy (COM (83) 314 final of 27 June 1985) PARA 40.
- 15 See *ibid* para 41.
- 16 See *ibid* paras 36, 38, 39, 42.
- 17 See *ibid* paras 43, 44. The Consumers' Consultative Committee has been replaced by the Consumer Committee: see PARA 442 post.
- 18 See COM (85) 369 final (OJ C238, 19.9.85, p 7), submitted on 6 August 1985.
- 19 *Ie* EC Council Resolution of 23 June 1986 (OJ C167, 5.7.86, p 1).
- 20 See EC Council Resolution of 23 June 1986.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/ (2) EU LEGISLATION/390. Relaunch of the consumer protection policy.

390. Relaunch of the consumer protection policy.

By a resolution of 9 November 1989¹ the EC Council specified the following priorities for relaunching the policy for the protection and promotion of consumer interests:

- 373 (1) integrating that policy into other common policies through an overall study of the consequences of the internal market for the consumer, highlighting which specific sectors most affect consumer interests and the preparation of an adequate impact assessment for those proposals which were particularly sensitive for consumers²;
- 374 (2) improving consumer representation at Community level, by studying various possible ways of promoting:
 - 17 14. (a) participation by the associations in the various member states in the system of consumer representation;
 15. (b) the exchange of ideas with representatives of economic sectors and of employers;
 16. (c) optimum implementation of the EC Council Resolution³ on the improvement of consumer involvement in standardisation⁴;
 - 18 375 (3) promoting the general safety of goods and services and better information on the quality of goods and services by:

19

17. (a) looking into the possible implementation at Community level of means of promoting the safety of services;
18. (b) ensuring optimum operation of the project for a Community system of information on accidents involving consumer products ('EHLASS')⁵, the Community system for the rapid exchange of information on dangers arising from the use of consumer products⁶;
19. (c) encouraging campaigns which were to lead to greater safety of products, in particular of products which might be used by children or which might affect them;
20. (d) harmonising the different member states' monitoring systems with regard to foodstuffs and looking into the possibility of harmonising monitoring systems for other products;
21. (e) seeking a Community framework for providing information on products, including foodstuffs, by means of labelling, ancillary materials and distinctive marks to aid consumers in making informed choices and to prevent misleading claims and unfair competition;
22. (f) studying common criteria to be applied for the conduct of comparative tests and analyses of goods and services and for the dissemination of the results thereof and promoting the carrying out of such tests and analyses;
23. (g) agreeing on an overall approach⁷ for establishing a common framework in the field of tests and certification (assessment of compliance) for securing the principle of mutual recognition⁸;

20

- 376 (4) without prejudice to national provisions on the subject, encouraging member states to promote access to legal redress and, to that end:

21

24. (a) completing the studies proposed by the EC Council⁹;
25. (b) encouraging member states to seek judicial and extra-judicial systems to ensure that minor disputes between consumers and suppliers of goods and services are speedily and effectively resolved;
26. (c) studying, together with the member states, the feasibility of a system for the exchange of information to promote access to the legal system of another member state in minor disputes involving more than one country¹⁰;

22

- 377 (5) bringing to a conclusion¹¹ the work already begun at the EC Commission, including a proposal for a Directive concerning unfair terms in contracts and the report on general consumer information policy and the study, as part of the three-year plan and taking account of the 1992 target, of other possible initiatives, particularly in the areas of consumer education, new technologies involving teleshopping, guarantees and after-sales service and unfair advertising¹².

1 Ie EC Council Resolution of 9 November 1989 (OJ C294, 22.11.89, p 1).

2 Ibid para 1.

3 Ie EC Council Resolution of 4 November 1988 (OJ C293, 17.11.88, p 1).

4 EC Council Resolution of 9 November 1989 para 2.

5 Ie the project referred to in EC Council Decision of 22 April 1986 (OJ L109, 26.4.86, p 23).

6 Ie the system set up by EC Council Decision 84/103 (OJ L70, 13.3.84, p 16) and EC Council Decision 89/45 (OJ L17, 21.1.89, p 15).

7 Ie in accordance with the 'new approach to technical harmonisation and standards' in the 1985 White Paper on the completion of the internal market.

8 EC Council Resolution of 9 November 1989 para 3.

9 le the studies described in EC Council Resolution of 25 June 1987 (OJ L176, 4.7.87, p 3) point 7.

10 EC Council Resolution of 9 November 1989 para 4.

11 le in consultation with national experts and in accordance with the criteria set by EC Council Resolution of 23 June 1986 (OJ C167, 5.7.86, p 1).

12 EC Council Resolution of 9 November 1989 para 5.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/ (2) EU LEGISLATION/391. Consumer Policy Strategy 2002-2006.

391. Consumer Policy Strategy 2002-2006.

On 7 May 2002, the European Commission adopted a consumer policy strategy for the period 2002-2006¹. There are three key objectives:

- 378 (1) a high level of consumer protection, which involves harmonising the safety of goods and services and also economic and legal interests to enable consumers to shop with confidence anywhere in the European Union²;
- 379 (2) effective enforcement of consumer protection rules, to ensure that consumers are given the same protection throughout the European Union³;
- 380 (3) proper involvement of consumer organisations in European Union policies, in order to provide consumers with an opportunity to contribute to the development of policies that affect them⁴.

The European Commission has also adopted a Health and Consumer Protection Programme for the period 2007-2013 with the aim of bringing together and extending the current European Union Health Programme and the European Union consumer policy⁵.

1 le the Consumer Policy Strategy 2002-2006, Com (2002) 208 final (OJ C137/2, 8.6.2002). See also EU Council Resolution of 2 December 2002 on community consumer policy strategy 2002-2006 (OJ C11/1, 17.1.2003). The previous action plan was the EC Commission's Consumer Policy Action Plan 1999-2001 (Com (1998) 696 final), which expired at the end of 2001.

2 See the Consumer Policy Strategy 2002-2006, Com (2002) 208 final (OJ C137/2, 8.6.2002) Objective 1. In response to this objective, amongst other initiatives, the United Kingdom has established Consumer Direct, a telephone helpline to inform consumers of their rights and where to obtain help and advice, a 'good garage' scheme and a safe internet shopping campaign; the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045 have also been brought into force, giving consumers who buy faulty goods greater protection: see *National Activities of the UK in support of the objectives of the Consumer Policy Strategy (2002-2006) - Report on the implementation of the strategy*.

3 See the Consumer Policy Strategy 2002-2006, Com (2002) 208 final (OJ C137/2, 8.6.2002) Objective 2. In response to this objective, the Enterprise Act 2002, which contains measures strengthening consumer protection, has been brought into force: see *National Activities of the UK in support of the objectives of the Consumer Policy Strategy (2002-2006) - Report on the implementation of the strategy*.

4 See the Consumer Policy Strategy 2002-2006, Com (2002) 208 final (OJ C137/2, 8.6.2002) Objective 3. In accordance with this objective, the Department of Trade and Industry coordinates the consumer committee which has representatives from national consumer organisations: see *National Activities of the UK in support of the objectives of the Consumer Policy Strategy (2002-2006) - Report on the implementation of the strategy*.

5 See the Commission Communication 'Healthier, safer, more confident citizens: a health and consumer protection strategy' and Proposal for a Decision establishing a programme of Community action in the field of

Health and Consumer Protection 2007-2013 (COM (2005) 115 final, 2005/42 (COD)). In relation to consumer protection, the programme aims to consolidate and expand the existing consumer policy programme, and aims to expand Community activities on developing knowledge and evidence base, enforcement cooperation, consumer education and capacity building for consumer organisations. In particular, the programme seeks to support cooperation between member state consumer protection authorities to keep dangerous products off the EU's internal market and prevent rogue traders operating across borders.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/ (2) EU LEGISLATION/392. Consumer participation in standardisation.

392. Consumer participation in standardisation.

By a Recommendation of 10 December 1987¹ the EC Commission recommended to the member states:

- 381 (1) that they associate themselves with EC Commission action aimed at:
- 23
27. (a) persuading national and European standards organisations to provide for active participation of consumers, as well as all other interested parties (such as manufacturers, users, traders and trade unions), in their activity and to assure the selection of consumer representatives nominated by consumer interests to serve as members of delegations of national standards bodies in chosen technical committees of CEN/Cenelec;
28. (b) encouraging consumer representatives to fix clear priorities at European level for standardisation aimed at greater consumer protection²;
- 24
- 382 (2) to provide basic funding to enable consumers to play an effective role in European standardisation without loss of earnings³.

1. Ibid EC Commission Recommendation of 10 December 1987 (OJ L23, 28.1.88, p 26).

2. Ibid para 1.

3. Ibid para 2.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/ (2) EU LEGISLATION/393. EU legislation.

393. EU legislation.

Numerous measures have been made by the European Union to protect and promote the interests of consumers, the principal such measures being:

- 383 (1) EC Council Directive of 15 December 1969 on the approximation of the laws of the member states relating to crystal glass¹;
- 384 (2) EC Council Directive of 17 July 1972 on the approximation of the laws of the member states relating to certain methods for the quantitative analysis of binary textile fibre mixtures²;

- 385 (3) EC Council Directive of 19 February 1973 on the harmonisation of the laws of the member states relating to electrical equipment designed for use within certain voltage limits³;
- 386 (4) EC Council Directive of 27 July 1976 on the approximation of the laws of the member states relating to cosmetic products⁴;
- 387 (5) EC Council Directive of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the member states relating to restrictions on the marketing and use of certain dangerous substances and preparations⁵;
- 388 (6) EC Council Directive of 10 September 1984 on the approximation of the laws, regulations and administrative provisions of the member states concerning misleading advertising⁶;
- 389 (7) EC Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products⁷;
- 390 (8) EC Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises⁸;
- 391 (9) EC Council Directive of 25 June 1987 on the approximation of the laws of the member states concerning products which, appearing to be other than they are, endanger the health or safety of consumers⁹;
- 392 (10) EC Council Directive of 3 May 1988 on the approximation of the laws of the member states concerning the safety of toys¹⁰;
- 393 (11) EC Council Directive of 21 December 1988 on the approximation of the laws of the member states relating to materials and articles intended to come into contact with foodstuffs¹¹;
- 394 (12) EC Council Directive of 21 December 1989 on the approximation of the laws of the member states relating to personal protective equipment¹²;
- 395 (13) EC Council Directive of 13 June 1990 on package travel, package holidays and package tours¹³;
- 396 (14) EC Council Directive of 20 June 1990 on the approximation of the laws of the member states relating to active implantable medical devices¹⁴;
- 397 (15) EC Council Directive of 29 June 1990 on the approximation of the laws of the member states relating to appliances burning gaseous fuels¹⁵;
- 398 (16) EC Council Directive of 18 March 1991 on batteries and accumulators containing certain dangerous substances¹⁶;
- 399 (17) EC Council Directive of 21 May 1992 on efficiency requirements for new hot-water boilers fired with liquid or gaseous fuels¹⁷;
- 400 (18) EC Commission Recommendation of 7 April 1992 on codes of practice for the protection of consumers in respect of contracts negotiated at a distance (distance selling)¹⁸;
- 401 (19) EC Council Directive of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances¹⁹;
- 402 (20) EC Council Regulation of 8 February 1993 on checks for conformity with the rules of product safety in the case of products imported from third countries²⁰;
- 403 (21) EC Commission Directive of 15 March 1993 concerning the release of the N-nitrosamines and N-nitrosatable substances from elastomer or rubber teats and soothers²¹;
- 404 (22) EC Council Directive of 5 April 1993 on unfair terms in consumer contracts²²;
- 405 (23) EC Council Directive of 14 June 1993 concerning medical devices²³;
- 406 (24) EC Commission Directive of 21 January 1994 on the energy labelling of household electric refrigerators, freezers and their combinations²⁴;
- 407 (25) European Parliament and EC Council Directive of 23 March 1994 on the approximation of the laws, regulations and administrative provisions of the

- member states relating to labelling of materials used in the main components of footwear for sale to the consumer²⁵;
- 408 (26) European Parliament and EC Council Directive of 16 June 1994 on the approximation of the laws, regulations and administrative provisions of the member states relating to recreational craft²⁶;
- 409 (27) European Parliament and EC Council Directive of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis²⁷;
- 410 (28) EC Commission Directive of 23 May 1995 on the energy labelling of household washing machines²⁸;
- 411 (29) EC Commission Directive of 23 May 1995 on the energy labelling of household electric tumble driers²⁹;
- 412 (30) European Parliament and EC Council Directive of 3 September 1996 on energy efficiency requirements for household electric refrigerators, freezers and combinations thereof³⁰;
- 413 (31) EC Commission Directive of 19 September 1996 on the energy labelling of household combined washer-driers³¹;
- 414 (32) EC Council Directive of 16 December 1996 on the approximation of the laws of the member states relating to textile names³²;
- 415 (33) European Parliament and EC Council Directive of 20 May 1997 on the protection of consumers in respect of distance contracts³³;
- 416 (34) EC Commission Directive of 16 April 1997 on the energy labelling of household dishwashers³⁴;
- 417 (35) EC Commission Directive of 27 January 1998 on the energy labelling of household lamps³⁵;
- 418 (36) European Parliament and EC Council Directive of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers³⁶;
- 419 (37) EC Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes³⁷;
- 420 (38) European Parliament and EC Council Directive of 19 May 1998 on injunctions for the protection of consumers' interests³⁸;
- 421 (39) European Parliament and EC Council Directive of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees³⁹;
- 422 (40) European Parliament and EC Council Directive of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the member states relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use⁴⁰;
- 423 (41) European Parliament and EC Council Directive of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the member states concerning the manufacture, presentation and sale of tobacco products⁴¹;
- 424 (42) European Parliament and EC Council Directive of 3 December 2001 on general product safety⁴²;
- 425 (43) European Parliament and EC Council Directive of 23 September 2002 concerning the distance marketing of consumer financial services⁴³;
- 426 (44) European Parliament and EC Council Regulation of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms⁴⁴;
- 427 (45) European Parliament and EC Council Regulation of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights⁴⁵;

428 (46) European Parliament and EC Council Regulation of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption⁴⁶;

429 (47) European Parliament and EC Council Regulation of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws⁴⁷.

1 le EC Council Directive 69/493 (OJ L326, 29.12.69, p 36), implemented by the Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952 (see PARA 514 post).

2 le EC Council Directive 72/276 (OJ L173, 31.7.72, p 1) (amended by EC Council Directive 79/76 (OJ L17, 24.1.79, p 17); EC Commission Directive 81/75 (OJ L57, 4.3.81, p 23); EC Commission Directive 87/184 (OJ L75, 17.3.87, p 21)), implemented by the Textile Products (Determination of Composition) Regulations 1976, SI 1976/202 (amended by SI 1988/1349) (see PARA 515 post).

3 le EC Council Directive 73/23 (OJ L77, 26.3.73, p 29) (amended by EC Commission Directive 93/68 (OJ L22, 30.1.93, p 124)), implemented by the Plugs and Sockets etc (Safety) Regulations 1994, SI 1994/1768 (see PARA 603 post) and the Electrical Equipment (Safety) Regulations 1994, SI 1994/3260 (see PARA 602 post).

4 le EC Council Directive 76/768 (OJ L262, 27.9.76, p 169) (as amended), implemented by the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (amended by SI 2004/2361 and SI 2004/2988). As to the mechanism for deciding whether a product is a cosmetic falling within EC Council Directive 76/768 (as amended) or a medical device falling within EC Council Directive 93/42 (OJ L169, 12.7.93, p 1) (as amended) (see *infra*) see *Optident Ltd v Secretary of State for Trade and Industry* (1999) 51 BMLR 74, CA.

5 le EC Council Directive 76/769 (OJ L262, 27.9.76, p 201) (as amended), implemented by (inter alia) the Aerosol Dispensers (EEC Requirements) Regulations 1977, SI 1977/1140 (amended by SI 1980/36; SI 1981/36; SI 1985/1279; SI 1996/2412) (see PARA 575 post), the Asbestos Products (Safety) Regulations 1985, SI 1985/2042 (amended by SI 1987/1979) (see PARA 576 post), the Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844 (amended by SI 1996/2635; SI 1999/2084; SI 2000/2897; SI 2002/1770; SI 2002/3010; and SI 2004/1031) (see PARA 595 et seq post) and the Controls on Pentabromodiphenyl Ether and Octabromodiphenyl Ether (No 2) Regulations 2004, SI 2004/3278 (see PARA 601 post).

6 le EC Council Directive 84/450 (OJ L250, 19.9.84, p 17) (amended by European Parliament and EC Council Directive 97/55 (OJ L290, 23.10.97, p 18)), implemented by the Control of Misleading Advertisements Regulations 1988, SI 1988/915 (as amended) (see PARA 731 et seq post). EC Council Directive 84/450 (as amended) is a listed directive for the purposes of enforcement under the Enterprise Act 2002 Pt 8 (ss 210-236, Sch 13) (as amended): s 210(7), Sch 13 para 1. See further COMPETITION vol 18 (2009) PARAS 339-360.

7 le EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) (amended by European Parliament and EC Council Directive 1999/34 (OJ L141, 4.6.99, p 20)), implemented in part by the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended) (see PARA 518 et seq post).

8 le EC Council Directive 85/577 (OJ L372, 31.12.85, p 31), implemented by the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (amended by SI 1988/958; SI 1998/3050) (see PARA 663 et seq post). EC Council Directive 85/577 is a listed directive for the purposes of enforcement under the Enterprise Act 2002 Pt 8 (as amended): s 210(7), Sch 13 para 2. See further COMPETITION vol 18 (2009) PARAS 339-360.

The provisions of EC Council Directive 85/577 arts 1(1), 2, which provide that EC Council Directive 85/577 applies to contracts concluded between a trader supplying goods and services in his commercial or professional capacity and a consumer (who, for the purposes of the transaction, is acting outside his trade or profession), either during an excursion away from the trader's business premises or during an uninvited visit by him to the consumer's home or place of work, are sufficiently precise to enable the national court to determine on whom, and for whose benefit, the obligations were imposed. No specific implementing measure is, therefore, needed in that regard. Articles 4, 5 allow member states some latitude regarding consumer protection when information on the right of cancellation is not provided by the trader and in determining the time limit and conditions of cancellation, but that latitude does not affect the precise and unconditional nature of the provisions of EC Council Directive 85/577 or make it impossible to determine minimum rights. In the absence of measures transposing EC Council Directive 85/577 within the prescribed time limit, consumers could not derive from EC Council Directive 85/577 itself a right of cancellation as against traders with whom they had concluded a contract or enforce such a right in a national court: Case C-91/92 *Faccini Dori v Recreb Srl* [1995] All ER (EC) 1, [1994] ECR I-3325, ECJ. EC Council Directive 85/577 applies to secured credit agreements, and precludes the imposition of a time limit within which a consumer who has not received the information required by art 4 can

exercise the right of cancellation under art 5: Case C-481/99 *Heininger v Bayerische Hypo und Vereinsbank AG* [2004] All ER (EC) 1, [2001] ECR I-9945, ECJ.

EC Council Directive 85/577 is designed to protect consumers by enabling them to withdraw from a contract concluded on the initiative of the trader rather than the customer, where the customer may have been unable to see all the implications of his act. Accordingly, a contract which benefits a third party standing outside the contractual relationship, such as a guarantee securing the performance of a credit agreement, cannot be excluded from the scope of EC Council Directive 85/577 on the sole ground that the goods or services purchased are intended for the use of that third party. Since, however, EC Council Directive 85/577 is designed to protect only consumers, a contract of guarantee comes within the scope of EC Council Directive 85/577 only where, in accordance with art 2, the guarantor has entered into a commitment for a purpose which can be 'regarded as outside his trade or profession'. It follows that a contract of guarantee concluded by a natural person who is not acting in the course of his trade or profession does not come within the protection of EC Council Directive 85/577 where it guarantees repayment of a debt by another person who, for his part, is acting within the course of his trade or profession: Case C-45/96 *Bayerische Hypotheken und Wechselbank AG v Dietzinger* [1998] All ER (EC) 332, [1998] ECR I-1199, ECJ.

Where, in order to present the products and services he is offering, a trader invites a consumer to go to a specified place: (1) at a certain distance from the place where that consumer lives; (2) which is different from the premises where he usually carries on his business; and (3) is not clearly identified as premises for sales to the public, any resulting contract is to be considered to have been concluded 'during an excursion organised by the trader away from his business premises' within the meaning of EC Council Directive 85/577 art 1(1): Case C-423/97 *Travel-Vac SL v Antelm Sanchis* [1999] All ER (EC) 656, [1999] ECR I-2195, ECJ. When a contract is concluded away from a trader's premises, the consumer is unprepared for the contract negotiations and often unable to compare the quality and price of the offer with other offers. The seven-day cancellation period provided for by EC Council Directive 85/577 art 5(1) is designed to enable him to assess the obligations arising under the contract. It follows, therefore, that a consumer may exercise his right of renunciation where the contract has been concluded in circumstances set out in art 1, without there being any need to prove that the consumer has been influenced or manipulated by the trader: Case C-423/97 *Travel-Vac SL v Antelm Sanchis* supra. EC Council Directive 85/577 does not preclude a member state from adopting rules which provide that notice of renunciation is not subject to any condition as to form, so allowing the notice to consist, in particular, of unequivocal acts. Given the objective of EC Council Directive 85/577, namely to protect the consumer, a member state may adopt such provisions as to make it easier for the consumer to exercise his right of renunciation: Case C-423/97 *Travel-Vac SL v Antelm Sanchis* supra. EC Council Directive 85/577 art 5(2) provides that, in the event of renunciation, the consumer is released from any obligations under the cancelled contract. It follows, therefore, that EC Council Directive 85/577 precludes the inclusion in a contract of a clause imposing payment by the consumer of a lump sum for damage caused to the trader solely because the consumer has exercised his right of renunciation: Case C-423/97 *Travel-Vac SL v Antelm Sanchis* supra.

9 EC Council Directive 87/357 (OJ L192, 11.7.87, p 49), implemented by the Food Imitations (Safety) Regulations 1989, SI 1989/1291 (see PARA 619 post).

10 EC Council Directive 88/378 (OJ L187, 16.7.88, p 1) (amended by EC Council Directive 92/32 (OJ L154, 5.6.92, p 1); EC Council Directive 93/68 (OJ L220, 30.8.93, p 1); EC Council Directive 93/68 (OJ L22, 30.1.93, p 124)), implemented by the Toys (Safety) Regulations 1995, SI 1995/204 (see PARA 579 post).

11 *Ie* EC Council Directive 89/109 (OJ L40, 11.2.89, p 38). See also EC Commission Directives 2002/16 (OJ L51, 22.2.2002, p 27) and 2002/72 (OJ L220, 15.8.2002, p 18).

12 *Ie* EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (amended by EC Council Directive 93/68 (OJ L220, 30.8.93, p 1); EC Council Directive 93/95 (OJ L276, 9.11.93, p 11); European Parliament and EC Council Directive 96/58 (OJ L236, 18.9.96, p 44)), implemented by the Personal Protective Equipment Regulations 2002, SI 2002/1144 (amended by SI 2004/693) (see PARA 586 post) and the Motor Cycles (Eye Protectors) Regulations 1999, SI 1999/535 (see PARA 812 post).

13 EC Council Directive 90/314 (OJ L158, 23.6.90, p 59), implemented by the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (amended by SI 1995/1648; SI 1998/1208) (see PARA 817 et seq post). EC Council Directive 90/314 is a listed directive for the purposes of enforcement under the Enterprise Act 2002 Pt 8 (as amended): s 210(7), Sch 13 para 4. See further COMPETITION vol 18 (2009) PARAS 339-360. EC Council Directive 90/314 does not apply to travel: (1) comprising student exchanges of about six months' or one year's duration; (2) the purpose of which is attendance by the student at an educational establishment in the host country in order to familiarise himself with its people and culture; and (3) during which the student stays with a host family as if he were a family member free of charge: Case C-237/97 *Administrative proceedings concerning AFS Intercultural Programs Finland ry* [1999] ECR I-825, ECJ.

On a proper construction of EC Council Directive 90/314, the purpose of art 7 is to protect consumers against the risks arising from the insolvency of their package holiday or tour operator. Those risks stem from the payment in advance of the price of the package and from the spread of liability between the organiser and the various providers of the services which together make up the package. Security for 'refund of money paid over'

is intended to cover cases where the organiser's insolvency becomes known any time after the contract with the consumer has been concluded and security for 'repatriation of the consumer' is intended to ensure that the consumer does not become stranded abroad during the performance of the contract: Case C-364/96 *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* [1998] All ER (EC) 183, [1998] ECR I-2949, ECJ (holidaymakers who had already paid a package holiday operator the cost of their accommodation but, following the operator's insolvency, were compelled by the hotelier to pay him again before they could leave the hotel and return home, claimed from the operator's insurer a refund of the payment to the hotelier), following Joined Cases C-178, 179, 188-190/94 *Dillenkofer v Germany* [1997] QB 259, [1996] All ER (EC) 917, ECJ (German residents who purchased package travel and, following the insolvency of their tour operators, either never left for their destination or had to return from their holiday at their own expense).

See also Case C-140/97 *Rechberger v Austria* [1999] ECR I-3499, [2000] 2 CMLR 1, ECJ (EC Council Directive 90/314 applied notwithstanding that traveller not required to pay amount corresponding to full value of holiday, and that package would be offered to unlimited number of consumers); C-168/00 *Leitner v TUI Deutschland GmbH & Co KG* [2002] All ER (EC) 561, [2002] ECR I-2631, ECJ (EC Council Directive 90/314 conferred on consumers a right to compensation for non-material damage).

14 EC Council Directive 90/385 (OJ L189, 20.7.90, p 17), implemented by (inter alia) the Medical Devices Regulations 2002, SI 2002/618, Pt II (regs 6-19A), Pt V (regs 44A-51) and Pt VII (regs 59-66) (amended by SI 2003/1697) (see PARA 621 post).

15 le EC Council Directive 90/396 (OJ L196, 26.7.90, p 15) (amended by EC Council Directive 93/68 (OJ L199, 9.8.93, p 1)), implemented by the Gas Appliances (Safety) Regulations 1995, SI 1995/1629 (see PARA 612 post).

16 le EC Council Directive 91/157 (OJ L78, 26.3.91, p 38), implemented by the Batteries and Accumulators (Containing Dangerous Substances) Regulations 1994, SI 1994/232 (amended by SI 2000/3097; and SI 2001/2551) (see PARA 578 post).

17 le EC Council Directive 92/42 (OJ L167, 22.6.92, p 17) (amended by EC Council Directive 93/68 (OJ L220, 30.8.93, p 1)), implemented by the Boiler (Efficiency) Regulations 1993, SI 1993/3083 (amended by SI 1994/3083) (see PARA 779 post).

18 le EC Commission Recommendation 92/295 (OJ L156, 10.6.92, p 21).

19 le EC Council Directive 92/75 (OJ L297, 13.10.92, p 16), implemented by the Energy Information (Refrigerators and Freezers) Regulations 1994, SI 1994/3076 (see PARA 786 post), the Energy Information (Washing Machines) Regulations 1996, SI 1996/600 (amended by SI 1997/803) (see PARA 788 post), the Energy Information (Tumble Driers) Regulations 1996, SI 1996/601 (see PARA 787 post), the Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624 (see PARA 781 post), the Energy Information (Lamps) Regulations 1999, SI 1999/1517 (see PARA 785 post), the Energy Information (Dishwashers) Regulations 1999, SI 1999/1676 (see PARA 782 post), the Energy Information (Household Air Conditioners) Regulations 2003, SI 2003/750 (see PARA 783 post), and the Energy Information (Household Electric Ovens) Regulations 2003, SI 2003/751 (see PARA 784 post).

20 le EC Council Regulation 339/93 (OJ L40, 17.2.93, p 1) (amended by EC Council Regulation 806/2003 (OJ L122, 16.5.2003, p 1)).

21 le EC Commission Directive 93/11 (OJ L93, 17.4.93, p 37), implemented by the N-nitrosamines and N-nitrosatable Substances in Elastomer or Rubber Teats and Dummies (Safety) Regulations 1995, SI 1995/1012 (see PARA 581 post).

22 le EC Council Directive 93/13 (OJ L95, 21.4.93, p 29), implemented by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended) (see PARA 452 et seq post). EC Council Directive 93/13 is a listed directive for the purposes of enforcement under the Enterprise Act 2002 Pt 8 (as amended): s 210(7), Sch 13 para 5. See further COMPETITION vol 18 (2009) PARAS 339-360.

23 le EC Council Directive 93/42 (OJ L169, 12.7.93, p 1) (amended by EC Council Directive 98/79 (OJ L331, 7.12.98, p 1); European Parliament and EC Council Directive 2001/104 (OJ L6, 10.1.2002, p 50)), implemented by (inter alia) the Medical Devices Regulations 2002, SI 2002/618 (amended by SI 2003/1697) (see PARA 621 post). As to the mechanism for deciding whether a product is a cosmetic falling within EC Council Directive 76/768 (as amended) (see supra) or a medical device falling within EC Council Directive 93/42 (as amended) see *Optident Ltd v Secretary of State for Trade and Industry* (1999) 51 BMLR 74, CA; on appeal [2001] UKHL 32, (2001) 61 BMLR 10. See also EC Commission Decision 2002/364 (OJ L131, 16.5.2002, p 17) on common technical specifications for in vitro diagnostic medical devices; and EC Commission Directive 2003/12 (OJ L28, 4.2.2003, p 43) on the reclassification of breast implants in the framework of EC Council Directive 93/42.

24 le EC Commission Directive 94/2 (OJ L45, 17.2.94, p 1) (amended by EC Commission Directive 2003/66), implemented by the Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468 (see PARA 786 post).

- 25 Ie European Parliament and EC Council Directive 94/11 (OJ L100, 19.4.94, p 37), implemented by the Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489 (see PARA 516 post).
- 26 Ie European Parliament and EC Council Directive 94/25 (OJ L164, 30.6.94, p 15) (amended by European Parliament and EC Council Directive 2003/44 (OJ L214, 26.8.2003, p 18)), implemented by the Recreational Craft Regulations 2004, SI 2004/1464 (amended by SI 2004/3201) (see PARAS 865-866 post).
- 27 Ie European Parliament and EC Council Directive 94/47 (OJ L280, 29.10.94, p 83), implemented by the Timeshare Regulations 1997, SI 1997/1081 (see PARA 867 et seq post). European Parliament and EC Council Directive 94/47 is a listed directive for the purposes of enforcement under the Enterprise Act 2002 Pt 8 (as amended): s 210(7), Sch 13 para 6. See further COMPETITION vol 18 (2009) PARAS 339-360. For a view that there is a lack of uniformity in the implementation of European Parliament and EC Council Directive 94/47 throughout the European Community see T Bourne 'Changing Times?' (1998) 148 NLJ 654. Whilst all timeshare agreements are covered by European Parliament and EC Council Directive 94/47, that does not preclude an agreement with a timeshare element from being covered by EC Council Directive 85/577 (see note 8 supra); furthermore, an agreement which relates not only to the right to use a timeshare apartment, but also to the provision of services of a higher value than that of the right to use the property, is not covered by the exception for rights relating to immovable property provided in European Parliament and EC Council Directive 94/47 art 3(2)(a): Case C-423/97 *Travel-Vac SL v Antelm Sanchis* [1999] All ER (EC) 656, [1999] ECR I-2195, ECJ.
- 28 Ie EC Commission Directive 95/12 (OJ L297, 13.10.92, p 16) (amended by EC Commission Directive 96/89 (OJ L338, 28.12.96, p 85)), implemented by the Energy Information (Washing Machines) Regulations 1996, SI 1996/600 (amended by SI 1997/803) (see PARA 788 post).
- 29 Ie EC Commission Directive 95/13 (OJ L136, 21.6.95, p 28), implemented by the Energy Information (Tumble Driers) Regulations 1996, SI 1996/601 (see PARA 787 post).
- 30 Ie European Parliament and EC Council Directive 96/57 (OJ L236, 18.9.96, p 36), implemented by the Energy Efficiency (Refrigerators and Freezers) Regulations 1997, SI 1997/1941 (see PARA 780 post).
- 31 Ie EC Commission Directive 96/60 (OJ L266, 18.10.96, p 1), implemented by the Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624 (see PARA 781 post).
- 32 Ie EC Council Directive 96/74 (OJ L32, 3.2.97, p 38) (amended by EC Commission Directive 97/37 (OJ L169, 27.6.97, p 74)), implemented by the Textile Products (Indication of Fibre Content) Regulations 1986, SI 1986/26 (amended by SI 1988/1350; SI 1994/450; SI 1998/1169; SI 2005/1401) (see PARA 515 post).
- 33 Ie European Parliament and EC Council Directive 97/7 (OJ L144, 4.6.97, p 19) (amended by European Parliament and EC Council Directive 2002/65 (OJ L271, 9.10.2002, p 16)); implemented by the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (as amended) (see PARA 657 post). European Parliament and EC Council Directive 97/7 is a listed directive for the purposes of enforcement under the Enterprise Act 2002 Pt 8 (as amended): s 210(7), Sch 13 para 7.
- 34 Ie EC Commission Directive 97/17 (OJ L118, 7.5.97, p 1) (amended by EC Commission Directive 1999/9 (OJ L56, 4.3.99, p 46)), implemented by the Energy Information (Dishwashers) Regulations 1999, SI 1999/1676 (see PARA 782 post).
- 35 Ie EC Commission Directive 98/11 (OJ L71, 10.3.98, p 1), implemented by the Energy Information (Lamps) Regulations 1999, SI 1999/1517 (see PARA 785 post).
- 36 Ie European Parliament and EC Council Directive 98/6 (OJ L80, 18.3.98, p 27), implemented by the Price Marking Order 2004, SI 2004/102 (see PARA 682 et seq post).
- 37 Ie EC Commission Recommendation 98/257 (OJ L115, 17.4.98, p 31).
- 38 Ie European Parliament and EC Council Directive 98/27 (OJ L166, 11.6.98, p 51) (amended by European Parliament and EC Council Directive 2000/31 (OJ L178, 17.7.2000, p 1); and European Parliament and EC Council Directive 2002/65 (OJ L271, 9.10.2002, p 16)).
- 39 Ie EC Council and European Parliament Directive 1999/44 (OJ L171, 7.7.99, p 12). European Parliament and EC Council Directive 1999/44 is a listed directive for the purposes of enforcement under the Enterprise Act 2002 Pt 8 (as amended): s 210(7), Sch 13 para 8.
- 40 Ie European Parliament and EC Council Directive 2001/20 (OJ L121, 1.5.2001, p 34).
- 41 Ie European Parliament and EC Council Directive 2001/37 (OJ L 194 18.7.2001, p 26), implemented by the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041 (see PARA 640

et seq post), and the Tobacco for Oral Use (Safety) Regulations 1992, SI 1992/3134 (see PARA 650 post). As to the use of colour photographs or other illustrations as health warnings on tobacco packages, see EC Commission Decision 2003/641 (OJ L226, 10.9.2003, p 24). As to the validity of the legal basis of Directive 2001/37 see Case C-491/01 *R (on the application of British American Tobacco (Investments) Ltd (supported by Japan Tobacco Inc)) v Secretary of State for Health* [2003] All ER (EC) 604, [2002] ECR I-11453, ECJ.

42 le European Parliament and EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4), implemented by the General Product Safety Regulations 1994, SI 1994/2328 (see PARA 565 et seq post).

43 le European Parliament and EC Council Directive 2002/65 (OJ L271, 9.10.2002, p 16) concerning the distance marketing of consumer financial services; implemented by the Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095. European Parliament and EC Council Directive 2002/65 is a listed directive for the purposes of enforcement under the Enterprise Act 2002 Pt 8 (as amended): s 210(7), Sch 13 para 9A (added by the Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095, reg 26).

44 le European Parliament and EC Council Regulation 1830/2003 (OJ L268, 18.10.2003, p 24).

45 le European Parliament and EC Council Regulation 261/2004 (OJ L46, 17.2.2004, p 1).

46 le European Parliament and EC Council Regulation 854/2004 (OJ L139, 30.4.2004, p 206).

47 le European Parliament and EC Council Regulation 2006/2004 (OJ L364, 9.12.2004, p 1).

UPDATE

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NOTE 2--SI 1976/202 replaced: Textile Products (Determination of Composition) Regulations 2008, SI 2008/15.

NOTE 3--EC Council Directive 73/23 replaced: European Parliament and EC Council Directive 2006/95 (OJ L374, 27.12.2006, p 10).

NOTE 4--SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367).

NOTE 5--SI 1977/1140 replaced: Aerosol Dispensers Regulations 2009, SI 2009/2824. SI 1994/2844 revoked: SI 2006/2916 (revoked by SI 2008/2852). SI 2004/3278 revoked: SI 2006/3311 (revoked by SI 2008/2852).

EEC Council Directive 76/769 replaced by European Parliament and EC Council Regulation 1907/2006 (OJ L396 30.12.2006, p 1; corrected version in OJ L136, 29.5.2007, p 3) (amended by EC Commission Regulation 987/2008 (OJ L268, 9.10.2008, p 14)) concerning the registration, evaluation, authorisation and restriction of chemicals. The REACH Enforcement Regulations 2008, SI 2008/2852, provides for the enforcement of European Parliament and EC Council Regulation 1907/2006.

NOTE 6--Enterprise Act 2002 Sch 13 para 1 repealed: SI 2008/1277. EC Council Directive 84/450 replaced by European Parliament and EC Council Directive 2006/114 (OJ L376, 27.12.2006, p 21) which codifies Directive 84/450. Directive 2006/114 implemented: Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276. See Case C-356/04 *Lidl Belgium GmbH & Co KG v Etablissements Franz Colruyt NV* [2007] Bus LR 492, ECJ.

NOTE 7--See Case C-402/03 *Skov AEG v Bilka Lavprisvarehus A/S Bilka Lavprisvarehus A/S v Mikkelsen* [2006] 2 CMLR 455, ECJ.

NOTE 8--Where a consumer has been given defective notice concerning the exercise of the right of cancellation, national legislation may provide that the right may be exercised no later than one month from the time at which the contracting parties have performed in full their obligations under a contract for long-term credit: Case C-412/06

Hamilton v Volksbank Filder EG [2008] CMLR 1247, [2008] All ER (D) 139 (Apr), ECJ. SI 1987/2117 replaced: Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816.

NOTE 10--Directive 88/378 replaced with effect in part from 20 July 2011 and in part from 20 July 2013: European Parliament and EC Council Directive 2009/48 (OJ L170, 30.6.2009, p 1).

NOTE 11--le EC Council Directive 89/109 repealed and replaced: European Parliament and EC Council Regulation 1935/2004 (OJ L338, 13.11.2004, p 4). EC Commission Directive 2002/16 replaced: EC Commission Regulation 1895/2005 (OJ L302, 19.11.2005, p 28). EC Commission Directive 2002/72 amended: EC Commission Directive 2005/79 (OJ L302, 18.11.2005, p 35), EC Commission Regulation 975/2009 (OJ L274, 20.10.2009, p 3). See also EC Commission Regulation 282/2008 on recycled plastic materials and articles intended to come into contact with foods (OJ 86, 28.3.2008, p 9).

NOTE 14--SI 2002/618 Pts II, V and VII further amended: SI 2007/400, SI 2008/2936 (with effect from 21 March 2010). EC Council Directive 90/385 amended: European Parliament and EC Council Directive 2007/47 (OJ L247, 21.9.2007, p 21).

NOTE 16--EEC Council Directive 91/157 replaced: European Parliament and EC Council Directive 2006/66 (OJ L266, 26.9.2006, p 1) on batteries and accumulators and waste batteries and accumulators. Directive 2006/66 is partially implemented by Batteries and Accumulators (Placing on the Market) Regulations 2008, SI 2008/2164 (which replace SI 1994/232); and Waste Batteries and Accumulators Regulations 2009, SI 2009/890 (regs 56, 57 in force on 1 January 2010 and Pt 4 (regs 31-34) in force on 1 February 2010). See also EC Commission Decision 2009/603 (OJ L206, 8.8.2009, p 13) establishing requirements for the registration of producers of batteries and accumulators.

NOTE 17--EC Council Directive 92/42 further amended: European Parliament and EC Council Directive 2005/32 (OJ L191, 22.7.2005, p 29). SI 1993/3083 replaced: Ecodesign for Energy-Using Products Regulations 2007, SI 2007/2037 (amended by SI 2009/2560).

NOTE 20--EC Council Regulation 339/93 replaced (with effect from 1 January 2010): European Parliament and EC Council Regulation 765/2008 (OJ L218, 13.8.2008, p 30).

NOTE 27--EC Council Directive 94/47 replaced (member state implementing measures to be in force by 23 February 2011): European Parliament and EC Council Regulation 2009/122 (OJ L33, 3.2.2009, p 10); references to the repealed directive should be construed as references to Directive 2009/122 and read in accordance with the correlation table in Annex VI: art 18.

NOTE 23--SI 2002/618 further amended: SI 2007/400, SI 2008/530, SI 2008/2936 (with effect from 21 March 2010). EC Council Directive 93/42 amended: European Parliament and EC Council Directive 2007/47 (OJ L247, 21.9.2007, p 21).

NOTE 30--EC Council Directive 96/57 further amended: European Parliament and EC Council Directive 2005/32 (OJ L191, 22.7.2005, p 29). SI 1997/1941 replaced: Ecodesign for Energy-Using Products Regulations 2007, SI 2007/2037 (amended by SI 2009/2560).

NOTE 32--EC Council Directive 96/74 replaced: European Parliament and EC Council Directive 2008/121 (OJ L19, 23.1.2009, p 29) (amended by EC Commission Directive 2009/121 (OJ L242, 15.9.2009, p 13)). SI 1986/26 further amended: SI 2006/3297, SI 2008/6, SI 2009/1034.

NOTE 33--EC Council Directive 97/7 further amended: European Parliament and EC Council Directives 2005/29 (OJ L149, 11.6.2005, p 22), 2007/64 (OJ L319, 5.12.2007, p 1).

NOTE 38--See also Case C-298/07 *Bundesverband de Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v Deutsche Internet Versicherung AG* [2009] 1 All ER (Comm) 938, ECJ. Directive 98/27 replaced: European Parliament and EC Council Directive 2009/22 (OJ L110, 1.5.2009, p 33); references to the repealed directive should be construed as references to Directive 2009/22 and read in accordance with the correlation table in Annex III: art 9.

NOTE 39--Where a seller has sold consumer goods which are not in conformity with the contract of sale he is precluded from requiring the consumer to pay compensation for use of defective goods until their replacement with new goods: Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] 2 CMLR 1347, [2008] All ER (D) 247 (Apr), ECJ.

NOTE 40--European Parliament and EC Council Directive 2001/20 amended: European Parliament and EC Council Regulation 1901/2006 (OJ L378, 27.12.2006, p 1).

TEXT AND NOTE 41--See also European Parliament and EC Council Directive 2003/33 of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the member states relating to the advertising and sponsorship of tobacco products. See Case C-380/03 *Germany v European Parliament* [2007] All ER (EC) 1016, ECJ (proceedings for annulment of European Parliament and EC Council Directive 2003/33 arts 3 and 4 dismissed).

NOTE 42--European Parliament and EC Council Directive 2001/95 amended: European Parliament and EC Council Regulation 765/2008 (OJ L218, 13.8.2008, p 30). SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing Directive 2001/95).

NOTE 43--SI 2004/2095 amended: SI 2007/108, SI 2008/1277, SI 2009/209. See European Parliament and EC Council Directive 2005/29 (OJ L149, 11.6.2005, p 22) concerning unfair business-to-consumer commercial practices in the internal market, and European Parliament and EC Council Directive 2006/123 (OJ L376, 27.12.2006, p 36) on services in the internal market, which are also listed directives for the purposes of enforcement under the 2002 Act Pt 8: Enterprise Act 2002 Sch 13 paras 9C, 9D (added by SI 2008/1277, SI 2009/2999).

NOTE 47--European Parliament and EC Council Directive 2006/2004 implemented by EC Commission Decision 2007/76 (OJ L32 6.2.2007 p 192).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(i) In general/394. The government.

(3) REGULATION OF CONSUMER PROTECTION

(i) In general

394. The government.

The government department which is mainly responsible for consumer protection is the Department of Trade and Industry, which was formed in 1983 by an amalgamation of the

Department of Trade and the Department of Industry¹. The Department of Trade and Industry was the successor to the functions of the Department of Prices and Consumer Affairs². The Department of Trade and Industry is headed by the Secretary of State for Trade and Industry, who is also the President of the Board of Trade³. The Consumer and Competition Policy Directorate within the Department of Trade and Industry takes the lead on consumer and competition policy issues⁴.

Supervisory functions are also exercised by various other government departments and the National Assembly for Wales⁵.

1 See PARA 15 note 2 ante; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 505.

2 See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 507.

3 See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 506; and PARA 15 ante.

4 See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 508.

5 See CONSTITUTIONAL LAW AND HUMAN RIGHTS.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(i) In general/395. The Citizen's Charter.

395. The Citizen's Charter.

The Citizen's Charter was introduced in 1991 to lay down standards which were to be expected over a period of ten years from public services, including government departments, 'next step' agencies, nationalised industries, local authorities, the National Health Service, courts, police, emergency services and the key utilities in the private sector¹. Under the Citizen's Charter every citizen has been entitled to expect published standards of service, greater openness and information, choice and consultation where possible, courteous and helpful service, redress when things go wrong and value for money. Nevertheless it has generally been felt that the Citizen's Charter failed to deliver and that those Charters which were published often promised standards which were vague, unclear and did not deal with the issues which were most important to users.

A new programme has been established entitled 'Service First - the New Charter Programme', its aim being to build on the strengths of the original Citizen's Charter but to deal with its perceived weaknesses². The main elements of the new Charter Programme are:

- 430 (1) to put users first, and to consult and involve them not only in the way that services are delivered but also in what is delivered;
- 431 (2) to involve front-line staff in finding ways to improve the standard of service delivered to users;
- 432 (3) to improve the quality and consistency of Charters and to ensure that standards focus on quality of output and not simply on process;
- 433 (4) to find new ways to encourage the spread of best practice, and to bring services that are not performing well up to the level of the best;
- 434 (5) to lay greater emphasis on innovation as a means of improving service delivery; and
- 435 (6) to encourage public services to work together and to provide the seamless services that people want and need.

Nine new principles of public service delivery have been established, namely:

- 436 (a) setting clear standards of service that users can expect;
- 437 (b) being open and providing full information to help people using public services;
- 438 (c) consulting and involving present and potential users of public services;
- 439 (d) encouraging access and the promotion of choice;
- 440 (e) treating all people fairly;
- 441 (f) putting things right when they go wrong;
- 442 (g) using resources effectively;
- 443 (h) looking for ways to improve the services and facilities offered; and
- 444 (i) working with other providers.

1 See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 431.

2 See *Service First - the New Charter Programme* published by the Cabinet Office, Service First Unit, Horse Guards Road, London SW1P 3AL. As to the award of Charter Marks to recognise and encourage excellence in public service see PARA 396 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(i) In general/396. Charter Marks.

396. Charter Marks.

Charter Mark is the government award scheme for recognising and encouraging excellence in public service¹. All public sector organisations which serve the public direct, including government departments and agencies, local authority services, National Health Service units, general practitioner practices and dentists, schools, universities, further and higher education colleges, the courts and the emergency services may apply for a Charter Mark. Charter Mark is also open to regulated monopoly privatised utilities, housing associations, voluntary organisations which provide services to the public and receive at least 50 per cent of their income from public funding, sub-contractors who provide services on behalf of public sector organisations, post offices (including sub-post offices) and citizens' advice bureaux.

An organisation applying for a Charter Mark will need to show that:

- 445 (1) it sets clear standards of service that users can expect, and monitors and reviews performance and publishes the results, following independent validation, wherever possible;
- 446 (2) it is open, and communicates clearly and effectively in plain language to help people using the service in question, and provides full information about services, their cost and how well it performs;
- 447 (3) it consults and involves present and potential users of public services, as well as those who work in them, and uses their views to improve the service provided;
- 448 (4) it makes services easily available to everyone who needs them, including using new technology to the full, offering choice, wherever possible;
- 449 (5) it treats all people fairly, respects their privacy and dignity, is helpful and courteous and pays particular attention to those with special needs;
- 450 (6) it puts things right quickly and effectively, learns from complaints, and has a clear, well publicised and easy to use complaints procedure, with independent review, wherever possible;
- 451 (7) it uses resources effectively to provide best value for taxpayers and users;

- 452 (8) it always looks for ways to improve the services and facilities offered, particularly the use of new technology;
- 453 (9) it works with other providers to ensure that services are simple to use, effective and co-ordinated, and delivers a better service to the user; and
- 454 (10) it shows that its users are satisfied with the quality of service they are receiving².

If awarded, a Charter Mark lasts for a period of three years³; but, if at any time during that three-year period the organisation's performance falls below the standard which won the award, the Charter Mark may be withdrawn⁴. Organisations awarded a Charter Mark receive national and local recognition for providing an excellent service and are entitled to use the Charter Mark logo on their stationery, vehicles and other equipment during the period for which the Charter Mark has been awarded. There is no limit on the number of Charter Marks which may be awarded.

1 See *How to apply for a Charter Mark 2000* (August 1999), published by the Modernising Public Services Group, Cabinet Office, Horse Guards Road, London SW1P 3AL.

2 See *How to apply for a Charter Mark 2000* (August 1999) Pt 3, criteria 1-10. The Charter Mark assessors are independent experts in good customer service with backgrounds from across the public and private sectors.

3 Before the three-year period expires, organisations awarded a Charter Mark must reapply for an award.

4 Eg as in the case of the Passport Agency in July 1999.

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397. Local authorities.

The responsibility for the enforcement of most of the legislation relating to consumer protection rests with local authorities¹.

Where a local authority² considers it expedient for the promotion or protection of the interests of the inhabitants of its area, it may prosecute or appear in any legal proceedings and, in the case of civil proceedings, may institute them in its own name³.

Any member or officer of a local authority⁴ who is authorised by that authority to prosecute on its behalf, or to appear on its behalf in, proceedings before a magistrates' court is entitled to prosecute or to appear in any such proceedings and to conduct any such proceedings⁵ although he is not a solicitor holding a current practising certificate⁶.

1 As to local weights and measures authorities see PARA 398 post; and as to LACORS see PARA 399 post.

2 For these purposes, 'local authority' means a county council, a district council, a London Borough council or a parish council but, in relation to Wales, means a county council, county borough council or community council: Local Government Act 1972 s 270(1) (amended by the Local Government Act 1985 s 102(2), Sch 17; and the Local Government (Wales) Act 1994 s 1(5)). 'Local authority' includes the Common Council of the City of London: Local Government Act 1972 s 222(2). As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq.

3 Ibid s 222(1)(a). Under the Local Government Act 1933 s 276 (repealed) a local authority was bound to sue on the relation of the Attorney-General and not in its own name, at least where the proceedings were in respect of a public nuisance: *Prestatyn UDC v Prestatyn Raceway Ltd* [1969] 3 All ER 1573, [1970] 1 WLR 33. By virtue

of the inclusion in the Local Government Act 1972 s 222(1)(a) of the express provision that civil proceedings may be instituted by a local authority in its own name, civil proceedings may now be instituted by a local authority in its own name and without the consent of the Attorney-General: *Solihull Metropolitan Borough Council v Maxfern Ltd* [1977] 2 All ER 177, [1977] 1 WLR 127. The power of a local authority under the Local Government Act 1972 s 222(1)(a) to institute proceedings in its own name for injunctive relief to restrain anticipated criminal offences is not restricted to proceedings where the anticipated offence is likely to cause public nuisance but includes cases where previously the Attorney-General could have invoked the relief in order to restrain an offender deliberately and flagrantly flouting the law: see *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754, [1984] 2 All ER 332, HL (injunction to prevent breach of the Sunday trading laws). See also *Runnymede Borough Council v Ball* [1986] 1 All ER 629, [1986] 1 WLR 353, CA (civil remedy may be sought before exhausting the processes of the criminal law); *Waverley Borough Council v Hilden* [1988] 1 All ER 807, [1988] 1 WLR 246. A court may exercise its power under the Local Government Act 1972 s 222(1)(a) to grant an interlocutory injunction to prevent a breach of the criminal law, notwithstanding that the defendant has a defence, since the existence of an alleged defence is not a matter of jurisdiction but something to be taken into account when exercising the discretion to grant an interlocutory injunction: see *Kirklees Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, [1992] 3 All ER 717, HL.

Local authorities may validly delegate their power to institute proceedings to their sub-committees: *R v South Somerset District Council, ex p DJB (Group) Ltd* (1989) 87 LGR 624.

4 For these purposes, 'local authority' includes the Common Council of the City of London, a joint authority, the Greater London Authority, a police authority established under the Police Act 1996 s 3 (see POLICE vol 36(1) (2007 Reissue) PARA 139) and the Metropolitan Police Authority (see POLICE vol 36(1) (2007 Reissue) PARAS 147-155); Local Government Act 1972 s 223(2) (amended by the Local Government Act 1985 s 84, Sch 14 para 21; the Education Reform Act 1988 s 237(2), Sch 13 Pt I; the Police and Magistrates' Courts Act 1994 s 43, Sch 4 Pt I para 12; the Environment Act 1995 s 120(1), (3), Sch 22 para 17, Sch 24; the Police Act 1996 s 103(1), Sch 7 para 1(1), (2)(h); the Police Act 1997 ss 88, 134(2), Sch 6 para 7, Sch 10; the Criminal Justice and Police Act 2001 s 128(1), Sch 6 Pt 2 paras 22, 29; and the Greater London Authority (Miscellaneous Amendments) (No 2) Order 2001, SI 2001/3719, art 2, Schedule paras 1, 2). 'Joint authority' means an authority established by the Local Government Act 1985 Pt IV (ss 23-42) (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 47); Local Government Act 1972 s 270(1) (amended by the Local Government Act 1985 Sch 14 para 34).

5 le notwithstanding anything contained in the Solicitors Act 1974: see LEGAL PROFESSIONS.

6 Local Government Act 1972 s 223(1) (amended by the Solicitors Act 1974 s 89(1), Sch 3 para 9). If, and to the extent that, an order under the Deregulation and Contracting Out Act 1994 s 70 (contracting out of functions of local authorities: see LOCAL GOVERNMENT vol 69 (2009) PARA 407) so provides, the Local Government Act 1972 s 223 (as amended) has effect as if: (1) any person authorised by virtue of the order to exercise a function of a local authority; and (2) any employee of a person so authorised, were an officer of the authority: Deregulation and Contracting Out Act 1994 s 76, Sch 16 para 3.

UPDATE

397 Local authorities

NOTE 7--Definition of 'local authority' in Local Government Act 1972 s 223(2) further amended: Local Government and Public Involvement in Health Act 2007 Sch 13 para 13; Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 24.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(i) In general/398. Local weights and measures authorities.

398. Local weights and measures authorities.

Most statutory provisions imposing criminal penalties for offences relating to consumer protection require a local weights and measures authority to enforce those provisions¹.

In England the local weights and measures authority is:

- 455 (1) for each non-metropolitan county, metropolitan district and London borough, the council of that county, district or borough;
- 456 (2) for the City of London and the Inner and Middle Temples, the Common Council of the City of London, and, for the Isles of Scilly, the Council of the Isles of Scilly².

In Wales the local weights and measures authority for each county is the county council and for each county borough is the county borough council³.

A local weights and measures authority may make, or assist in the making of, arrangements to provide advice to or for the benefit of consumers of goods and services within the area of the authority⁴.

Every weights and measures authority may, subject to certain conditions, apply for an injunction, including an interim injunction, against any person appearing to it to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers⁵.

1 See eg the Trade Descriptions Act 1968 s 26 (as amended) (see PARA 507 post); the Hallmarking Act 1973 s 9 (see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 485); the Fair Trading Act 1973 s 27 (as amended); the Prices Act 1974 s 7, Schedule para 6 (s 7 as amended) (see PARA 699 post); and the Consumer Credit Act 1974 s 161 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 305). As to the power of local authorities to prosecute legal proceedings see PARA 397 ante.

2 Weights and Measures Act 1985 s 69(1). See further WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 20.

3 Ibid s 69(2) (amended by the Local Government (Wales) Act 1994 s 66(6), Sch 16 para 75).

4 Weights and Measures Act 1985 s 69(5).

5 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12(1), (2) (amended by virtue of the Enterprise Act 2002 s 2); and PARA 460 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(i) In general/399. LACORS.

399. LACORS.

The United Kingdom is probably unique among member states of the European Union in relying on local authorities for the enforcement of trading standards legislation. The advantage is greater local accountability and perhaps sensitivity to the needs of a particular area than could otherwise be obtained if the legislation were to be enforced by divisional departments of central government. A serious disadvantage is, however, the tendency to uneven levels of enforcement of, and varying interpretations of, the legislation in different local authority jurisdictions.

In recognition of this growing problem, an agreement was reached in 1976 between the Association of County Councils and the Association of Metropolitan Authorities to set up a new co-ordinating body to be known as the Local Authorities Co-ordinating Body on Food and Trading Standards ('LACOTS'). That body has now been replaced by the Local Authorities Coordinators of Regulatory Services ('LACORS'), which was set up in 1978 to coordinate the enforcement activities of trading standards. Since 1991, LACORS has also worked on food safety and is currently responsible for a range of other regulatory and related services.

The main aims and objectives of that body are:

- 457 (1) to work with, and on behalf of, the United Kingdom local authority associations and serve their best interests on regulatory and related services;
- 458 (2) to drive improvement and raise the profile of regulatory services;
- 459 (3) to support and promote the important role and contribution of these services in improving community well-being;
- 460 (4) to provide authorities with advice and guidance and assist in the development and dissemination of good practice;
- 461 (5) to support and promote effective coordination, consistency and cooperation between local authorities;
- 462 (6) to develop effective partnership working with key stakeholder organisations particularly government;
- 463 (7) to advise local authorities, their associations, central government departments and agencies and the European Union on effective policy, legislation and enforcement;
- 464 (8) to develop collaborative arrangements with local government and relevant European enforcement Networks.

Co-ordinating and educational services are also provided to trading standards officers by their professional association, the Institute of Trading Standards Administration.

LACORS oversees the Home Authority Principle which is designed to allow businesses which trade across local authority boundaries to receive advice and guidance from a single authority, usually where the relevant decision-making base of the business is located¹.

¹ See *Modern Markets: Confident Consumers* (Cm 4410) PARAS 7.12-7.16. Further information on LACORS can be obtained from its leaflet 'An Introduction to LACORS' and from its website www.lacors.gov.uk.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(ii) Prosecution for Offences/400. Notification of prosecution for certain offences.

(ii) Prosecution for Offences

400. Notification of prosecution for certain offences.

If a local weights and measures authority¹ intends to start proceedings for a specified offence under legislation relating to consumer protection², it is the duty of the authority to give notice to the Office of Fair Trading ('OFT')³ of the intended prosecution along with a summary of the evidence it intends to lead⁴; and it must not start proceedings until the earlier of: (1) the end of a period of 14 days starting with the day on which the authority gives notice; and (2) the day on which it is notified by the OFT that the OFT has received the notice and summary⁵. The authority must also notify the OFT of the outcome of the proceedings after they are finally determined⁶. Such proceedings are not invalid by reason only of the failure of the authority to comply with these provisions⁷.

¹ As to local weights and measures authorities see PARA 398 ante.

² I.e. offences under enactments and subordinate legislation specified by the Secretary of State by order for the purposes of the Enterprise Act 2002 s 230: s 230(1). Such an order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 230(7). See the Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional

Provision) Order 2003, SI 2003/1376, art 2, Schedule (amended by SI 2004/2095); and COMPETITION vol 18 (2009) PARA 359.

3 As to the OFT see PARA 407 post.

4 Enterprise Act 2002 s 230(2).

5 Ibid s 230(3).

6 Ibid s 230(4).

7 Ibid s 230(5). As to the enforcement provisions of the Enterprise Act 2002 see COMPETITION vol 18 (2009) PARAS 339-360.

UPDATE

400 Notification of prosecution for certain offences

NOTE 2--SI 2003/1376 further amended: SI 2008/1816.

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(iii) Disclosure of Information

401. Restrictions on the disclosure of information.

Information which comes to a public authority¹ in connection with the exercise of any function it has under or by virtue of specified enactments and subordinate legislation² ('specified information')³ which relates to the affairs of an individual or any business of an undertaking must not be disclosed during the lifetime of the individual or while the undertaking continues in existence unless the disclosure is permitted under the Enterprise Act 2002⁴. This does not, however, prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public in circumstances which do not contravene the restriction above or any other enactment or rule of law prohibiting or restricting the disclosure of the information⁵. Nothing in these provisions⁶ authorises a disclosure of information which contravenes the Data Protection Act 1998 or affects the Competition Appeal Tribunal⁷; nor do they⁸ affect any power or duty to disclose information which exists apart from these provisions⁹.

The disclosure by a public authority of information held by it to any other person is not prohibited if it obtains each required consent¹⁰. If the information was obtained by the authority from a person who had the information lawfully and the authority knows the identity of that person the consent of that person is required¹¹. If the information relates to the affairs of an individual the consent of the individual is required¹². If the information relates to the business of an undertaking the consent of the person for the time being carrying on the business is required, and may be given, in the case of a company by a director, secretary or other officer of the company, in the case of a partnership by a partner, and in the case of an unincorporated body or association by a person concerned in the management or control of the body or association¹³.

Disclosure of information held by a public authority to another person is not prohibited if the disclosure is required for the purpose of a Community obligation¹⁴.

A public authority which holds specified information may disclose it for the purposes of facilitating the exercise by the authority of any function it has under or by virtue of the

Enterprise Act 2002 or any other enactment¹⁵. If information is disclosed under this provision so that it is not made available to the public it must not be further disclosed by a person to whom it is so disclosed other than with the agreement of the public authority for the purpose of facilitating the exercise of any of its statutory functions¹⁶. A public authority which holds specified information may disclose that information to any other person for the purpose of facilitating the exercise by that person of any function he has under or by virtue of the Enterprise Act 2002 or other specified¹⁷ legislation¹⁸. Information so disclosed must not be used by the person to whom it is disclosed for any purpose other than a purpose relating to such a function¹⁹.

A public authority which holds specified information may disclose it to any person in connection with the investigation of any criminal offence in any part of the United Kingdom, for the purposes of any criminal proceedings there or for the purpose of any decision whether to start or bring to an end such an investigation or proceedings²⁰. Information so disclosed must not be used by the person to whom it is disclosed for any purpose other than that for which it is disclosed²¹. A public authority must not make a disclosure under this provision unless it is satisfied that the making of the disclosure is proportionate to what is sought to be achieved by it²².

A public authority which holds specified information may disclose it to an overseas public authority for specified purposes²³.

A public authority must have regard to the following considerations before disclosing any specified information²⁴:

- 465 (1) the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest²⁵;
- 466 (2) the need to exclude from disclosure (so far as practicable) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests²⁶;
- 467 (3) the extent to which the disclosure of the information mentioned in head (2) above is necessary for the purpose for which the authority is permitted to make the disclosure²⁷.

A person commits an offence if he discloses specified information in contravention of the statutory restriction²⁸ on disclosure²⁹. A person commits an offence if he uses information disclosed to him under these provisions for a purpose which is not permitted under these provisions³⁰.

1 'Public authority' (except in the expression 'overseas public authority') must be construed in accordance with the Human Rights Act 1998 s 6 (see JUDICIAL REVIEW vol 61 (2010) PARA 651); Enterprise Act 2002 s 238(3).

2 le under or by virtue of ibid Pt 1 (ss 1-11), Pt 3 (ss 22-130) (as amended), Pt 4 (ss 131-184) (as amended), Pt 6 (ss 188-202) (as amended), Pt 7 (ss 203-209) (as amended) or Pt 8 (ss 210-236) (as amended), an enactment specified in Sch 14 (as amended), or such subordinate legislation as the Secretary of State may by order specify for this purpose: s 238(1). As to the Secretary of State see PARA 15 ante. Under Sch 14 (amended by the Fireworks Act 2003 s 12(3); the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) Order 2003, SI 2003/1400; and the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) (No 2) Order 2003, SI 2003/2580), the following enactments (inter alia) are specified: the Fair Trading Act 1973 Pts I-VIII (ss 1-93B) (as amended; largely repealed), Pt XI (ss 118-123) (as amended) (see PARA 853 et seq post); the Trade Descriptions Act 1968 (see PARA 471 et seq post); the Hallmarking Act 1973 (see PARA 765 post); the Prices Act 1974 (see PARA 681 et seq post); the Consumer Credit Act 1974 (see PARAS 763, 768 et seq post); the Customs and Excise Management Act 1979; the Estate Agents Act 1979 (see PARA 789 post); the Competition Act 1980 (see PARA 405 post); the Consumer Protection Act 1987 (see PARA 518 et seq post); the Property Misdescriptions Act 1991 (see PARA 791 et seq post); the Timeshare Act 1992 (see PARA 868 et seq post); the Trade Marks Act 1994 (see PARA 767 post);

the Competition Act 1998 (see PARA 405 post); the Financial Services and Markets Act 2000 Pt 10 Ch 3, Pt 18 Ch 2 and an order made under s 95 (see PARA 802 post); and the Fireworks Act 2003 (see PARA 554 post).

By the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Specification) Order 2004, SI 2004/693 (amended by SI 2004/3201), the subordinate legislation specified includes the Personal Protective Equipment Regulations 2002, SI 2002/1144 (see PARA 586 post), the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941 (as amended) (see PARA 845 et seq post), and the Recreational Craft Regulations 2004, SI 2004/1464 (see PARA 865 et seq post).

3 Enterprise Act 2002 s 238(1). It is immaterial whether information comes to a public authority before or after the passing of the Act (ie 7 November 2002): s 238(2).

4 Ie under ibid Pt 9 (ss 237-247): s 237(1), (2).

5 Ibid s 237(3).

6 Ie ibid Pt 9.

7 Ibid s 237(4), (5).

8 Ie apart from ibid s 244 (considerations to which a public authority must have regard before disclosing any specified information: see the text to notes 24-27 infra).

9 Ibid s 237(6).

10 See ibid s 239(1); and COMPETITION vol 18 (2009) PARA 328.

11 See ibid s 239(2).

12 See ibid s 239(3).

13 See ibid s 239(4), (5).

14 See ibid s 240; and COMPETITION vol 18 (2009) PARA 329. For the meaning of 'Community obligation' see PARA 483 note 1 post.

15 See ibid s 241(1); and COMPETITION vol 18 (2009) PARA 330. The reference to an enactment in s 241(1) includes a reference to an enactment contained in an Act of the Scottish Parliament, Northern Ireland legislation and subordinate legislation: s 241(5).

16 See ibid s 241(2).

17 Ie an enactment specified in ibid Sch 15 (as amended) or in such subordinate legislation as the Secretary of State may by order specify for the purpose: s 241(3). Enactments specified in Sch 15 (as amended) as conferring functions include the Trade Descriptions Act 1968; the Unsolicited Goods and Services Act 1971; the Fair Trading Act 1973; the Hallmarking Act 1973; the Prices Act 1974; the Consumer Credit Act 1974; the Estate Agents Act 1979; the Competition Act 1980; the Weights and Measures Act 1985 (see PARAS 398 ante, 904 post); the Airports Act 1986; the Gas Act 1986; the Consumer Protection Act 1987; the Water Act 1989; the Electricity Act 1989; the Courts and Legal Services Act 1990; the Broadcasting Act 1990; the Property Misdescriptions Act 1991; the Water Industry Act 1991 (see PARA 427 post); the Timeshare Act 1992; the Railways Act 1993 (see PARA 425 post); the Trade Marks Act 1994; the Gas Act 1995; the Broadcasting Act 1996; the Competition Act 1998; the Financial Services and Markets Act 2000; the Postal Services Act 2000 (see PARA 423 post); the Communications Act 2003; and the Fireworks Act 2003.

18 See the Enterprise Act 2002 s 241(3).

19 See ibid s 241(4).

20 See ibid s 242(1); and COMPETITION vol 18 (2009) PARA 332.

21 See ibid s 242(2).

22 See ibid s 242(3).

23 See ibid s 243(1), (2). See further s 243(3)-(12); and COMPETITION vol 18 (2009) PARA 333.

24 See ibid s 244(1).

25 See ibid s 244(2).

26 See *ibid* s 244(3).

27 See *ibid* s 244(4).

28 See *ibid* s 237(2).

29 *Ibid* s 245(1). A person also commits an offence if he discloses information in contravention of a direction given under s 243(4) by the Secretary of State that a disclosure permitted by s 243 must not be made: s 245(2). A person who commits an offence under s 245 is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding the statutory maximum or to both, or on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both: s 245(4). The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140; MAGISTRATES vol 29(2) (Reissue) PARA 804. As to the prescribed sum see PARA 498 note 2 post.

30 Enterprise Act 2002 s 245(3). See note 29 *supra*.

UPDATE

401 Restrictions on the disclosure of information

TEXT AND NOTES--A public authority which holds prescribed information to which the 2002 Act s 237 applies may disclose that information to any person (1) for the purposes of, or in connection with, prescribed civil proceedings (including prospective proceedings) in the United Kingdom or elsewhere; or (2) for the purposes of obtaining legal advice in relation to such proceedings; or (3) otherwise for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings: s 241A(1) (s 241A added by the Companies Act 2006 s 1281). For these purposes 'prescribed' means prescribed by order of the Secretary of State: 2002 Act s 241A(3) (s 241A as added). Section 241A(1) does not apply to (a) information which comes to a public authority in connection with an investigation under the Fair Trading Act 1973 Pts 4, 5 or 6 (ss 44-80) or under the Competition Act 1980 s 11; (b) competition information within the meaning of the Financial Services and Markets Act 2000 s 351; (c) information which comes to a public authority in connection with an investigation under the 2002 Act Pt 3 or 4 (ss 22-184) or s 174; (d) information which comes to a public authority in connection with an investigation under the Competition Act 1998: 2002 Act s 241A(2) (s 241A as added). An order under this provision (i) may prescribe information, or civil proceedings, for these purposes by reference to such factors as appear to the Secretary of State to be appropriate; (ii) may prescribe all information, or civil proceedings, or all information or civil proceedings not falling within one or more specified exceptions; (iii) must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 241A(4) (s 241A as added). Information disclosed under this provision must not be used by the person to whom it is disclosed for any purpose other than those specified in s 241A(1): s 241A(5) (s 241A as added). The Enterprise Act 2002 (Disclosure of Information for Civil Proceedings etc) Order 2007, SI 2007/2193, has been made under the 2002 Act s 241A.

NOTE 2--SI 2004/693 further amended: SI 2008/37, SI 2008/1597.

NOTE 17--Gambling Act 2005 also specified in Enterprise Act 2002 Sch 15 (amended by the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment) Order 2006, SI 2006/2909).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/A. IN GENERAL/402. Introduction.

(iv) Regulatory Authorities

A. IN GENERAL

402. Introduction.

Various offices and bodies have been established, by statute or otherwise, with responsibility for consumer protection in a number of fields. These include OFCOM in respect of broadcasting¹; the Civil Aviation Authority²; the Competition Commission³; the Information Commissioner⁴; the Office of Fair Trading⁵; the Financial Services Authority⁶; the Food Standards Agency⁷; the designated operator in respect of complaints relating to higher education⁸; the Bar Council, the Law Society, the Legal Services Complaints Commissioner and other bodies in respect of legal services⁹; the Medicines Commission, the British Pharmacopoeia Commission and the Committee on Safety of Medicines in respect of medicines and drugs¹⁰; the Independent Regulator of NHS Foundation Trusts¹¹; the National Lottery Commission¹²; the Consumer Council for Postal Services¹³, the Gas and Electricity Markets Authority, the Office of Rail Regulation, OFCOM and the Director General of Water Services in respect of privatised utilities¹⁴; and Her Majesty's Revenue and Customs in relation to tax matters¹⁵.

- 1 See PARA 403 post.
- 2 See PARA 404 post.
- 3 See PARA 405 post.
- 4 See PARA 406 post.
- 5 See PARA 407 post.
- 6 See PARA 408 post.
- 7 See PARA 409 post.
- 8 See PARA 410 post.
- 9 See PARAS 411-416 post.
- 10 See PARAS 417-419 post.
- 11 See PARA 420 post.
- 12 See PARA 422 post.
- 13 See PARA 423 post.
- 14 See PARAS 424-427 post.
- 15 See PARAS 428-429 post.

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B. BROADCASTING

403. The Office of Communications ('OFCOM').

A body corporate, known as the Office of Communications ('OFCOM'), has been established¹, which has the functions transferred to OFCOM² and such other functions as may be conferred on OFCOM by or under any enactment (including the Communications Act 2003)³. These include duties relating to the regulation of electronic communications networks and services, the regulation and licensing of wireless telegraphy and spectrum use, and the regulation of broadcasting, including functions in relation to the British Broadcasting Corporation, independent television and radio services⁴.

It is the principal duty of OFCOM, in carrying out its functions:

- 468 (1) to further the interests of citizens in relation to communications matters; and
- 469 (2) to further the interests of consumers in relevant markets, where appropriate by promoting competition⁵.

The things which OFCOM is required to secure in the carrying out of its functions include, in particular, each of the following:

- 470 (a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
- 471 (b) the availability throughout the United Kingdom of a wide range of electronic communications services;
- 472 (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
- 473 (d) the maintenance of a sufficient plurality of providers of different television and radio services;
- 474 (e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;
- 475 (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both unfair treatment in programmes included in such services; and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services⁶.

In performing its duties, OFCOM must have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and any other principles appearing to OFCOM to represent the best regulatory practice⁷.

1 Office of Communications Act 2002 s 1(1). As to the establishment and membership of OFCOM see TELECOMMUNICATIONS vol 97 (2010) PARA 2 et seq.

2 Ie under the Communications Act 2003 s 2. These include the functions of various 'pre-commencement regulators' which formerly regulated areas of telecommunications and broadcasting, ie the Broadcasting Standards Commission, the Director General of Telecommunications, the Independent Television Commission and the Radio Authority: s 405(1).

3 Ibid s 1(1).

4 See TELECOMMUNICATIONS vol 97 (2010) PARA 15.

5 See the Communications Act 2003 s 3(1); and TELECOMMUNICATIONS vol 97 (2010) PARA 16.

6 See *ibid* s 3(2); and TELECOMMUNICATIONS vol 97 (2010) PARA 16.

7 See *ibid* s 3(3); and TELECOMMUNICATIONS vol 97 (2010) PARA 16.

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C. CIVIL AVIATION

404. Civil Aviation Authority.

The functions of the Civil Aviation Authority¹ ('the Authority') are:

- 476 (1) the general functions conferred on it by or under the Civil Aviation Act 1982;
- 477 (2) the functions conferred on it by or under the Civil Aviation Act 1982 with respect to the licensing of air transport, the licensing of the provision of accommodation in aircraft, the provision of air navigation services, the operation of aerodromes and the provision of assistance and information;
- 478 (3) such functions as are for the time being conferred on it² with respect to the registration of aircraft, the safety of air navigation and aircraft, including airworthiness, the control of air traffic, the certification of operators of aircraft and the licensing of air crews and aerodromes;
- 479 (4) such other functions as are for the time being conferred on it by virtue of the Civil Aviation Act 1982 or any other enactment³.

It is the duty of the Authority to perform the functions otherwise conferred on it in the manner which it considers is best calculated:

- 480 (a) to secure that British airlines provide air transport services which satisfy all substantial categories of public demand, so far as British airlines may reasonably be expected to provide such services, at the lowest charges consistent with a high standard of safety in operating the services and an economic return to efficient operators on the sums invested in providing the services and with securing the sound development of the civil air transport industry of the United Kingdom; and
- 481 (b) to further the reasonable interests of users of air transport services⁴.

1 As to the Civil Aviation Authority see AIR LAW vol 2 (2008) PARA 50 et seq.

2 *Ie* under Air Navigation Orders.

3 See the Civil Aviation Act 1982 s 3; and AIR LAW vol 2 (2008) PARA 51.

4 See *ibid* s 4; and AIR LAW vol 2 (2008) PARA 52.

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D. COMPETITION

405. Competition Commission.

There is a body corporate known as the Competition Commission ('the Commission') which has such statutory functions as are conferred on it by or as a result of the Competition Act 1998¹.

The Commission is required to investigate references made to it by the Office of Fair Trading ('OFT') in consequence of:

- 482 (1) the OFT's duty to make a reference to the Commission in relation to completed mergers² where it believes that a relevant merger situation³ has been created and has resulted in lessening of competition⁴;
- 483 (2) the OFT's duty to make reference in relation to anticipated mergers⁵;
- 484 (3) in relation to cases referred to it by the European Commission, the OFT's duty to consider whether to make a reference under head (1) or head (2) above⁶;
- 485 (4) the OFT's power to make a reference if it has reasonable grounds for suspecting that a feature, or combination of features, of a market for goods or services in the United Kingdom restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom⁷.

The Commission also has the duty to remedy the effects of completed or anticipated mergers⁸ by requiring a final undertaking⁹ or making a final order¹⁰.

1 See the Competition Act 1998 s 45(1), (2); and COMPETITION vol 18 (2009) PARAS 9-11. The Monopolies and Mergers Commission has been dissolved and its functions transferred to the Competition Commission: s 45(3). In any enactment, instrument or other document, any reference to the Monopolies and Mergers Commission which has continuing effect is to be read as a reference to the Competition Commission: s 45(4). As to the Commission see further Sch 7 (as amended).

2 Ie under the Enterprise Act 2002 s 23 or s 24.

3 For the meaning of 'relevant merger situation' see *ibid* s 22; and COMPETITION vol 18 (2009) PARAS 172, 173.

4 See COMPETITION.

5 See the Enterprise Act 2002 s 33; and COMPETITION vol 18 (2009) PARAS 182, 189.

6 See *ibid* s 34A (as added); and COMPETITION vol 18 (2009) PARA 183.

7 See *ibid* s 131; and COMPETITION vol 18 (2009) PARA 276.

8 See *ibid* s 41; and COMPETITION vol 18 (2009) PARA 188.

9 Ie under *ibid* s 82: see COMPETITION vol 18 (2009) PARA 225.

10 Ie under *ibid* s 84: see COMPETITION vol 18 (2009) PARA 226.

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E. DATA PROTECTION

406. Information Commissioner.

The Information Commissioner ('the Commissioner') has the functions conferred on him by the Data Protection Act 1998¹, including:

- 486 (1) maintaining the register of notifications²;
- 487 (2) making amendments of the relevant entries in the register of notifications³;
- 488 (3) making preliminary assessments⁴;
- 489 (4) submitting, and keeping under review the working of, notification regulations⁵;
- 490 (5) serving and cancelling enforcement notices⁶;
- 491 (6) making assessments⁷;
- 492 (7) serving information notices⁸ and special information notices⁹;
- 493 (8) making determinations as to the special purposes¹⁰;
- 494 (9) laying annually before each House of Parliament a general report on the exercise of his functions under the Data Protection Act 1998¹¹; and
- 495 (10) providing assistance in cases involving processing for the special purposes¹².

It is the Commissioner's duty to promote the following of good practice¹³ by data controllers and, in particular, so to perform his functions under the Data Protection Act 1998 as to promote the observance of the requirements of that Act by data controllers¹⁴.

The Commissioner must arrange for the dissemination in such form and manner as he considers appropriate of such information as it may appear to him expedient to give to the public about the operation of the Data Protection Act 1998, about good practice, and about other matters within the scope of his functions under that Act, and may give advice to any person as to any of those matters¹⁵.

Where the Secretary of State so directs by order or the Commissioner considers it appropriate to do so, the Commissioner must, after such consultation with trade associations¹⁶, data subjects or persons representing data subjects as appears to him to be appropriate, prepare and disseminate to such persons as he considers appropriate codes of practice for guidance as to good practice¹⁷.

The Commissioner must also:

- 496 (a) where he considers it appropriate to do so, encourage trade associations to prepare, and to disseminate to their members, such codes of practice; and
- 497 (b) where any trade association submits a code of practice to him for his consideration, consider the code and, after such consultation with data subjects or persons representing data subjects as appears to him to be appropriate, notify the trade association whether in his opinion the code promotes the following of good practice¹⁸.

The Commissioner may, with the consent of the data controller, assess any processing of personal data for the following of good practice and must inform the data controller of the results of the assessment¹⁹.

The Commissioner may, subject to certain conditions, apply for an injunction, including an interim injunction, against any person appearing to him to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers²⁰.

1 See the Data Protection Act 1998 s 6(1) (substituted by the Freedom of Information Act 2000 s 18(4), Sch 2 Pt I para 13(1), (2)); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 518. The office originally established by the Data Protection Act 1984 s 3(1)(a) (repealed) as the office of Data Protection Registrar continues to exist for the purposes of the Data Protection Act 1998 and the Freedom of Information Act 2000 but is now known as the office of Information Commissioner: Data Protection Act 1998 s 6(1) (as so substituted).

- 2 See *ibid* s 19; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 539.
- 3 See *ibid* s 20; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 540.
- 4 See *ibid* s 22 (as amended); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 541.
- 5 See *ibid* s 25 (as amended); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 543.
- 6 See *ibid* ss 40, 41; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARAS 559-560.
- 7 See *ibid* s 42; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 561.
- 8 See *ibid* s 43; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 562.
- 9 See *ibid* s 44; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 563.
- 10 See *ibid* s 45; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 564. 'The special purposes' means any one or more of the following: (1) the purposes of journalism; (2) artistic purposes; and (3) literary purposes: s 3.
- 11 See *ibid* s 52 (as amended); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 518.
- 12 See *ibid* s 53 (as amended); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 519.
- 13 For these purposes, 'good practice' means such practice in the processing of personal data as appears to the Commissioner to be desirable, having regard to the interests of data subjects and others, and includes, but is not limited to, compliance with the requirements of the Data Protection Act 1998: s 51(9).
- 14 See *ibid* s 51(1); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 518.
- 15 See *ibid* s 51(2); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 518.
- 16 For these purposes, 'trade association' includes any body representing data controllers: *ibid* s 51(9).
- 17 See *ibid* s 51(3) (amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, art 9, Sch 2 para 9(1)(a)); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 518. An order under the Data Protection Act 1998 s 51(3) (as amended) must describe the personal data or processing to which the code of practice is to relate, and may also describe the persons or classes of persons to whom it is to relate: s 51(5).
- 18 See *ibid* s 51(4); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 518.
- 19 See *ibid* s 51(7); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 518.
- 20 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12(1), (2) (amended by virtue of the Enterprise Act 2002 s 2); and PARA 460 post.

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F. FAIR TRADING

407. Office of Fair Trading.

There is a body corporate known as the Office of Fair Trading (the 'OFT') for the purpose of performing the statutory functions assigned or transferred to it on behalf of the Crown¹. In managing its affairs the OFT must have regard, in addition to any relevant general guidance as to the governance of public bodies, to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to the OFT².

The OFT has the function of promoting good practice in the carrying out of activities which may affect the economic interests of consumers in the United Kingdom³. In carrying out that function the OFT may (without prejudice to the generality of the preceding sentence) make arrangements for approving consumer codes⁴ and may, in accordance with the arrangements, give its approval to or withdraw its approval from any consumer code⁵. Any such arrangements must specify the criteria to be applied by the OFT in determining whether to give approval to or withdraw approval from a consumer code⁶. Any such arrangements may in particular:

- 498 (1) specify descriptions of consumer code which may be the subject of an application to the OFT for approval (and any such description may be framed by reference to any feature of a consumer code, including the persons who are, or are to be, subject to the code, the manner in which it is, or is to be, operated and the persons responsible for its operation); and
- 499 (2) provide for the use in accordance with the arrangements of an official symbol intended to signify that a consumer code is approved by the OFT⁷.

Subject to certain exceptions, it is the duty of the OFT to consider any complaint made to it that any contract term drawn up for general use is unfair⁸; and the OFT may apply for an injunction to prevent the continued use of unfair terms in consumer contracts⁹.

1 See the Enterprise Act 2002 s 1(1)-(3), Sch 1. As to the Office of Fair Trading see COMPETITION vol 18 (2009) PARA 6 et seq. The functions of the Director General of Fair Trading, and his property, rights and liabilities, have been transferred to the OFT (s 2(1)) and the office of the Director has been abolished (s 2(2)). Any enactment, instrument or other document passed or made before the commencement of s 2(1) (ie 1 April 2003) which refers to the Director has effect, so far as necessary for the purposes of or in consequence of anything being transferred, as if any reference to the Director were a reference to the OFT: s 2(3).

2 See *ibid* s 1(4).

3 *Ibid* s 8(1).

4 'Consumer code' means a code of practice or other document (however described) intended, with a view to safeguarding or promoting the interests of consumers, to regulate by any means the conduct of persons engaged in the supply of goods or services to consumers (or the conduct of their employees or representatives): *ibid* s 8(6).

5 *Ibid* s 8(2). The OFT must publish any arrangements under s 8(2) in such manner it considers appropriate: s 8(5).

6 *Ibid* s 8(3).

7 *Ibid* s 8(4).

8 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 10(1) (amended by virtue of the Enterprise Act 2002 s 2); and PARA 458 post. As to the power of the OFT to obtain documents and information see the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 13 (amended by virtue of the Enterprise Act 2002 s 2); and PARA 461 post.

9 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12(1) (amended by virtue of the Enterprise Act 2002 s 2); and PARA 460 post.

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G. FINANCIAL SERVICES

408. Financial Services Authority.

The Financial Services Authority¹ (formerly known as the Securities and Investment Board) is the single regulator for the whole of the financial services industry² with responsibility for regulating banks³, building societies⁴, friendly societies⁵, credit unions and insurance companies⁶, and it is also responsible for the regulation of Lloyd's of London⁷.

The Authority is an independent non-governmental body and has the functions conferred on it by or under the Financial Services and Markets Act 2000⁸. Its general functions are:

- 500 (1) its function of making rules under the Financial Services and Markets Act 2000 (considered as a whole)⁹;
- 501 (2) its function of preparing and issuing codes under the Act (considered as a whole)¹⁰;
- 502 (3) its functions in relation to the giving of general guidance (considered as a whole)¹¹; and
- 503 (4) its function of determining the general policy and principles by reference to which it performs particular functions¹².

In discharging its general functions the Authority must, so far as is reasonably possible, act in a way which is compatible with the regulatory objectives and which the Authority considers most appropriate for the purpose of meeting those objectives¹³. The regulatory objectives are:

- 504 (a) market confidence;
- 505 (b) public awareness;
- 506 (c) the protection of consumers¹⁴; and
- 507 (d) the reduction of financial crime¹⁵.

The Authority's specific objective of the protection of consumers is securing the appropriate degree of protection for consumers¹⁶. In considering what degree of protection may be appropriate, the Authority must have regard to:

- 508 (i) the differing degrees of risk involved in different kinds of investment or other transaction;
- 509 (ii) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity;
- 510 (iii) the needs that consumers may have for advice and accurate information; and
- 511 (iv) the general principle that consumers should take responsibility for their decisions¹⁷.

The Financial Services Authority must make and maintain effective arrangements for consulting practitioners and consumers on the extent to which its general policies and practices are consistent with its general duties¹⁸. These arrangements must include the establishment and maintenance of a panel of persons (to be known as 'the Consumer Panel') to represent the interests of consumers¹⁹. The Authority must have regard to any representations made to it by the Consumer Panel²⁰. It must appoint to the Consumer Panel such consumers, or persons representing the interests of consumers, as it considers appropriate²¹, and must secure that the membership of the Consumer Panel is such as to give a fair degree of representation to those who are using, or are or may be contemplating using, services otherwise than in connection with businesses carried on by them²².

- 1 See the Financial Services Authority Press Release dated 28 October 1997. As to the Financial Services Authority see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 4 et seq.
- 2 Other former regulatory bodies, such as the Building Societies Commission, the Friendly Societies Commission and the Registry of Friendly Societies, have been abolished. Provision for such abolition was made by the Financial Services and Markets Act 2000 ss 334-336: see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 758 et seq.
- 3 As to banking generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq.
- 4 As to building societies generally see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1856 et seq.
- 5 As to friendly societies generally see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2081.
- 6 As to insurance generally see INSURANCE.
- 7 See the Financial Services and Markets Act 2000 s 1. As to the constitution of the Authority and the exercise of its functions see Sch 1; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 6 et seq.
- 8 Ibid s 1(1).
- 9 See ibid s 2(4)(a); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 6.
- 10 See ibid s 2(4)(b).
- 11 See ibid s 2(4)(c).
- 12 See ibid s 2(4)(d). As to the Authority's Handbook of Rules and Guidance generally see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 22.
- 13 See ibid s 2(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 6.
- 14 For these purposes, 'consumers' means persons who are consumers for the purposes of ibid s 138 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 21) or who, in relation to regulated activities carried on otherwise than by authorised persons, would be consumers for those purposes if the activities were carried on by authorised persons: see s 5(3). As to authorised persons see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 314. The definition of 'consumer' is modified by the Financial Services and Markets Act 2000 (Consequential and Transitional Provisions) (Miscellaneous) Order 2001, SI 2001/1821, art 3; and the Financial Services and Markets Act 2000 (Consequential Amendments and Transitional Provisions) (Credit Unions) Order 2002, SI 2002/1501, art 4.
- 15 See the Financial Services and Markets Act 2000 s 2(2); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 8.
- 16 See ibid s 5(1).
- 17 See ibid s 5(2).
- 18 See ibid s 8; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 9.
- 19 See ibid s 10(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 9.
- 20 See ibid s 10(4).
- 21 See ibid s 10(5).
- 22 See ibid s 10(6).

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H. FOOD

409. Food Standards Agency.

A body known as the Food Standards Authority ('the Agency') has been established to perform the statutory functions assigned to it¹. The main objective of the Agency in carrying out its functions is to protect public health from risks which may arise in connection with the consumption of food, including risks caused by the way in which it is produced or supplied, and otherwise to protect the interests of consumers in relation to food².

The Agency has the function of:

- 512 (1) developing policies, or assisting in the development by any public authority of policies, relating to matters connected with food safety or other interests of consumers in relation to food³;
- 513 (2) providing advice, information or assistance in respect of such matters to any public authority⁴;
- 514 (3) providing advice and information to the general public, or any section of the public, in respect of matters connected with food safety or other interests of consumers in relation to food⁵;
- 515 (4) providing advice, information or assistance in respect of such matters to any person who is not a public authority⁶;
- 516 (5) obtaining, compiling and keeping under review information about matters connected with food safety and other interests of consumers in relation to food⁷, including (inter alia):
 - 25 29. (a) monitoring developments in science, technology and other fields of knowledge relating to those matters⁸;
 - 30. (b) carrying out, commissioning or co-ordinating research on such matters⁹.

1 See the Food Standards Act 1999 s 1(1); and FOOD vol 18(2) (Reissue) PARA 225. The name of the Agency in Welsh is yr Asiantaeth Safonau Bwyd: s 1(1). As to the appointment of members of the Agency, and as to their remuneration, see s 2(4), Sch 1; and FOOD vol 18(2) (Reissue) PARA 226.

2 See ibid s 1(2); and FOOD vol 18(2) (Reissue) PARA 225.

3 See ibid s 6(1)(a); and FOOD vol 18(2) (Reissue) PARA 235.

4 See ibid s 6(1)(b); and FOOD vol 18(2) (Reissue) PARA 235.

5 See ibid s 7(1)(a); and FOOD vol 18(2) (Reissue) PARA 235. The function under s 7(1)(a) is to be carried out, without prejudice to any other relevant objectives, with a view to ensuring that members of the public are kept adequately informed about and advised in respect of matters which the Agency considers significantly affect their capacity to make informed decisions about food: s 7(2).

6 See ibid s 7(1)(b); and FOOD vol 18(2) (Reissue) PARA 235.

7 See ibid s 8(1); and FOOD vol 18(2) (Reissue) PARA 235. The function under s 8(1) is to be carried out, without prejudice to any other relevant objectives, with a view to ensuring that the Agency has sufficient information to enable it to take informed decisions and to carry out its other functions effectively: s 8(3).

8 See ibid s 8(2)(a); and FOOD vol 18(2) (Reissue) PARA 235.

9 See ibid s 8(2)(b); and FOOD vol 18(2) (Reissue) PARA 235.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/I. HIGHER EDUCATION/410. Student complaints scheme.

I. HIGHER EDUCATION

410. Student complaints scheme.

The Secretary of State and the National Assembly for Wales may designate a body corporate¹ as the designated operator² of the student complaints scheme for England or Wales as from a date specified in the designation³. The designated operator must comply with the duties as to providing a student complaints scheme⁴ during the specified period⁵. The designation of a body continues until it is terminated in accordance with the statutory provisions⁶, and if the designation of a body is terminated, the Secretary of State or the Assembly must publish notice of the termination in such manner as he or it thinks fit⁷.

The designated operator must provide a scheme for the review of qualifying complaints which meets all of the specified⁸ conditions⁹. The designated operator must publish the latest version of the scheme in such manner as it thinks fit¹⁰. The designated operator must comply with any requirements that the scheme imposes on it¹¹. It must produce and publish an annual report on the scheme and its operation¹².

A 'qualifying complaint' is a complaint about an act or omission of a qualifying institution which is made by a person:

- 517 (1) as a student or former student at that institution; or
- 518 (2) as a student or former student at another institution (whether or not a qualifying institution) undertaking a course of study, or programme of research, leading to the grant of one of the qualifying institution's awards¹³;

but a complaint is not a qualifying complaint to the extent that it relates to matters of academic judgment¹⁴.

'Qualifying institution' means any of the following institutions in England or Wales:

- 519 (a) a university (whether or not receiving financial support¹⁵) whose entitlement to grant awards is conferred or confirmed by an Act of Parliament, a royal charter, or an order of the Privy Council¹⁶;
- 520 (b) a constituent college, school or hall or other institution of a university falling within head (a) above;
- 521 (c) an institution conducted by a higher education corporation¹⁷;
- 522 (d) a designated¹⁸ institution¹⁹.

The governing body²⁰ of every qualifying institution in England and Wales must comply with any obligation imposed upon it by a scheme for the review of qualifying complaints that is provided by the designated operator²¹.

¹ le for the purposes of the Higher Education Act 2004 Pt 2 (ss 11-21): see EDUCATION vol 15(2) (2006 Reissue) PARA 1041.

² For these purposes, any reference to the designated operator is, in relation to an institution in England, a reference to the body designated under *ibid* s 13(1), and in relation to an institution in Wales, a reference to the body designated under s 13(2): *ibid* s 13(5)(b).

3 See *ibid* s 13(1), (2); and EDUCATION vol 15(2) (2006 Reissue) PARA 1041. The Secretary of State or the Assembly may not designate a body under s 13(1) or (2) unless he or the Assembly is satisfied that the body: (1) meets all of the conditions set out in Sch 1; (2) is providing a scheme for the review of qualifying complaints that meets all of the conditions set out in Sch 2, or is proposing to provide such a scheme from a date not later than the effective date; (3) has consulted interested parties about the provisions of that scheme; and (4) consents to the designation: s 13(3). If a body is designated under s 13(1) or (2) the Secretary of State or the Assembly must, before the effective date, give the body notice of the designation, and publish notice of the designation in such manner as he or the Assembly thinks fit: s 13(4). The 'effective date', in relation to the designation of a body corporate under s 13, means the date specified in the designation as the date from which the body is designated as designated operator: s 13(5)(a). The conditions to be met by the body are that the body corporate is a suitable person to be the designated operator, and that it is capable of providing in an effective manner, on and after the effective date, a scheme for the review of qualifying complaints which meets all of the conditions set out in Sch 2: see Sch 1.

4 *Ie* the duties specified in *ibid* Sch 3.

5 See *ibid* s 14; and EDUCATION vol 15(2) (2006 Reissue) PARA 1043. The period is as specified in Sch 3.

6 See *ibid* s 16(1); and EDUCATION vol 15(2) (2006 Reissue) PARA 1044. Termination is in accordance with Sch 4.

7 See *ibid* s 16(2); and EDUCATION vol 15(2) (2006 Reissue) PARA 1044.

8 *Ie* specified in *ibid* Sch 2.

9 See *ibid* s 14, Sch 2 para 2.

10 See *ibid* Sch 2 para 3; and EDUCATION vol 15(2) (2006 Reissue) PARA 1041. As to changes to the scheme see Sch 2 para 4.

11 See *ibid* Sch 2 para 5; and EDUCATION vol 15(2) (2006 Reissue) PARA 1043.

12 See *ibid* Sch 2 para 6; and EDUCATION vol 15(2) (2006 Reissue) PARA 1043. Further provision is made as to review and operation of the scheme: see Sch 2 paras 7-10.

13 See *ibid* s 12(1); and EDUCATION vol 15(2) (2006 Reissue) PARA 1039.

14 See *ibid* s 12(2).

15 *Ie* under the Further and Higher Education Act 1992 s 65 (as amended): see EDUCATION vol 15(2) (2006 Reissue) PARA 746.

16 *Ie* an order under *ibid* s 76: see EDUCATION vol 15(2) (2006 Reissue) PARA 727.

17 'Higher education corporation' has the meaning given by *ibid* s 90(1): Higher Education Act 2004 s 21; see EDUCATION vol 15(2) (2006 Reissue) PARA 646.

18 *Ie* as defined by the Further and Higher Education Act 1992 s 72(3): see EDUCATION vol 15(2) (2006 Reissue) PARA 646.

19 See the Higher Education Act 2004 ss 11, 48; and EDUCATION.

20 'Governing body' has the meaning given by the Further and Higher Education Act 1992 s 90(1), but subject to any provision made by virtue of s 90(2): Higher Education Act 2004 ss 21, 48; see EDUCATION vol 15(2) (2006 Reissue) PARA 584.

21 See *ibid* s 15(1); and EDUCATION vol 15(2) (2006 Reissue) PARA 1040. The duty imposed by s 15(1) applies from the effective date of the designation and ceases to apply only if the designation is terminated: s 15(2). The obligations referred to include any obligation to pay fees to the designated operator: s 15(3).

J. LEGAL SERVICES

411. Barristers.

The General Council of the Bar ('the Bar Council'), which is elected by both practising and employed barristers, is the governing body of the Bar¹. It represents the Bar in its relations with others and has principal responsibility for the formulation of policy with regard to all matters affecting the Bar¹.

1 As to the Bar Council see LEGAL PROFESSIONS vol 66 (2009) PARA 1042 et seq.

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412. Solicitors.

The Law Society is the representative organisation of solicitors of the Supreme Court¹; and the Council of the Law Society makes rules regulating in certain respects the professional practice, conduct and discipline of solicitors².

1 As to the Law Society see LEGAL PROFESSIONS vol 65 (2008) PARA 603 et seq.

2 As to the practice rules see LEGAL PROFESSIONS vol 66 (2009) PARA 828 et seq.

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413. Legal executives.

The Institute of Legal Executives ('ILEX') is the professional body that represents legal executives¹. Persons enrolling as members of the Institute become bound by its memorandum and articles of association and must, therefore, support the aims and objectives of the Institute and uphold the standards of professional practice prescribed in its code of conduct². Members guilty of unbecoming conduct or wilfully committing a breach of the Institute's articles of association or of the byelaws of the Council of the Institute may be suspended or excluded from membership or may be reprimanded or admonished³; and disciplinary proceedings against members of the Institute are heard by the Disciplinary Tribunal⁴.

1 As to the Institute of Legal Executives see LEGAL PROFESSIONS vol 66 (2009) PARA 1463 et seq.

2 As to membership of the Institute see LEGAL PROFESSIONS vol 66 (2009) PARA 1468.

3 As to members' misconduct see LEGAL PROFESSIONS vol 66 (2009) PARAS 1468, 1471 et seq.

4 As to the Disciplinary Tribunal and disciplinary proceedings see LEGAL PROFESSIONS vol 66 (2009) PARA 1472 et seq.

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414. Licensed conveyancers.

The Council for Licensed Conveyancers ('the Council') is the body responsible for ensuring that the standards of competence and professional conduct among persons who practise as licensed conveyancers are sufficient to secure adequate protection for consumers, and that the conveyancing services provided by such persons are provided both economically and efficiently¹.

The Council makes rules for regulating the professional practice, conduct and discipline of licensed conveyancers². The preliminary investigation of disciplinary matters is carried out by the Investigating Committee³; and the Discipline and Appeals Committee hears and determines cases referred to it by the Investigating Committee⁴.

- 1 As to the Council for Licensed Conveyancers see LEGAL PROFESSIONS vol 66 (2009) PARA 1320 et seq.
- 2 As to the code of conduct of licensed conveyancers see LEGAL PROFESSIONS vol 66 (2009) PARA 1342 et seq.
- 3 As to preliminary investigation of disciplinary matters see LEGAL PROFESSIONS vol 66 (2009) PARAS 1359-1361.
- 4 As to the Discipline and Appeals Committee see LEGAL PROFESSIONS vol 66 (2009) PARA 1362 et seq.

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415. Notaries public.

All faculties appointing notaries public to practise are issued by the Archbishop of Canterbury, through his Court of Faculties, the chief officer of which, known as the Master of the Faculties, exercises jurisdiction over notaries public after their appointment¹.

The Master of the Faculties may make provision by rules relating to (inter alia):

- 523 (1) practice, conduct and discipline;
- 524 (2) the handling of clients' money;
- 525 (3) indemnification against losses arising from claims in respect of civil liability incurred by notaries public;
- 526 (4) compensation payable for losses suffered by persons in respect of dishonesty on the part of notaries public or their employees².

The Master of the Faculties may admonish a notary, requiring an undertaking to remedy or not to engage further in the misconduct, suspend the notary from practice or strike a notary off the roll of notaries for misconduct as a notary or for other good cause³.

A public notary may practise as a notary in, or within three miles of, the City of London whether or not he is a member of the Incorporated Company of Scriveners of London, even if he is admitted to practise only outside that area⁴.

- 1 As to the Court of Faculties and the Master of the Faculties see LEGAL PROFESSIONS vol 66 (2009) PARA 1413.
- 2 As to the supervision of notaries public see LEGAL PROFESSIONS vol 66 (2009) PARA 1437.
- 3 As to striking a notary off the roll and other disciplinary measures see LEGAL PROFESSIONS vol 66 (2009) PARA 1453.
- 4 See the Access to Justice Act 1999 s 53; and LEGAL PROFESSIONS vol 66 (2009) PARA 1416.

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416. Legal Services Complaints Commissioner.

The Secretary of State for Constitutional Affairs may appoint a person as Legal Services Complaints Commissioner ('the Commissioner')¹; but the Commissioner must not be an authorised advocate, authorised litigator, licensed conveyancer or authorised practitioner or a notary².

If it appears to the Secretary of State that complaints about members of any professional body are not being handled effectively and efficiently, he may by direction require the Commissioner to consider exercising, in relation to the body, such of the following powers as are specified in the direction:

- 527 (1) to require a professional body to provide information, or make reports, to the Commissioner about the handling of complaints about its members;
- 528 (2) to investigate the handling of complaints about the members of a professional body;
- 529 (3) to make recommendations in relation to the handling of complaints about the members of a professional body;
- 530 (4) to set targets in relation to the handling of complaints about the members of a professional body; and
- 531 (5) to require a professional body to submit to the Commissioner a plan for the handling of complaints about its members³.

Where the Commissioner requires a professional body to submit to him a plan for the handling of complaints about its members but the body fails to submit to him a plan which he considers adequate for securing that such complaints are handled effectively and efficiently or submits to him such a plan but fails to handle complaints in accordance with it, he may require the body to pay a penalty⁴; but, before so requiring a professional body to pay a penalty, the Commissioner must afford it a reasonable opportunity of appearing before him to make representations⁵. In determining the amount of any penalty which a professional body is to be so required to pay, the Commissioner must have regard to all the circumstances of the case, including, in particular:

- 532 (a) the total number of complaints about members of the body and, where the penalty is imposed in respect of a failure to handle complaints in accordance with a plan, the number of complaints not so handled; and
- 533 (b) the assets of the body and the number of its members⁶.

Such a penalty must be paid to the Commissioner who must pay it to the Secretary of State⁷.

1 See the Access to Justice Act 1999 s 51(1) (amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, art 9, Sch 2 para 11(1)(e)); and LEGAL PROFESSIONS vol 65 (2008) PARAS 423, 435 et seq. As to the appointment, functions and remuneration of the Legal Services Complaints Commissioner see the Access to Justice Act 1999 s 51(2), (3), (5), Sch 8 (Sch 8 amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, Sch 2 para 11(1)(f)); and LEGAL PROFESSIONS vol 65 (2008) PARA 435 et seq. Where a direction under the Access to Justice Act 1999 s 51(1) (as amended) in relation to a professional body has been given, and not revoked, the Courts and Legal Services Act 1990 s 24(1) (power of the Legal Services Ombudsman to make recommendations about arrangements for the investigation of complaints: see LEGAL PROFESSIONS vol 65 (2008) PARA 433) does not have effect in relation to the body: see the Access to Justice Act 1999 s 52(8); and LEGAL PROFESSIONS vol 65 (2008) PARA 436. For these purposes, 'professional body' has the same meaning as in the Courts and Legal Services Act 1990 s 22 (as amended) (see LEGAL PROFESSIONS vol 65 (2008) PARA 425): Access to Justice Act 1999 s 52(10).

2 See *ibid* s 51(4); note 1 *supra*; and LEGAL PROFESSIONS vol 65 (2008) PARA 435.

3 See *ibid* s 52(1), (2) (s 52(1) amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, Sch 2 para 11(1)(e)); note 1 *supra*; and LEGAL PROFESSIONS vol 65 (2008) PARA 436.

4 See the Access to Justice Act 1999 s 52(3); note 1 *supra*; and LEGAL PROFESSIONS vol 65 (2008) PARA 437. The Secretary of State must by order made by statutory instrument specify the maximum amount of any such penalty: see s 52(5) (amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, Sch 2 para 11(1)(e)); and LEGAL PROFESSIONS vol 65 (2008) PARA 437. For the maximum amount of such penalty see the Legal Services Complaints Commissioner (Maximum Penalty) Order 2004, SI 2004/2758.

5 See the Access to Justice Act 1999 s 52(4); note 1 *supra*; and LEGAL PROFESSIONS vol 65 (2008) PARA 437.

6 See *ibid* s 52(6); note 1 *supra*; and LEGAL PROFESSIONS vol 65 (2008) PARA 437.

7 See *ibid* s 52(7) (amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, Sch 2 para 11(1)(e)); note 1 *supra*; and LEGAL PROFESSIONS vol 65 (2008) PARA 437.

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K. MEDICINES AND DRUGS

417. Medicines Commission.

A body known as the Medicines Commission ('the Commission') has been established to perform the statutory functions assigned to it¹.

Where either the Commission considers it expedient, or it is requested to do so, the Commission must give to any one or more of the Ministers advice on matters relating to the execution of or the exercise of any power conferred by the Medicines Act 1968 or otherwise relating to medicinal products².

1 See the Medicines Act 1968 s 2 (as amended; prospectively repealed); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 13. As from 30 October 2005, the Medicines Commission is abolished, and a new body called the Commission on Human Medicines is established in its place: see the Medicines (Advisory Bodies) Regulations 2005, SI 2005/1094.

2 See the Medicines Act 1968 s 3(1) (prospectively substituted); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 14.

UPDATE

417 Medicines Commission

NOTE 2--1986 s 3(1) amended: Veterinary Medicines Regulations 2006, SI 2006/2407.

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418. British Pharmacopoeia Commission.

The British Pharmacopoeia Commission¹ ('the Commission') must, at such time as may be determined, prepare or cause to be prepared a new edition of the British Pharmacopoeia containing such relevant information as may be determined relating to substances and articles, whether medicinal products or not, which are or may be used in the practice of medicine (other than veterinary medicine), surgery (other than veterinary surgery), dentistry or midwifery, and substances and articles used in the manufacture of such substances or articles². The Commission may also, at any such time as may be determined, prepare or cause to be prepared a compendium other than the British Pharmacopoeia containing such relevant information relating to such substances or articles or any class of them as may be determined, or a new edition of any such compendium³.

Whenever it is directed by the Medicines Commission⁴, the Commission must prepare or cause to be prepared a list of names suitable to be used as the names of the specified substances or articles and to be placed at the head of monographs relating to those substances or articles in any edition of the British Pharmacopoeia or any other compendium or edition of a compendium prepared by the Commission⁵.

1 The British Pharmacopoeia Commission was established under the Medicines Act 1968 s 4: see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 15. As to the establishment of the Commission see the Medicine (British Pharmacopoeia Commission) Order 1970, SI 1970/1256 (amended by SI 1982/1335); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 149.

2 See the Medicines Act 1968 s 99(1), (2); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 149.

3 See *ibid* s 99(3)(a); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 149.

4 As to the Medicines Commission, which as from 30 October 2005 is replaced by the Commission on Human Medicines, see PARA 417 ante.

5 See the Medicines Act 1968 s 100(1); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 150.

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419. Committee on Safety of Medicines.

A committee known as the Committee on Safety of Medicines has been established for the purpose of:

- 534 (1) giving advice with respect to safety, quality and efficacy, in relation to human use, of any substance or article, not being an instrument, apparatus or appliance, to which any provision of the Medicines Act 1968 is applicable; and
- 535 (2) promoting the collection and investigation of information relating to adverse reactions, for the purpose of enabling such advice to be given¹.

¹ Medicines (Committee on Safety of Medicines) Order 1970, SI 1970/1257, art 3 (prospectively revoked by SI 2005/1094). As from 30 October 2005, the Medicines (Committee on Safety of Medicines) Order 1970, SI 1970/1257, is revoked and a new Commission on Human Medicines is established replacing the Medicines Commission and the Committee on Safety of Medicines: see the Medicines (Advisory Bodies) Regulations 2005, SI 2005/1094; para 417; and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 13 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/L. NATIONAL HEALTH SERVICE/420. Independent Regulator of NHS Foundation Trusts.

L. NATIONAL HEALTH SERVICE

420. Independent Regulator of NHS Foundation Trusts.

A body corporate known as the Independent Regulator of NHS Foundation Trusts ('the regulator') has been established¹. An NHS foundation trust is a public benefit corporation which is authorised² to provide goods and services for the purposes of the health service in England³. The regulator must exercise its functions in a manner that is consistent with the performance by the Secretary of State of the duties⁴ as to health service and services generally and as to university clinical teaching and research⁵.

The regulator consists of a number of members (but not more than five) appointed by the Secretary of State⁶ and may, after consulting the Minister for the Civil Service as to numbers and terms and conditions of service, employ such staff as the regulator may determine⁷. The regulator may regulate its own procedure and make any arrangements it considers appropriate for the discharge of its functions⁸. It must prepare and lay before Parliament reports in respect of each financial year on the exercise of its functions and providing an overall summary of the accounts of NHS foundation trusts, and send a copy of each to the Secretary of State⁹. The regulator must respond in writing to any recommendation which is made by a Committee of either House of Parliament, or a Committee of both Houses and relates to the exercise by the regulator of its functions¹⁰. The regulator must exercise its functions effectively, efficiently and economically¹¹. It is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown¹².

If the regulator is satisfied that an NHS foundation trust is contravening, or failing to comply with, any term of its authorisation or any requirement imposed on it under any enactment, or that an NHS foundation trust has contravened, or failed to comply with, any such term or requirement and is likely to do so again, and that the contravention or failure is or was significant, the regulator may by notice require the trust to take specified action or remove any or all of the directors or members of the board of governors and appoint interim directors or governors¹³.

¹ See the Health and Social Care (Community Health and Standards) Act 2003 s 2(1); and HEALTH SERVICES vol 54 (2008) PARA 188. As to membership, staff, procedure and powers, etc of the regulator see s 2(2), Sch 2.

2 le under *ibid* Pt 1 (ss 1-40). An NHS trust may make an application to the regulator for authorisation to become an NHS foundation trust, if the application is supported by the Secretary of State (see s 4; and HEALTH SERVICES vol 54 (2008) PARA 193), and an application may be made to the regulator by persons (other than an NHS trust) to be incorporated as a public benefit corporation and authorised to become an NHS foundation trust, if the application is supported by the Secretary of State (see s 5; and HEALTH SERVICES vol 54 (2008) PARA 194). As to authorisation and the effect of authorisation see ss 6, 7; and HEALTH SERVICES vol 54 (2008) PARAS 195-196.

3 See *ibid* s 1(1); and HEALTH SERVICES vol 54 (2008) PARA 174. A public benefit corporation is a body corporate which, in pursuance of an application under Pt 1, is constituted in accordance with Sch 1: s 1(2).

4 le the duties under the National Health Service Act 1977 ss 1, 3, 51 (as amended); and HEALTH SERVICES vol 54 (2008) PARA 10 *et seq*.

5 See the Health and Social Care (Community Health and Standards) Act 2003 s 3; and HEALTH SERVICES vol 54 (2008) PARA 188.

6 See *ibid* Sch 2 para 1(1); and HEALTH SERVICES vol 54 (2008) PARA 188.

7 See *ibid* Sch 2 para 4; and HEALTH SERVICES vol 54 (2008) PARA 189.

8 See *ibid* Sch 2 para 6(1); and HEALTH SERVICES vol 54 (2008) PARA 190.

9 See *ibid* Sch 2 para 11; and HEALTH SERVICES vol 54 (2008) PARA 192.

10 See *ibid* Sch 2 para 13; and HEALTH SERVICES vol 54 (2008) PARA 192.

11 See *ibid* Sch 2 para 16(3); and HEALTH SERVICES vol 54 (2008) PARA 188.

12 See *ibid* Sch 2 para 16(1); and HEALTH SERVICES vol 54 (2008) PARA 188.

13 See *ibid* s 23; and HEALTH SERVICES vol 54 (2008) PARA 209. As to further powers of the regulator see ss 24, 25.

UPDATE

420 Independent Regulator of NHS Foundation Trusts

TEXT AND NOTES--For consolidation of health service enactments see National Health Service Act 2006, National Health Service (Wales) Act 2006 and National Health Service (Consequential Provisions) Act 2006; and HEALTH SERVICES.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/M. NATIONAL INSTITUTE FOR HEALTH AND CLINICAL EXCELLENCE/421. National Institute for Health and Clinical Excellence.

M. NATIONAL INSTITUTE FOR HEALTH AND CLINICAL EXCELLENCE

421. National Institute for Health and Clinical Excellence.

A Special Health Authority known as the National Institute for Clinical Excellence ('NICE') was set up in 1999 to promote clinical excellence and the effective use of available resources in the health service¹.

The National Institute for Health and Clinical Excellence (retaining the acronym NICE) was formed on 1 April 2005, when the National Institute for Clinical Excellence took on the functions of the Health Development Agency to create a single excellence-in-practice organisation

responsible for providing national guidance on the promotion of good health and the prevention and treatment of ill health².

The National Institute for Health and Clinical Excellence produces guidance in three areas of health:

- 536 (1) public health: guidance on the promotion of good health and the prevention of ill health for those working in the National Health Service, local authorities and the wider public and voluntary sector;
- 537 (2) health technologies: guidance on the use of new and existing medicines, treatments and procedures within the National Health Service;
- 538 (3) clinical practice: guidance on the appropriate treatment and care of people with specific diseases and conditions within the National Health Service.

The guidance is produced by three 'centres' within NICE: the Centre for Health Technology Evaluation, the Centre for Clinical Practice and the Centre for Public Health Excellence³.

1 See the National Institute for Clinical Excellence (Establishment and Constitution) Order 1999, SI 1999/220, arts 2, 3 (amended by SI 1999/2219); and the National Institute for Clinical Excellence Regulations 1999, SI 1999/260 (amended by SI 1999/2218; SI 2002/1759; SI 2004/696; SI 2005/498). See also HEALTH SERVICES vol 54 (2008) PARA 149.

2 See the Special Health Authorities Abolition Order 2005, SI 2005/502; and the National Institute for Clinical Excellence (Establishment and Constitution) Amendment Order 2005, SI 2005/497. See also Public Health White Paper *Choosing health: making healthier choices easier* (Cm 6374) (2004) which discusses the amalgamation of the National Institute for Clinical Excellence and the Health Development Agency.

3 See the National Institute for Clinical Excellence (Establishment and Constitution) Order 1999, SI 1999/220, art 3 (amended by SI 2005/497); and the National Institute for Health and Clinical Excellence Consultation Document *Operating Model for the Centre for Public Health Excellence* (March 2005).

UPDATE

421 National Institute for Health and Clinical Excellence

NOTE 1--SI 1999/260 further amended: SI 2005/2114, SI 2008/2250.

NOTE 2--SI 2005/502 amended: SI 2006/562.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/N. NATIONAL LOTTERY/422. National Lottery Commission.

N. NATIONAL LOTTERY

422. National Lottery Commission.

A body corporate known as the National Lottery Commission ('the Commission') has been established¹. The Commission may:

- 539 (1) by licence authorise a body corporate to run the National Lottery, but it must not grant such a licence unless it is satisfied that the applicant is a fit and proper body to run the National Lottery²;

- 540 (2) by licence authorise a body corporate to promote lotteries as part of the National Lottery, but it must not grant such a licence unless it is satisfied that the applicant is a fit and proper body to promote lotteries under the licence³.

The Secretary of State may by regulations make such provision in relation to the promotion of lotteries that form part of the National Lottery as he considers necessary or expedient; and such regulations may, in particular, impose requirements or restrictions as to:

- 541 (a) the minimum age of persons to whom or by whom tickets or chances may be sold;
 542 (b) the places, circumstances or manner in which tickets or chances may be sold or persons may be invited to buy them;
 543 (c) the information that must appear in an advertisement for a lottery;
 544 (d) the places, circumstances or manner in which signs relating to a lottery may be displayed⁴.

1 National Lottery Act 1993 s 3A(1) (added by the National Lottery Act 1998 s 1(3)). As to the appointment, staff and remuneration of the National Lottery Commission see LICENSING AND GAMBLING vol 67 (2008) PARA 7.

2 See *ibid* s 5(1), (4); and LICENSING AND GAMBLING vol 68 (2008) PARA 691.

3 See *ibid* s 6(1), (4); and LICENSING AND GAMBLING vol 68 (2008) PARA 692.

4 See *ibid* s 12(1), (2); the National Lottery Regulations 1994, SI 1994/189; and LICENSING AND GAMBLING vol 68 (2008) PARA 709.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/O. POST OFFICE/423. Consumer Council for Postal Services.

O. POST OFFICE

423. Consumer Council for Postal Services.

There is a body corporate known as the Consumer Council for Postal Services ('the Council')¹. The Council must establish a committee for Scotland, a committee for Wales and a committee for Northern Ireland, and must establish at least one committee in relation to England, whether a committee for England or a committee for an area within England². The purpose of such committees is the provision of advice and information to the Council about relevant postal issues affecting the areas for which they are established, and such other purposes as the Council may determine³. In exercising its functions, the Council must have regard to the interests of different users of relevant postal services (including, in particular, the interests of users in different areas)⁴.

The Council's duties include:

- 545 (1) to provide advice and information, represent the views of users of relevant postal services and make proposals about relevant postal issues⁵;
 546 (2) to make available to users of relevant postal services such information as it considers it expedient to give about relevant postal services, relevant postal issues and itself and its functions⁶;
 547 (3) to investigate complaints relating to the provision of relevant postal services referred to it⁷ and other matters⁸.

The Council has power to require the provision of information reasonably required in the exercise of its functions⁹. It must provide information to the Postal Services Commission when required to do so and must make an annual report on its activities during the year¹⁰.

1 Postal Services Act 2000 s 2(1). The Council is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown: s 2(2). As to the constitution of the Consumer Council for Postal Services see s 2(3), Sch 2; and POST OFFICE.

2 See *ibid* s 54(4); and POST OFFICE.

3 See *ibid* s 54(5); and POST OFFICE.

4 See *ibid* s 54; and POST OFFICE.

5 See *ibid* s 52; and POST OFFICE.

6 See *ibid* s 53 and POST OFFICE.

7 See *ibid* s 56; and POST OFFICE.

8 See *ibid* s 57; and POST OFFICE.

9 See *ibid* s 58; and POST OFFICE.

10 See *ibid* s 55; and POST OFFICE.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/P. PRIVATISED UTILITIES/424. The electricity and gas industries.

P. PRIVATISED UTILITIES

424. The electricity and gas industries.

A body corporate known as the Gas and Electricity Markets Authority has been established for the purpose of carrying out functions in relation to the supply of gas and electricity¹. There is also established a Gas and Electricity Consumer Council². The Authority and the Council must make arrangements with a view to securing co-operation and the exchange of information between them and consistent treatment of matters which affect both of them, and must prepare a memorandum setting them out and send a copy to the Secretary of State and keep such arrangements under review³.

The principal objective of the Secretary of State and the Authority is to protect the interests of consumers in relation to gas conveyed through pipes, and in relation to electricity conveyed by distribution systems, whenever appropriate by promoting effective competition⁴. They must carry out their functions in the manner which they consider is best calculated to further the principal objective, having regard to:

- 548 (1) the need to secure that, so far as it is economical to meet them, all reasonable demands in Great Britain for gas conveyed through pipes are met, and that all reasonable demands for electricity are met; and

- 549 (2) the need to secure that licence holders are able to finance the carrying on of their activities which are subject to statutory obligations⁵.

In performing their duties, the Secretary of State and the Authority must each have regard to the interests of individuals who are disabled or chronically sick, individuals of pensionable age, individuals with low incomes and individuals residing in rural areas, but that is not to be taken as implying that regard may not be had to the interests of other descriptions of consumer⁶. Each may have regard in carrying out his or its functions to the interests of consumers in relation to electricity conveyed by distribution systems or gas conveyed through pipes, and to any interests of consumers in relation to telecommunication services and telecommunication apparatus and water services or sewerage services which are affected by the carrying out of that function⁷.

The Secretary of State and the Authority must each carry out their functions in the manner in which he or it considers is best calculated:

- 550 (a) to promote efficiency and economy on the part of persons authorised by licences or exemptions to carry on any activity or to transmit, distribute or supply electricity, and the efficient use of gas conveyed through pipes or electricity conveyed by distribution systems;
- 551 (b) to protect the public from dangers arising from the conveyance of gas through pipes or from the use of any gas conveyed through pipes, or from the generation, transmission, distribution or supply of electricity; and
- 552 (c) to secure a diverse and viable long-term energy supply,

and must, in carrying out those functions, have regard to the effect on the environment of activities connected with the conveyance of gas through pipes or with the generation, transmission, distribution or supply of electricity⁸.

The Authority may from time to time direct that the maximum prices at which gas or electricity supplied by authorised suppliers may be resold is to be such as may be specified in the direction and is to be calculated by such method and by reference to such matters as may be so specified, and must publish such directions in such manner as in its opinion will secure adequate publicity for them⁹.

The Secretary of State may by regulations make provision for disputes between a gas supplier or an electricity supplier and a customer concerning the amount of the charge which the supplier is entitled to recover from the customer in connection with the provision of gas or electricity supply services ('billing disputes') to be referred to the Authority for determination in accordance with the regulations¹⁰.

Licence holders must comply with the gas code¹¹, and electricity suppliers must comply with the electricity code¹².

The Authority may with the consent of the Secretary of State, make regulations prescribing such standards of performance in connection with the activities of gas or electricity suppliers, or gas transporters or electricity distributors, so far as affecting customers or potential customers of the suppliers, as in the Authority's opinion ought to be achieved in individual cases¹³. If a gas supplier or an electricity supplier fails to meet a prescribed standard, he must make to any customer or potential customer (in the case of gas supplies) or person (in the case of electricity supplies) who is affected by the failure and is of a prescribed description such compensation as may be determined by or under the regulations¹⁴. The Authority may also from time to time determine such standards of overall performance in connection with the provision of gas supply services or electricity supply services as, in its opinion, ought to be achieved by them and arrange for the publication, in such form and in such manner as it considers appropriate, of the standards so determined; and different standards may be so determined for different gas or electricity suppliers if the Authority is of the opinion that the differences are such that no gas or electricity supplier would be unduly disadvantaged in competing with other gas or electricity suppliers¹⁵. The Authority may from time to time

determine such standards of overall performance as, in its opinion, ought to be achieved by gas transporters or electricity distributors, and arrange for publication of the standards so determined¹⁶.

The Authority must from time to time collect information with respect to (inter alia) levels of overall performance¹⁷. The Authority may make regulations requiring information about the standards of overall performance and the levels of performance achieved as respects those standards to be given by gas suppliers or gas transporters or electricity suppliers or electricity distributors to customers or potential customers of the suppliers¹⁸. The Authority is also required to publish statistical information about standards of performance¹⁹.

In considering the interests of consumers, the Gas and Electricity Consumer Council must have regard to the interests of individuals who are disabled or chronically sick, individuals of pensionable age, individuals with low incomes and individuals residing in rural areas, but that is not to be taken as implying that regard may not be had to the interests of other descriptions of consumer²⁰.

The Council has the function of obtaining and keeping under review information about consumer matters, including matters affecting consumers in different areas of Great Britain, and information about the views of consumers on such matters, including the views of consumers in different areas²¹. As part of the arrangements it makes for carrying out that function, the Council must establish one or more committees of the Council for, or for areas within, Wales and Scotland; and may establish one or more committees of the Council for, or for areas within, England²². The purposes of such a committee (referred to as a 'regional committee') is the provision of advice and information to the Council on consumer matters affecting the area for which the committee is established and such other purposes as the Council may determine²³. The Council must maintain in each of England, Wales and Scotland at least one office at which consumers may apply for information²⁴.

The Council has the function of making proposals, or providing advice and information, about consumer matters (including matters affecting consumers in different areas), and representing the views of consumers on such matters (including the views of consumers in different areas), to public authorities, persons authorised by a licence or exemption under the Gas Act 1986 or the Electricity Act 1989 and other persons whose activities may affect the interests of consumers²⁵.

The Council has the function of providing information about consumer matters, in such form as appears to the Council to be most useful to the recipients, to consumers of electricity or gas supplied by persons authorised to do so by a licence or exemption²⁶. That function may be exercised by publishing information in any manner the Council thinks appropriate for the purpose of bringing it to the attention of those likely to be interested or furnishing information to any consumer (whether in response to a request or otherwise)²⁷. Information may only be disclosed in the exercise of that function if it is information that is available to the public from some other source²⁸.

If it appears to the Council that the publication of any advice and information about consumer matters (including information about the views of consumers on such matters) would promote the interests of consumers, the Council may publish that advice or information in such manner as it thinks fit²⁹.

The Council has the duty to investigate consumer complaints referred to it by customers or potential customers of authorised suppliers³⁰ and to investigate other matters which appear to it to be matters relating to the interests of consumers in relation to gas conveyed through pipes or electricity conveyed by distribution systems³¹.

The Council may direct the Authority or the holder of a gas licence or an electricity licence to supply to it, in such form as it may reasonably specify, such information specified or described in the direction as it may require for the purpose of exercising its functions³². A person to whom

such a direction is given must comply with it as soon as is reasonably practicable³³. Before giving such a direction and in specifying the form in which any information is to be supplied, the Council must have regard to the desirability of minimising the costs, or any other detriment, to the Authority or licence holder³⁴.

- 1 See the Utilities Act 2000 s 1(1); and FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 708 et seq. The Authority exercises functions transferred to it from the Director General of Electricity Supply and the Director General of Gas Supply, and other functions under the Act. As to membership and functions of the authority see s 1(4), Sch 1.
- 2 See *ibid* s 2(1). As to membership of the Council see s 2(4), Sch 2. As to its functions see Pt III (ss 17-27).
- 3 See *ibid* s 7.
- 4 See the Gas Act 1986 s 4AA(1) (as added); the Electricity Act 1989 s 3A(1) (as added); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 789.
- 5 See the Gas Act 1986 s 4AA(2) (as added); the Electricity Act 1989 s 3A(2) (as added); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 789.
- 6 See the Gas Act 1986 s 4AA(3) (as added); the Electricity Act 1989 s 3A(3) (as added); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 789.
- 7 See the Gas Act 1986 s 4AA(4) (as added); the Electricity Act 1989 s 3A(4) (as added); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 789.
- 8 See the Gas Act 1986 s 4AA(5) (as added); the Electricity Act 1989 s 3A(5) (as added); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 789.
- 9 See the Gas Act 1986 s 37 (as substituted and amended); the Electricity Act 1989 s 44 (as substituted); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 797, 1142.
- 10 See the Gas Act 1986 s 15A (as added from a day to be appointed; and amended); the Electricity Act 1989 s 44A (as added from a day to be appointed; and amended); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 872, 1144.
- 11 See the Gas Act 1986 s 8B (as added and amended). As to the gas code see s 8B, Sch 2B (as added and amended); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 856 et seq.
- 12 See the Electricity Act 1989 s 24 (as amended). As to the electricity code see the Electricity Act 1989 s 24, Sch 6 (as substituted); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1101 et seq.
- 13 See the Gas Act 1986 ss 33A(1), (2) (as added and substituted), 33AA(1), (2) (as added); the Electricity Act 1989 ss 39(1) (as substituted), 39A(1) (as added); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 874, 875, 1110, 1111. As to the subject matter of such regulations see the Gas Act 1986 s 33A(3) (as added and amended); and the Electricity Act 1986 ss 39(2) (as amended), 39A(3).
- 14 See the Gas Act 1986 s 33A(4) (as added and amended); the Electricity Act 1989 s 39(3) (as amended); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 874, 1110.
- 15 See the Gas Act 1986 s 33B(4) (as added and amended); the Electricity Act 1989 s 40 (as amended); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 892, 1134.
- 16 See the Gas Act 1986 s 33BA (as added); the Electricity Act 1989 s 40A (as added); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 893, 1135.
- 17 See the Gas Act 1986 s 33C (as added); the Electricity Act 1989 s 42 (as amended); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 896, 1138.
- 18 See the Gas Act 1986 s 33D (as added); the Electricity Act 1989 s 42A (as added and amended); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 894, 1136.
- 19 See the Gas Act 1986 s 33DA (as added); the Electricity Act 1989 s 42AA (as added); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 897, 1139.
- 20 Utilities Act 2000 s 17(2).

21 Ibid s 18(1).

22 Ibid s 18(2).

23 Ibid s 18(3).

24 Ibid s 18(4).

25 Ibid s 19(1). As to the disclosure of information which relates to the affairs of any particular individual or body of persons (corporate or unincorporate) obtained in the exercise of the Council's function under s 19 see s 19(2)-(5); and FUEL AND ENERGY vol 19(1) (2007 Reissue) PARAS 724.

26 Ibid s 20(1).

27 Ibid s 20(2).

28 Ibid s 20(3).

29 Ibid s 21(1). As to the disclosure of information which relates to the affairs of any particular individual or body of persons (corporate or unincorporate) obtained in the exercise of the Council's function under s 21 see s 21(2)-(4); and FUEL AND ENERGY vol 19(1) (2007 Reissue) PARAS 726.

30 See the Gas Act 1986 s 32 (as substituted); the Electricity Act 1989 s 46 (as substituted); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 966, 1145.

31 See the Gas Act 1986 s 33 (as substituted); the Electricity Act 1989 s 46A (as added); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 967, 1146.

32 Utilities Act 2000 s 24(1).

33 Ibid s 24(2). If the Authority fails to comply with a direction under s 24 it must, if so required by the Council, give notice to the Council of the reasons for its failure: s 24(4). The Council may publish a notice given to it under s 24(4): s 25(1). As to the exclusion of information which relates to the affairs of any particular individual or body of persons (corporate or unincorporate) from such notice see s 25(2)-(4); and FUEL AND ENERGY vol 19(1) (2007 Reissue) PARAS 727.

34 Ibid s 24(3).

UPDATE

424 The electricity and gas industries

TEXT AND NOTES 20-34--Repealed: Consumers, Estate Agents and Redress Act 2007 Sch 8.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/P. PRIVATISED UTILITIES/425. The railways industry.

425. The railways industry.

A body corporate known as the Office of Rail Regulation has been established¹.

The Office of Rail Regulation has a duty to exercise the statutory functions assigned or transferred to it in the manner which it considers best calculated (inter alia):

553 (1) to protect the interests of users of railway services;

- 554 (2) to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable;
 - 555 (3) to contribute to the development of an integrated system of transport of passengers and goods;
 - 556 (4) to contribute to the achievement of sustainable development;
 - 557 (5) to promote efficiency and economy on the part of persons providing railway services;
 - 558 (6) to promote competition in the provision of railway services for the benefit of users of railway services;
 - 559 (7) to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;
 - 560 (8) to impose on the operators of railway services the minimum restrictions which are consistent with the performance of its statutory functions;
 - 561 (9) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance;
 - 562 (10) to protect:
- 27
- 31. (a) the interests of users and potential users of services for the carriage of passengers by railway provided by a private sector operator otherwise than under a franchise agreement in respect of the prices charged for travel by means of those services and the quality of the service provided; and
 - 32. (b) the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector operator, in respect of the prices charged for such use and the quality of the service provided; and
- 28
- 563 (11) to take into account the need to protect all persons from dangers arising from the operation of railways and to have regard to the effect on the environment of activities concerned with the provision of railway services².

A code of practice for protecting the interests of users of railway passenger services or station services who are disabled must be prepared and from time to time revised, and it must be published and its adoption and implementation must be promoted³.

There must be established a number of committees, not exceeding nine at any one time, known as Rail Passengers' Committees⁴; and it is their duty to investigate any matter which relates to the provision of railway passenger services and the provision of station services⁵. In addition to the Rail Passengers' Committees so established, the London Transport Users' Committee is treated as the Rail Passengers' Committee for the Greater London area for most purposes⁶.

There is a council known as the Rail Passengers' Council⁷; and its duty is to investigate any matter which relates to the provision of railway passenger services and the provision of station services⁸.

The Office of Rail Regulation may, subject to certain conditions, apply for an injunction, including an interim injunction, against any person appearing to it to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers⁹.

1 See the Railways and Transport Safety Act 2003 s 15(1); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 47. The office of Rail Regulator has been abolished and the functions of the Rail Regulator have been transferred to the Office of Rail Regulation: see s 16; and RAILWAYS, INLAND WATERWAYS

AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 47. For detailed provision relating to the Office of Rail Regulation including membership, staff and financial arrangements see s 15(2), Sch 1.

2 See the Railways Act 1993 s 4(1)-(3) (as amended); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 33.

3 See *ibid* s 71B (as added and amended); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 38.

4 See *ibid* s 2(2) (as amended); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 48. As from a day to be appointed, the Rail Passengers' Committees are to be replaced by the Rail Passengers' Council: see the Railways Act 2005 s 21 (not yet in force).

5 See the Railways Act 1993 s 77 (as amended; prospectively repealed). See note 4 *supra*.

6 See *ibid* s 2(4) (as amended; prospectively repealed). See note 4 *supra*.

7 See *ibid* s 3(2) (as amended; prospectively repealed); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 48. See note 4 *supra*.

8 See *ibid* s 76 (as amended); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARAS 72, 73.

9 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12(1), (2) (amended by virtue of the Enterprise Act 2002 s 2); and PARA 460 *post*.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/P. PRIVATISED UTILITIES/426. The telecommunications industry.

426. The telecommunications industry.

The regulation of the telecommunications industry, formerly the responsibility of the Director General of Telecommunications, is now a function of the Office of Communications ('OFCOM')¹. A person intending to provide a designated electronic communications network, or provide a designated electronic communications service or make available a designated associated facility must, before beginning to provide it or to make it available, give a notification to OFCOM of his intention to provide that network or service, or to make that facility available². OFCOM has power to set conditions of entitlement to provide a network or service, and to enforce any such conditions³. It has a duty to intervene on network access issues⁴; and power to regulate premium rate services, to approve a code for regulating the provision and contents of premium rate services and to make an order in the absence of such a code⁵. OFCOM has powers in relation to the persistent misuse of an electronic communications network or electronic communications services⁶, and in relation to requiring the provision of information for the purpose of carrying out its functions⁷.

The Independent Committee for the Supervision of Standards of Telephone Information Services ('ICSTIS') is a non-profit making organisation which regulates the advertising and content of premium rate services⁸.

1 As to OFCOM see PARA 403 *ante*.

2 See the Communications Act 2003 s 33(1); and TELECOMMUNICATIONS vol 97 (2010) PARA 92.

3 See *ibid* ss 45, 46, 96-104; and TELECOMMUNICATIONS vol 97 (2010) PARA 98 *et seq*.

4 See *ibid* s 105; and TELECOMMUNICATIONS vol 97 (2010) PARA 127.

5 See *ibid* ss 120-122; and TELECOMMUNICATIONS vol 97 (2010) PARAS 128-130.

6 See *ibid* ss 128-130; and TELECOMMUNICATIONS vol 97 (2010) PARA 131 et seq.

7 See *ibid* ss 135-144; and TELECOMMUNICATIONS vol 97 (2010) PARA 135 et seq.

8 The Independent Committee for the Supervision of Standards of Telephone Information Services may be contacted at 1st Floor, Clove Building, 4 Maguire Street, London SE1 2NQ.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/P. PRIVATISED UTILITIES/427. The water industry.

427. The water industry.

The Secretary of State must appoint an officer to be known as the Director General of Water Services ('the Director') for the purpose of performing the statutory functions assigned to him¹.

The Secretary of State must exercise and perform the powers and duties conferred or imposed on him by virtue of the statutory provisions relating to the regulation of relevant undertakers, and the Director must exercise and perform the powers and duties imposed on him by virtue of any of those provisions, by the provisions relating to the financial conditions of requisitions or by the provisions relating to the movement of certain pipes, in the manner which he considers is best calculated:

- 564 (1) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;
- 565 (2) to secure that companies holding appointments as relevant undertakers are able, in particular by securing reasonable returns on their capital, to finance the proper carrying out of the functions of such undertakers;
- 566 (3) to ensure that the interests of every person who is a customer or potential customer of a company which has been or may be appointed to be a relevant undertaker are protected as respects the fixing and recovery by that company of water and drainage charges and, in particular, that the interests of customers and potential customers in rural areas are so protected and that no undue preference is shown, and that there is no undue discrimination in the fixing of charges;
- 567 (4) to ensure that the interests of every such person are also protected as respects the other terms on which any services are provided by that company in the course of the carrying out of the functions of a relevant undertaker and as respects the quality of those services;
- 568 (5) to ensure that the interests of every such person are also protected as respects any activities of that company which are not attributable to the exercise of functions of a relevant undertaker, or as respects any activities of any person appearing to the Secretary of State or, as the case may be, the Director to be connected with that company, and, in particular, by ensuring that transactions are carried out at arm's length and that that company, in relation to the exercise of its functions as a relevant undertaker, maintains and presents accounts in a suitable form and manner;
- 569 (6) to ensure that the interests of every such person are further protected as respects benefits that could be secured for them by the application in a particular manner of any of the proceeds of any disposal of any of that company's protected land and of any interest or right in or over any of that land;
- 570 (7) to promote economy and efficiency on the part of any such company in the carrying out of the functions of a relevant undertaker; and

571 (8) to facilitate effective competition, with respect to such matters as he considers appropriate, between persons holding or seeking appointments as relevant undertakers².

In performing his duty under heads (3) to (8) above, so far as he is required to do anything in the manner which he considers is best calculated to ensure that the interests of the customers and potential customers of any company are protected as respects the quality of any services provided by that company in the course of the carrying out of the functions of a relevant undertaker, the Secretary of State or, as the case may be, the Director, must take into account, in particular, the interests of those who are disabled or of pensionable age³.

Every company holding an appointment as a relevant undertaker must be allocated by the Director to a customer service committee established and maintained by him for the purpose, in relation to the companies allocated to it, of carrying out the statutory functions of such a committee and such other functions as the committees so maintained may be required to carry out by the Director⁴.

The Director may, subject to certain conditions, apply for an injunction, including an interim injunction, against any person appearing to him to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers⁵.

1 Water Industry Act 1991 s 1(1), (2). As to the appointment, staff and remuneration of the Director General of Water Services see WATER AND WATERWAYS vol 100 (2009) PARAS 13, 109 et seq; and as to the functions assigned to him see WATER AND WATERWAYS vol 100 (2009) PARAS 13, 109 et seq. The office of the Director is known as OFWAT. As from a day to be appointed, the office of Director General of Water Services is abolished: see the Water Services Act 2003 s 34(3) (not yet in force). A body corporate to be known as the Water Services Regulation Authority is to be established for the purpose of carrying out the functions conferred on or transferred to it by the Water Industry Act 1991 or under or by virtue of any other enactment: s 1A(1) (added, as from a day to be appointed, by the Water Services Act 2003 s 34(1)). As to the Authority see further the Water Industry Act 1991 s 34(3), Sch 1A (added, as from a day to be appointed, by the Water Services Act 2003 s 34(1), (2)).

2 See the Water Industry Act 1991 s 2 (as amended); and WATER AND WATERWAYS vol 100 (2009) PARA 130.

3 Ibid s 2(4).

4 Ibid s 28(1), (2). As to the constitution and duties of customer service committees see WATER AND WATERWAYS vol 100 (2009) PARA 142.

5 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12(1), (2) (amended by virtue of the Enterprise Act 2002 s 2); and PARA 460 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/Q. TAX MATTERS/428. Complaints by taxpayers.

Q. TAX MATTERS

428. Complaints by taxpayers.

If a taxpayer has a complaint¹, he should in the first instance give the staff at the relevant office an opportunity to settle the complaint; but, if the complaint is not settled at this stage, the taxpayer should then contact the Director responsible for that office². If the complaint is still not settled to the taxpayer's satisfaction, he may ask the Adjudicator's Office to look into the matter³. A complaint should be made to the Adjudicator's Office as soon as possible after the taxpayer has been unable to settle the complaint with the Commissioners; and the Adjudicator

will not normally investigate a complaint if more than six months have elapsed since the Director responsible for the taxpayer's affairs has provided an answer with which the taxpayer is not satisfied.

The Adjudicator will not deal with the following types of complaint:

- 572 (1) appeals on matters of law relating to the taxpayer's tax liability, which should be referred to the General Commissioners or the Special Commissioners, as the case may be;
- 573 (2) appeals about the award of tax credits, which are considered by appeal tribunals;
- 574 (3) complaints about government or departmental policy;
- 575 (4) issues that the courts have already considered or could have considered; and
- 576 (5) complaints which have been investigated by the Parliamentary Commissioner for Administration⁴.

The Adjudicator will investigate the complaint and, where possible, attempt to put together an informal agreement. If this is not possible, the Adjudicator will make a formal recommendation to the Commissioners about how the complaint should be settled. This may include a recommendation to provide financial redress if the complainant has suffered financial loss as a result of maladministration.

1 Note that the Inland Revenue and Her Majesty's Customs and Excise have merged to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005. However, it seems that the complaints procedure is still differentiated.

2 See Inland Revenue Leaflet IR120 *You and the Inland Revenue*.

3 See Leaflet AO1 *How to Complain about the Inland Revenue and the Valuation Agency*. Complaints are to be made to The Adjudicator's Office, Haymarket House, 28 Haymarket, London SW1Y 4SP. The Adjudicator will investigate complaints about eg mistakes, delays, poor or misleading advice, behaviour of staff, the way in which the Inland Revenue has exercised its discretion (eg how it has dealt with a request for additional time to pay a tax bill) or the way in which the Inland Revenue has dealt with requests for information.

4 See PARA 431 post. The Parliamentary Commissioner for Administration may, however, be asked to look at complaints which the independent Adjudicator has investigated.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(iv) Regulatory Authorities/Q. TAX MATTERS/429. Complaints regarding customs and excise.

429. Complaints regarding customs and excise.

If a person has a complaint which the staff at the local customs and excise office or at the port or airport cannot resolve, he should contact the Regional Complaints Unit¹. If the Regional Complaints Unit does not then settle the complaint to that person's satisfaction, he should ask for it to be referred to the Regional or Business Head. If the person is still not satisfied, he may ask the Adjudicator's Office to look into the matter². A complaint should be made to the Adjudicator's Office as soon as possible; and the Adjudicator will not normally investigate a complaint if more than six months have elapsed since the final correspondence with a Regional or Business Head.

The Adjudicator will not deal with the following types of complaint:

- 577 (1) disputes where independent tribunals or the courts already exist for settling disagreements;
- 578 (2) decisions made by such tribunals or courts;
- 579 (3) complaints about government or departmental policy;
- 580 (4) issues that the courts have already considered or could have considered; and
- 581 (5) complaints which have been, or are being, investigated by the Parliamentary Commissioner for Administration³.

The Adjudicator will investigate the complaint and, where possible, attempt to settle complaints by mediation. If this is not possible, the Adjudicator will make a formal recommendation about how the complaint should be settled. This may include a recommendation to provide financial redress if the complainant has suffered financial loss as a result of maladministration.

1 See HM Customs and Excise Notice 1000 *Complaints and Putting Things Right: Our Code of Practice* (March 2002). Note that the Inland Revenue and Her Majesty's Customs and Excise have merged to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005. However, it seems that the complaints procedure is still differentiated.

2 See Leaflet AO2 *How to Complain about Customs and Excise*. Complaints are to be made to The Adjudicator's Office, Haymarket House, 28 Haymarket, London SW1Y 4SP. The Adjudicator will investigate complaints about eg mistakes, delays, poor or misleading advice, behaviour of staff, the way in which Customs and Excise has exercised its discretion (eg how it has dealt with a request for time to pay a VAT debt), the way in which Customs and Excise has searched the complainant or the complainant's property or the way in which Customs and Excise has dealt with requests for information.

3 See PARA 431 post. The Parliamentary Commissioner for Administration may, however, be asked to look at complaints which the Adjudicator's Office has investigated.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(v) Ombudsmen/430. In general.

(v) Ombudsmen

430. In general.

The concept of an officer appointed to investigate complaints by individuals against maladministration originated in Sweden in 1809, where an ombudsman is a legal representative of a group, appointed to handle its legal affairs and protect its interests. In the United Kingdom, the office of ombudsman was introduced in 1967 (although not under that name) with the creation of the office of Parliamentary Commissioner for Administration¹.

Subsequently, further offices have been created to investigate complaints in specific areas of administration, some using the term 'ombudsman' while others are known as 'commissioners'. Ombudsmen include the Parliamentary Commissioner for Administration², the Welsh Administration Ombudsman³, the Commissions for Local Administration⁴, the Health Service Commissioners⁵, the housing ombudsman⁶, the Legal Services Ombudsman⁷, the Financial Ombudsman Service⁸, the Pensions Ombudsman⁹, the Estate Agents Ombudsman¹⁰, and the Telecommunications Ombudsman¹¹.

1 See the Parliamentary Commissioner for Administration Act 1967; and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 41 et seq.

2 See PARA 431 post.

- 3 See PARA 432 post.
- 4 See PARA 433 post.
- 5 See PARA 434 post.
- 6 See PARA 435 post.
- 7 See PARA 436 post.
- 8 See PARA 437 post.
- 9 See PARA 439 post.
- 10 See PARA 440 post.
- 11 See PARA 441 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(v) Ombudsmen/431. Parliamentary Commissioner for Administration.

431. Parliamentary Commissioner for Administration.

The Parliamentary Commissioner for Administration may investigate, on reference being duly made to him, administrative actions taken by or on behalf of a government department or other specified authority, other than those which he is expressly precluded from investigating¹. An investigation may take place in any case where a written complaint has been made to a member of the House of Commons by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with administrative action and the complaint has been referred to the Parliamentary Commissioner, with the consent of the person who made it, by a member of the House of Commons with a request to conduct an investigation thereon². The Parliamentary Commissioner may not, however, conduct such an investigation in respect of any of the following matters:

- 582 (1) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative;
- 583 (2) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law;

but the Parliamentary Commissioner may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if satisfied that in the particular circumstances it is not reasonable to have expected him to resort or have resorted to it³.

1 See the Parliamentary Commissioner Act 1967 ss 4(1), 5(1), Schs 2, 3 (as amended); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 41 et seq. This role is carried out by the Parliamentary and Health Service Ombudsman.

2 Ibid s 5(1)(a), (b).

3 Ibid s 5(2).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(v) Ombudsmen/432. Welsh Administration Ombudsman.

432. Welsh Administration Ombudsman.

The Welsh Administration Ombudsman¹ ('the Ombudsman') may investigate any action² taken by or on behalf of a body subject to investigation by him³ if the action was taken in the exercise of administrative functions of that body⁴ and a written complaint is duly made to him by or on behalf of a person who claims to have sustained injustice in consequence of maladministration in connection with the action ('the person aggrieved')⁵.

A complaint may be made to the Ombudsman by any individual or body of persons, whether or not incorporated, except:

- 584 (1) the Assembly for Wales⁶;
- 585 (2) a local authority or other authority or body constituted for purposes of the public service or of local government;
- 586 (3) a body constituted for the purposes of carrying on under national ownership an industry or undertaking or part of an industry or undertaking; and
- 587 (4) any other authority or body whose members are appointed by Her Majesty, any Minister of the Crown or government department or the Assembly for Wales or whose revenues consist wholly or mainly of money provided by Parliament or the Assembly for Wales⁷.

A complaint is not to be entertained by the Ombudsman unless made by the person aggrieved himself⁸; but, where an individual by whom a complaint might have been made to the Ombudsman has died, or is for any reason unable to act for himself, the complaint may be made by his personal representatives, a member of his family or another individual, or any body, suitable to represent him⁹. Where a body by which a complaint might have been made to the Ombudsman is for any reason unable to act for itself, the complaint may be made by an individual, or another body, suitable to represent it¹⁰. Nor is a complaint to the Ombudsman to be entertained unless it is made to him not later than 12 months after the day on which the person aggrieved first had notice of the matters alleged in the complaint; but the Ombudsman may conduct an investigation pursuant to a complaint not made within that period if he considers that there are special circumstances which make it proper to do so¹¹.

A body subject to investigation by the Ombudsman may itself refer to him a complaint made to the body about action taken by or on behalf of the body in the exercise of administrative functions of the body if the complaint was made in writing, by a person who could have made a complaint to the Ombudsman about the action and not more than 12 months after the day on which the person aggrieved first had notice of the matters alleged in the complaint or such later day as the Ombudsman considers appropriate in any particular case¹². A body subject to investigation by the Ombudsman may not, however, so refer a complaint more than 12 months after the day on which the body received the complaint¹³.

The Ombudsman may not conduct an investigation:

- 588 (a) in respect of which the person aggrieved has or had:
- 29 33. (i) a right of appeal, reference or review to or before a tribunal constituted under any enactment or by virtue of Her Majesty's prerogative; or
- 34. (ii) a remedy by way of proceedings in any court of law,
- 30

- 589 unless the Ombudsman is satisfied that, in the particular circumstances, it is not
reasonable to expect the person aggrieved to resort or have resorted to it¹⁴;
- 590 (b) in respect of any action if the person aggrieved has or had the opportunity to
make a complaint under a procedure operated by the body in the exercise of
whose functions the action was taken unless he is satisfied:
- 31
35. (i) that the procedure has been invoked and exhausted; or
36. (ii) that, in the particular circumstances, it is not reasonable to expect the
procedure to be or have been invoked or exhausted¹⁵;
- 32
- 591 (c) in respect of:
- 33
37. (i) action taken by or with the authority of a body for the purposes of investigating
crime;
38. (ii) the commencement or conduct of any criminal proceedings before any court of
law in the United Kingdom;
39. (iii) action which could be investigated under the Health Service
Commissioners Act 1993¹⁶;
40. (iv) action taken by any member of the administrative staff of a relevant tribunal
so far as taken at the direction, or on the authority (whether express or implied), of
any person acting in his capacity as a member of the tribunal;
41. (v) action taken in matters relating to contractual or other commercial
transactions, other than compulsory land transactions¹⁷; or
42. (vi) action taken in respect of appointments or removals, pay, discipline,
superannuation or other personnel matters in relation to relevant service¹⁸.
- 34

In determining whether to initiate, continue or discontinue an investigation, the Ombudsman must act in accordance with his own discretion; but he may not question the merits of a decision taken without maladministration in the exercise of a discretion¹⁹.

Any question whether a complaint is duly made or referred to the Ombudsman is to be determined by him; but a complaint duly referred to him is deemed to be duly made to him²⁰.

1 As to the appointment of the Welsh Administration Ombudsman see the Government of Wales Act 1998 s 111(2), Sch 9 Pt I (paras 1-13); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 45. The name of the Welsh Administration Ombudsman in Welsh is Ombudsman Gweinyddiaeth Cymru: s 111(1). As from a day to be appointed, the Welsh Administration Ombudsman, together with the Commission for Local Administration in Wales, the Health Service Commissioner for Wales and the Social Housing Ombudsman for Wales will be replaced by the Public Services Ombudsman for Wales: see the Public Services Ombudsman (Wales) Act 2005 (not yet in force).

2 For these purposes, references to action include failure to act; and related expressions are to be construed accordingly: Government of Wales Act 1998 Sch 9 para 17(10).

3 As to the bodies subject to investigation by the Welsh Administration Ombudsman see *ibid* Sch 9 paras 14-17; and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 45.

4 For these purposes, administrative functions exercisable by any person appointed as a member of the administrative staff of a relevant tribunal (1) by a body subject to investigation by the Welsh Administration Ombudsman; or (2) with the consent, whether as to remuneration and other terms and conditions of service or otherwise, of such a body, are to be taken to be administrative functions of the body: *ibid* Sch 9 para 17(2). 'Relevant tribunal' means a tribunal specified by order made by the Secretary of State; and references to a tribunal include the person constituting a tribunal consisting of one person: Sch 9 para 17(9).

5 *Ibid* Sch 9 para 17(1).

6 As to the Assembly for Wales see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

7 Government of Wales Act 1998 Sch 9 para 18(1).

8 Ibid Sch 9 para 18(2).

9 Ibid Sch 9 para 18(3).

10 Ibid Sch 9 para 18(4).

11 Ibid Sch 9 para 18(5).

12 Ibid Sch 9 para 18(6).

13 Ibid Sch 9 para 18(7).

14 Ibid Sch 9 para 17(3).

15 Ibid Sch 9 para 17(4).

16 See PARA 434 post.

17 For these purposes, 'compulsory land transactions' means transactions relating to: (1) the acquisition of land compulsorily or in circumstances in which it could be acquired compulsorily; or (2) the disposal as surplus of land acquired compulsorily or in such circumstances: Government of Wales Act 1998 Sch 9 para 17(6). See also note 18 infra.

18 Ibid Sch 9 para 17(5). For these purposes, 'relevant service' means service: (1) in any office or employment under the Crown or under any body subject to investigation by the Welsh Administration Ombudsman; or (2) in any office or employment, or under any contract for services, in respect of which power to take action, or to determine or approve the action to be taken, in personnel matters is vested in Her Majesty or any such body: Sch 9 para 17(6). The Assembly of Wales may by order amend Sch 9 para 17(5) or (6) so as to exclude any actions or matters from the provisions of Sch 9 para 17(5): Sch 9 para 17(7).

19 Ibid Sch 9 para 17(8).

20 Ibid Sch 9 para 18(8).

UPDATE

432 Welsh Administration Ombudsman

TEXT AND NOTES--Government of Wales Act 1998 s 111, Sch 9 repealed: Public Services Ombudsman (Wales) Act 2005 Sch 6 paras 65, 69, Sch 7.

NOTE 1--Day now appointed: SI 2005/2800.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(v) Ombudsmen/433. Commissions for Local Administration.

433. Commissions for Local Administration.

For the purpose of conducting investigations into local government administration, there is a body of commissioners known as the Commission for Local Administration in England and a body consisting of two or more commissioners known as the Commission for Local Administration in Wales¹.

Where a written complaint is made by or on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration in connection with action taken by or on behalf of a relevant authority, being action taken in the exercise of administrative

functions of that authority, a Local Commissioner may investigate that complaint²; but he may not do so in respect of (inter alia) any of the following matters:

- 592 (1) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment;
- 593 (2) any action in respect of which the person aggrieved has or had a right of appeal to a Minister of the Crown; or
- 594 (3) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law;

but the Local Commissioner may conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort or have resorted to it³.

1 See the Local Government Act 1974 s 23 (as amended); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 46. As to the prospective replacement of the Commission for Local Administration in Wales by the Public Services Ombudsman for Wales see PARA 432 note 1 ante.

2 See ibid s 26(1)-(5) (as amended); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 46.

3 See ibid s 26(6) (as amended); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 46.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(v) Ombudsmen/434. Health Service Commissioners.

434. Health Service Commissioners.

The Health Service Commissioner for England¹ or, as the case may be, the Health Service Commissioner for Wales², on a complaint being made to him by or on behalf of a person that he has sustained injustice or hardship in consequence of:

- 595 (1) a failure in a service provided by a health service body³;
- 596 (2) a failure of such a body to provide a service which it was a function of the body to provide; or
- 597 (3) maladministration connected with any other action taken by or on behalf of such a body,

may investigate the alleged failure or other action⁴. A complaint may be so made by an individual or a body of persons, whether incorporated or not, other than a public authority⁵.

In determining whether to initiate, continue or discontinue an investigation, the Commissioner is to act in accordance with his own discretion⁶; and any question whether a complaint is duly made is to be determined by the Commissioner⁷. Nothing in the above provisions authorises or requires the Commissioner to question the merits of a decision taken without maladministration by a health service body in the exercise of a discretion vested in that body⁸.

The Commissioner may not conduct an investigation in respect of (inter alia):

- 598 (a) action in relation to which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative or a remedy by way of proceedings in any

court of law, unless the Commissioner is satisfied that in the particular circumstances it is not reasonable to expect that person to resort or have resorted to it⁹;

599 (b) action which has been, or is, the subject of an inquiry by the Secretary of State¹⁰;

600 (c) action taken in connection with the diagnosis of a mental disorder or an injury or disability requiring medical or dental treatment or nursing or the care or treatment of a patient which, in the opinion of the Commissioner, was taken solely in consequence of the exercise of clinical judgment, whether formed by the person taking the action or any other person¹¹;

601 (d) action taken in connection with any general medical services, general dental services, general ophthalmic services or pharmaceutical services under the National Health Act 1977 by a person providing those services¹².

1 As to the appointment of the Health Service Commissioner for England see the Health Service Commissioners Act 1993 s 1(3), Sch 1 (as amended); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54. This role is carried out by the Parliamentary and Health Service Ombudsman.

2 As to the appointment of the Health Service Commissioner for Wales see *ibid* s 1(3) (as amended), Sch 1A (as added); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54. As to the prospective replacement of the Health Service Commissioner for Wales by the Public Services Ombudsman for Wales see PARA 432 note 1 ante.

3 As to the bodies subject to investigation by the Health Service Commissioner for England or, as the case may be, the Health Service Commissioner for Wales see *ibid* s 2 (as amended); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54.

4 See *ibid* s 3(1); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54.

5 See *ibid* s 8(1), (2); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54.

6 See *ibid* s 3(2); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54.

7 See *ibid* s 3(3); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54.

8 See *ibid* s 3(4); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54.

9 See *ibid* s 4(1); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54.

10 See *ibid* s 4(2); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54.

11 See *ibid* s 5(1), (2); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54.

12 See *ibid* s 6(1); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 54.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(v) Ombudsmen/435. Housing Ombudsman.

435. Housing Ombudsman.

Tenants and other individuals may have complaints against social landlords¹ investigated by a housing ombudsman in accordance with a scheme approved by the Secretary of State².

Where an approved scheme provides that it is to be administered by a body corporate, that body must appoint, on such terms as it thinks fit, the housing ombudsman for the purpose of the scheme; and the appointment and its terms are subject to the approval of the Secretary of State³. Where an approved scheme does not so provide:

- 602 (1) the housing ombudsman for the purpose of the scheme must be appointed by the Secretary of State;
- 603 (2) the Secretary of State may by order provide that the housing ombudsman for the purposes of the scheme is to be a corporation sole; and
- 604 (3) the staff to administer the scheme and otherwise assist the ombudsman in the discharge of his functions must be appointed and employed by him⁴.

The Secretary of State may at any time remove from office a housing ombudsman, whether appointed by him or otherwise⁵.

1 For the meaning of 'social landlord' see HOUSING vol 22 (2006 Reissue) PARA 117.

2 See the Housing Act 1996 s 51(1); and HOUSING vol 22 (2006 Reissue) PARA 117. As to such schemes see HOUSING vol 22 (2006 Reissue) PARAS 117-122. As to the prospective replacement of the Social Housing Ombudsman for Wales by the Public Services Ombudsman for Wales see PARA 432 note 1 ante.

3 See *ibid* s 51(1), Sch 2 para 10(1); and HOUSING vol 22 (2006 Reissue) PARA 123.

4 See *ibid* Sch 2 para 10(2); and HOUSING vol 22 (2006 Reissue) PARA 123. As to determinations and reports by the housing ombudsman see HOUSING vol 22 (2006 Reissue) PARA 124. A housing ombudsman appointed by the Secretary of State or otherwise is not to be regarded as the servant or agent of the Crown or as enjoying any status, privilege or immunity of the Crown or as exempt from any tax, duty, rate, levy or other charge whatsoever, whether general or local; and any property held by him is not to be regarded as property of, or held on behalf of, the Crown: see Sch 2 para 10(4); and HOUSING vol 22 (2006 Reissue) PARA 123.

5 See *ibid* Sch 2 para 10(3); and HOUSING vol 22 (2006 Reissue) PARA 123.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(v) Ombudsmen/436. Legal Services Ombudsman.

436. Legal Services Ombudsman.

The Secretary of State for Constitutional Affairs must appoint a person known as the Legal Services Ombudsman ('the Ombudsman') for the purposes of conducting investigations under his statutory powers¹.

The Ombudsman may investigate any allegation which is properly made to him and which relates to the matter in which a complaint made to a professional body with respect to:

- 605 (1) a person who is or was an authorised advocate, authorised litigator, licensed conveyancer, registered foreign lawyer, recognised body or duly certificated notary public and a member of that professional body;
- 606 (2) any employee of such a person,

has been dealt with by that professional body².

If the Ombudsman investigates an allegation, he may investigate the matter to which the complaint relates³; and, if the Ombudsman begins to investigate an allegation, he may at any time discontinue his investigation⁴.

If the Ombudsman decides not to investigate an allegation which he would be entitled to investigate, or discontinues an investigation which he has begun, he must notify the following of the reason for his decision:

- 607 (a) the person making the allegation;
- 608 (b) any person with respect to whom the complaint was made; and
- 609 (c) the professional body concerned⁵.

The Ombudsman must not investigate an allegation while:

- 610 (i) the complaint is being investigated by the professional body concerned;
- 611 (ii) an appeal is pending against the determination of the complaint by that body; or
- 612 (iii) the time within which such an appeal may be brought by any person has not expired⁶.

Nor must the Ombudsman investigate:

- 613 (A) any issue which is being or has been determined by a court, the Solicitors' Disciplinary Tribunal, the Disciplinary Tribunal of the Council of the Inns of Court or any tribunal specified in an order made by the Secretary of State for these purposes;
- 614 (B) any allegation relating to a complaint against any person which concerns an aspect of his conduct in relation to which he has immunity from any action in negligence or contract⁷.

1 See the Courts and Legal Services Act 1990 s 21 (amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, art 9, Sch 2 para 8(1)(a)); the Courts and Legal Services Act 1990 s 21, Sch 3 (amended by the Access to Justice Act 1999 ss 50, 106, Sch 15 Pt II; and the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, Sch 2 para 8(1)(d)); and LEGAL PROFESSIONS vol 65 (2008) PARA 423 et seq.

2 See the Courts and Legal Services Act 1990 s 22(1); and LEGAL PROFESSIONS vol 65 (2008) PARA 425.

3 See *ibid* s 22(2); and LEGAL PROFESSIONS vol 65 (2008) PARA 428.

4 See *ibid* s 22(3); and LEGAL PROFESSIONS vol 65 (2008) PARA 428.

5 See *ibid* s 22(4); and LEGAL PROFESSIONS vol 65 (2008) PARA 428.

6 See *ibid* s 22(5); and LEGAL PROFESSIONS vol 65 (2008) PARA 426. Section 22(5) does not apply if: (1) the allegation is that the professional body has acted unreasonably in failing to start an investigation into the complaint or, having started such an investigation, has failed to complete it within a reasonable time; or (2) the Ombudsman is satisfied that, even though the complaint is being investigated by the professional body concerned, an investigation by him is justified: see s 22(6); and LEGAL PROFESSIONS vol 65 (2008) PARA 426.

7 See *ibid* s 22(7) (amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, Sch 2 para 8(1)(a)); and LEGAL PROFESSIONS vol 65 (2008) PARA 426.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(v) Ombudsmen/437. Financial Ombudsman Service.

437. Financial Ombudsman Service.

An ombudsman scheme is established by the Financial Services and Markets Act 2000¹, under which certain disputes may be resolved quickly and informally by an independent person². The scheme is administered by a body corporate ('the scheme operator')³, established by the Financial Services Authority⁴ to exercise the functions conferred on the scheme operator by or

under the Financial Services and Markets Act 2000⁵, and is known as the Financial Ombudsman Service⁶. The scheme operator must appoint and maintain a panel⁷ of persons, appearing to it to have appropriate qualifications and experience, to act as ombudsmen⁸ for the purposes of the scheme⁹. At least once a year the scheme operator and the Chief Ombudsman must make a report to the Authority on the discharge of their functions¹⁰. Each report must distinguish between functions in relation to the scheme's compulsory jurisdiction and functions in relation to its voluntary jurisdiction¹¹. Each report must also comply with any requirements specified in rules made by the Authority¹². The scheme operator must publish each report in the way it considers appropriate¹³. The scheme operator may publish guidance consisting of such information and advice as it considers appropriate and may charge for it or distribute it free of charge¹⁴.

A complaint which relates to an act or omission of a person ('the respondent') in carrying on an activity to which compulsory jurisdiction rules¹⁵ apply is to be dealt with under the ombudsman scheme if the following conditions are satisfied¹⁶: (1) the complainant is eligible and wishes to have the complaint dealt with under the scheme; (2) the respondent was an authorised person¹⁷ at the time of the act or omission to which the complaint relates; and (3) the act or omission to which the complaint relates occurred at a time when compulsory jurisdiction rules were in force in relation to the activity in question¹⁸. A complainant is eligible, in relation to the compulsory jurisdiction of the ombudsman scheme, if he falls within a class of person specified in the rules as eligible¹⁹. The Financial Services Authority must make rules providing that a complaint is not to be entertained unless the complainant has referred it under the ombudsman scheme before the applicable time limit (determined in accordance with the rules) has expired²⁰, and may make rules as to the extension of that time limit, and as to other matters relating to the bringing of complaints²¹. The scheme operator must make rules (known as 'scheme rules'), which are to set out the procedure for reference of complaints and for their investigation, consideration and determination by an ombudsman and which require the consent of the Authority²². A money award, including interest, which has been registered in accordance with scheme rules, if a county court so orders, may be recovered by execution issued from the county court (or otherwise) as if it were payable under an order of that court²³.

A complaint which relates to an act or omission of a person ('the respondent') in carrying on an activity to which voluntary jurisdiction rules²⁴ apply is to be dealt with under the ombudsman scheme if the following conditions are satisfied²⁵: (a) the complainant is eligible and wishes to have the complaint dealt with under the scheme; (b) at the time of the act or omission to which the complaint relates, the respondent was participating in the scheme; (c) at the time when the complaint is referred under the scheme, the respondent has not withdrawn from the scheme in accordance with its provisions; (d) the act or omission to which the complaint relates occurred at a time when voluntary jurisdiction rules were in force in relation to the activity in question; and (e) the complaint cannot be dealt with under the compulsory jurisdiction²⁶. A complainant is eligible, in relation to the voluntary jurisdiction of the ombudsman scheme, if he falls within a class of person specified in the rules as eligible²⁷. A person qualifies for participation in the ombudsman scheme if he falls within a class of person specified in the rules in relation to the activity in question²⁸. Complaints are to be dealt with and determined under the voluntary jurisdiction on standard terms fixed by the scheme operator with the approval of the Financial Services Authority²⁹. Different standard terms may be fixed with respect to different matters or in relation to different cases³⁰. The scheme operator may not vary any of the standard terms or add or remove terms without the approval of the Authority³¹. The scheme operator may make arrangements with a relevant body³²: (i) for the exercise by that body of any part of the voluntary jurisdiction of the ombudsman scheme on behalf of the scheme; or (ii) for the exercise by the scheme of any function of that body as if it were part of the voluntary jurisdiction of the scheme³³. Such arrangements require the approval of the Authority³⁴.

1 le under the Financial Services and Markets Act 2000 Pt XVI (ss 225-234) (as amended).

- 2 See *ibid* s 225(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 575.
- 3 See *ibid* ss 225(2), 417(1).
- 4 As to the Financial Services Authority see PARA 408 ante.
- 5 See the Financial Services and Markets Act 2000 s 225(4), Sch 17 para 2(1).
- 6 See *ibid* ss 225(3), 417(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 575.
- 7 Is the panel established under *ibid* Sch 17 para 4: Sch 17 para 1.
- 8 For the purposes of *ibid* Sch 17, 'ombudsman' means a person who is a member of the panel: Sch 17 para 1.
- 9 See *ibid* Sch 17 para 4(1).
- 10 See *ibid* Sch 17 para 7(1).
- 11 See *ibid* Sch 17 para 7(2).
- 12 See *ibid* Sch 17 para 7(3).
- 13 See *ibid* Sch 17 para 7(4).
- 14 See *ibid* Sch 17 para 8.
- 15 'Compulsory jurisdiction rules' means rules: (1) made by the Financial Services Authority for the purposes of *ibid* s 226; and (2) specifying the activities to which they apply: s 226(3). Only activities which are regulated activities, or which could be made regulated activities by an order under s 22 (classes of activity and categories of investment) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 84), may be specified: s 226(4). As to regulated activities see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 84 et seq. Activities may be specified by reference to specified categories (however described): s 226(5).
- 16 See the Financial Services and Markets Act 2000 s 226(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 576.
- 17 As to authorised persons see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 314.
- 18 See the Financial Services and Markets Act 2000 s 226(2). As to determination of complaints, and as to awards, under the compulsory jurisdiction see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 579-580. As to the power to order costs on determining complaints under the compulsory jurisdiction see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 581.
- 19 See *ibid* s 226(6). The rules may include provision for persons other than individuals to be eligible, but may not provide for authorised persons to be eligible except in specified circumstances or in relation to complaints of a specified kind: s 226(7).
- 20 See *ibid* s 225(4), Sch 17 paras 12, 13(1).
- 21 See *ibid* Sch 17 para 13(2)-(4); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 576.
- 22 See *ibid* Sch 17 para 14; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 576.
- 23 See *ibid* Sch 17 para 16.
- 24 'Voluntary jurisdiction rules' means rules: (1) made by the scheme operator for the purposes of *ibid* s 227; and (2) specifying the activities to which they apply: s 227(3). The only activities which may be specified in the rules are activities which are, or could be, specified in compulsory jurisdiction rules: s 227(4). Activities may be specified by reference to specified categories (however described): s 227(5). The rules require the Financial Services Authority's approval: s 227(6).
- 25 See the Financial Services and Markets Act 2000 s 227(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 578.
- 26 See *ibid* s 227(4).

27 See *ibid* s 227(2). Provision may be made in the rules for persons other than authorised persons to participate in the ombudsman scheme: s 227(10).

28 See *ibid* s 227(9).

29 See *ibid* Sch 17 paras 17, 18(1). As to determination of complaints under the compulsory jurisdiction see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 579.

30 See *ibid* Sch 17 para 18(2).

31 See *ibid* Sch 17 para 18(4).

32 A 'relevant body' is one which the scheme operator is satisfied: (1) is responsible for the operation of a broadly comparable scheme (whether or not established by statute) for the resolution of disputes; and (2) in the case of arrangements under head (i) in the text, will exercise the jurisdiction in question in a way compatible with the requirements imposed by or under the Financial Services and Markets Act 2000 in relation to complaints of the kind concerned: Sch 17 para 19(2).

33 See *ibid* Sch 17 para 19(1).

34 See *ibid* Sch 17 para 19(3).

UPDATE

437 Financial Ombudsman Service

TEXT AND NOTE 18--Head (2). Such a complaint is also to be dealt with under the ombudsman scheme if the respondent was a payment services provider within the meaning of the Payment Services Regulations 2009, SI 2009/209 (FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1399) at the time of the act or omission to which the complaint relates: Financial Services and Markets Act 2000 s 226(2) (amended by SI 2009/209).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(v) Ombudsmen/438. The Office for Fair Access.

438. The Office for Fair Access.

The Office for Fair Access ('OFFA') is an independent, non-departmental public body set up under the Higher Education Act 2004¹ to promote and safeguard fair access to higher education in light of the introduction of variable tuition fees in 2006-2007². OFFA is led by the Director of Fair Access to Higher Education appointed by the Secretary of State³. The Director has a duty to protect academic freedom including, in particular, the freedom of institutions to determine the contents of particular courses and the manner in which they are taught, supervised or assessed, and to determine the criteria for the admission of students and apply those criteria in particular cases⁴.

All publicly funded providers of higher education who decide to charge tuition fees above the standard level are required to submit plans regarding variable tuition fees for approval by OFFA⁵. If an institution fails to comply with the approved plan, the Director has power to request the Higher Education Funding Council for England or the Teacher Training Agency, or both, to impose specified financial requirements on the governing body of the institution, or the Director may notify the governing body that on the expiry of the existing plan he will refuse to approve a new plan during a specified period⁶.

- 1 See the Higher Education Act 2004 Pt 3 (ss 22-41), Sch 5. See also EDUCATION.
- 2 See ibid s 32(1). As from a day to be appointed, the National Assembly for Wales may appoint an equivalent body for Wales: see s 30(1)(b). At the date at which this volume states the law no such day had been appointed.
- 3 See ibid s 31(1), (2).
- 4 Ibid s 32(2). The Director must have regard to any guidance given to him by the Secretary of State: s 32(3).
- 5 See ibid ss 33, 34. See also the Student Fees (Approved Plans) (England) Regulations 2004, SI 2004/2473.
- 6 Higher Education Act 2004 s 37.

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439. Pensions Ombudsman.

Under the Pension Schemes Act 1993, a commissioner known as the Pensions Ombudsman is appointed by the Secretary of State to conduct investigations in accordance with Part X¹ of the Act². The Ombudsman must prepare a report on the discharge of his functions for each financial year, and must submit it to the Secretary of State as soon as practicable afterwards³. The Secretary of State must arrange for the publication of each report so submitted to him⁴.

The Pensions Ombudsman may investigate and determine the following matters:

- 615 (1) a complaint made to him by or on behalf of an actual or potential beneficiary⁵ of an occupational or personal pension scheme⁶ who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme⁷;
- 616 (2) a complaint made to him:
 - 35 43. (a) by or on behalf of a person responsible for the management of an occupational pension scheme who, in connection with any act or omission of another person responsible for the management of the scheme, alleges maladministration of the scheme; or
 44. (b) by or on behalf of the trustees or managers of an occupational pension scheme who, in connection with any act or omission of any trustee or manager of another such scheme, allege maladministration of the other scheme⁸;
- 36 617 (3) a complaint made to him by or on behalf of an independent trustee of a trust scheme who, in connection with any act or omission which is an act or omission either:
 - 37 45. (a) of trustees of the scheme who are not independent trustees; or
 46. (b) of former trustees of the scheme who were not independent trustees,
 - 38 618 alleges maladministration of the scheme;
 - 619 (4) any dispute of fact or law in relation to an occupational or personal pension scheme between a person responsible for the management of the scheme and an actual or potential beneficiary; and
 - 620 (5) any dispute of fact or law between the trustees or managers of an occupational pension scheme and:

39

47. (a) another person responsible for the management of the scheme; or

48. (b) any trustee or manager of another such scheme,

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621 and in a case falling within head (5)(b) above, references in Part X of the Pension Schemes Act 1993 to the scheme to which the reference relates are references to each of the schemes;

622 (6) any dispute not falling within head (7) below between different trustees of the same occupational pension scheme;

623 (7) any dispute, in relation to a time while the statutory requirement for an independent trustee⁹ applies in relation to an occupational pension scheme, between an independent trustee of the scheme and either:

41

49. (a) trustees of the scheme who are not independent trustees; or

50. (b) former trustees of the scheme who were not independent trustees; and

42

624 (8) any question relating, in the case of an occupational pension scheme with a sole trustee, to the carrying out of the functions of that trustee¹⁰.

Complaints and references made to the Ombudsman must be made to him in writing¹¹.

The Ombudsman must not investigate or determine a complaint or dispute:

625 (i) if, before the making of the complaint or the reference of the dispute: (A)

proceedings in respect of the matters which would be the subject of the investigation have been begun in any court or employment tribunal; and (B) those proceedings are proceedings which have not been discontinued or which have been discontinued on the basis of a settlement or compromise binding all the persons by or on whose behalf the complaint or reference is made;

626 (ii) if the scheme is of a description which is excluded from the jurisdiction of the Ombudsman by regulations; or

627 (iii) if and to the extent that the complaint or dispute, or any matter arising in connection with the complaint or dispute, is of a description which is excluded from the jurisdiction of the Ombudsman by regulations¹².

In general, the Pensions Ombudsman must not investigate a complaint or dispute if the act or omission which is the subject of it occurred more than three years before the date on which the complaint or reference of the dispute was received by him in writing, but there is a discretion for the Ombudsman to extend that time¹³.

Court proceedings commenced after and involving the same subject matter as a dispute referred to the Ombudsman may be stayed¹⁴. The procedure on an investigation is prescribed¹⁵, and provision is made as to the determination of complaints by the Ombudsman¹⁶. An appeal on a point of law lies to the High Court from a determination or direction of the Ombudsman¹⁷.

1 le the Pension Schemes Act 1993 Pt X (ss 145-152) (as amended).

2 See *ibid* s 145(1); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 663. Provision is made for staff and other resources for the Ombudsman (see s 145(4A)-(4C) (as added)) and as to his remuneration and expenses (see s 145(5)).

3 See *ibid* s 145(6); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 663.

4 See *ibid* s 145(7); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 663.

5 For the meaning of 'actual or potential beneficiary' see *ibid* s 146(7) (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 664.

6 For the meaning of 'occupational pension scheme' and 'personal pension scheme' see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARAS 741, 710 respectively.

7 As to persons responsible for the management of a scheme see the Pension Schemes Act 1993 s 146(3) (as substituted), s 146(8); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 664. Regulations may provide that, subject to any prescribed modifications or exceptions, Pt X (as amended) applies in the case of an occupational or personal pension scheme in relation to any prescribed person or body of persons, where the person or body is not a trustee or manager or employer but is concerned with the financing or administration of, or the provision of benefits under, the scheme, as if for the purposes of Pt X (as amended) he were a person responsible for the management of the scheme: see s 146(4) (as substituted); the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 664.

8 In any case falling within head (2)(b) in the text, references to the scheme to which the complaint relates are to the other scheme referred to in that head: see the Pension Schemes Act 1993 s 146(1) (as substituted).

9 *le* the Pensions Act 1995 s 22: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 795.

10 See the Pension Schemes Act 1993 s 146(1) (as substituted and amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 664. In any case falling within head (5)(b) in the text, references to the scheme to which the reference relates are to the scheme first mentioned in that head: s 146(1) (as substituted). The Pensions Ombudsman may not investigate or determine any dispute or question falling within heads (4)-(8) in the text unless it is referred to him: (1) in the case of a dispute falling within head (4) in the text, by or on behalf of the actual or potential beneficiary who is a party to the dispute; (2) in the case of a dispute falling within head (5) in the text, by or on behalf of any of the parties to the dispute; (3) in the case of a dispute falling within head (6) in the text, by or on behalf of at least half the trustees of the scheme; (4) in the case of a dispute falling within head (7) in the text, by or on behalf of the independent trustee who is a party to the dispute; (5) in the case of a question falling within head (8) in the text, by or on behalf of the sole trustee: see s 146(1A) (as added); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 664.

11 See *ibid* s 146(2) (as substituted); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 664. As to the manner of making a complaint see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 669.

12 See *ibid* s 146(6) (as substituted); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 664. As to exclusions from the jurisdiction of the Ombudsman see the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475, regs 3, 4 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 665.

13 See *ibid* reg 5; and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 666.

14 See the Pension Schemes Act 1993 s 148 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 668.

15 See *ibid* ss 149, 150 (as amended); the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARAS 670-675.

16 See the Pension Schemes Act 1993 s 151 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 676.

17 See *ibid* s 151(4); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 676. The right of appeal applies only to final determinations and not to interim determinations: *Legal and General Assurance Society Ltd v Pensions Ombudsman*; *R v Pensions Ombudsman, ex p Legal and General Assurance Society Ltd* [2000] 2 All ER 577, [2000] 1 WLR 1524.

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440. Estate Agents Ombudsman.

There is an Estate Agents Ombudsman¹ appointed by the Council of the Estate Agents Ombudsman, a body comprised of independent consumer representatives, who form a majority, and representatives of the estate agency profession.

If a person who is an actual or potential buyer or seller of residential property in the United Kingdom believes that a member agency²:

- 628 (1) has infringed his legal rights or breached the Ombudsman for Estate Agents' Code of Practice;
- 629 (2) has treated him unfairly;
- 630 (3) has been guilty of maladministration, including inefficiency or delay,

in a way that results in his losing money or suffering loss, he may make a complaint to the Estate Agents Ombudsman. Such a complaint will, however, not normally be considered by the Estate Agents Ombudsman unless the complainant has first used the internal complaints procedure of the member agency concerned and the complaint is either not dealt with by the member agency within three months of receiving the written complaint or the internal complaints procedure has been exhausted without the complaint's having been satisfactorily resolved. The Estate Agents Ombudsman may not, however, consider such a complaint if:

- 631 (a) the complaint is not against a member agency;
- 632 (b) the complaint is not made as a private individual;
- 633 (c) the complaint is being, or has been, dealt with by a court or similar body;
- 634 (d) the complaint relates to a dispute relating to a survey or a formal valuation of the property or over property letting;
- 635 (e) the complaint relates to a service provided on special terms because the complainant or his or her spouse is or was an employee of a member agency;
- 636 (f) the complaint is for more than £25,000;
- 637 (g) the act complained of occurred more than 12 months before the complaint is made in writing to the member agency or prior to the member agency's becoming a member of the Ombudsman for Estate Agents Scheme; or
- 638 (h) the complaint is sent to the Estate Agents Ombudsman more than six months after the complainant receives the final offer of settlement or final observations of the member agency.

The Estate Agents Ombudsman will then investigate the complaint; and he may try to settle the dispute by agreement. If this is not possible, he will consider all the relevant factors and make a decision according to what he believes to be fair in all the circumstances. The decision will be sent to both the complainant and the member agency; and it may be accepted or rejected by the complainant. Member agencies have agreed to pay any compensation awarded, not exceeding £25,000, provided that the payment is accepted by the complainant in full and final settlement of the complaint. If the complainant does not accept the decision, it lapses and the complainant may take such further action as he thinks fit. If the complainant decides to take legal action, his rights are not in any way affected by the decision of the Estate Agents Ombudsman.

1 The Estate Agents Ombudsman Scheme is a non-statutory scheme and is operated free of charge. The Estate Agents Ombudsman may be contacted at Beckett House, 4 Bridge Street, Salisbury, Wiltshire SP1 2LX. For statutory regulation of estate agents see PARAS 789-790 post.

2 Membership of the Estate Agents Ombudsman Scheme is open to all corporate estate agencies and all firms where there is a principal, partner or director who is a member of the Incorporated Society of Valuers and Auctioneers (ISVA), the National Association of Estate Agents (NAEA) or the Royal Institution of Chartered Surveyors (RICS).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(v) Ombudsmen/441. Telecommunications Ombudsman.

441. Telecommunications Ombudsman.

In addition to statutory regulation by OFCOM¹ and the Secretary of State², the telecommunications industry is subject to, inter alia, the Office of the Telecommunications Ombudsman ('OTELO'), which provides an independent service, approved by OFCOM, to public communications providers³ and their customers, for the resolution of disputes and the investigation of complaints⁴. The provider must be a member of the service in order for OTELO to investigate a complaint against it. Complaints which can be dealt with include complaints as to the way in which mobile and fixed telephones, faxes and internet service are provided to customers, as to certain services such as short messaging services (SMS or texting), voice mail and call forwarding, and as to services and products for people with disabilities. The Ombudsman will decide whether a complaint is justified, and if so whether the member company must take any action to put things right, and member companies have undertaken to honour the Ombudsman's decision. There are some issues which are excluded from OTELO's terms of reference⁵.

1 As to OFCOM see PARA 403 ante.

2 As to the Secretary of State see TELECOMMUNICATIONS vol 97 (2010) PARA 84 et seq.

3 As to public communications providers see TELECOMMUNICATIONS vol 97 (2010) PARA 104 et seq.

4 See TELECOMMUNICATIONS vol 97 (2010) PARAS 91, 105.

5 See generally OTELO's terms of reference.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(vi) EU Institutions/442. European Consumer Consultative Group.

(vi) EU Institutions

442. European Consumer Consultative Group.

The European Commission has established the European Consumer Consultative Group ('ECCG') which is composed of one member representing national consumer organisations from each Member State and one member from each European consumer organisation¹.

The members of the ECCG are appointed by the European Commission; and an equal number of alternates are appointed under the same conditions as the full members, with the alternates automatically replacing a full member who is absent or indisposed².

The term of office of the members is three years and is renewable, only once for members representing national consumer organisations. At the end of the three-year period the members remain in office until a replacement is found or until their term of office is renewed. The term of office of a member lapses before the end of the three-year period in the event of his resignation, retirement or death. The term of office of a member may also be terminated

where the organisation, body or authority which nominated him requests his replacement. The member is to be replaced for the remainder of the term of office in accordance with the prescribed³ procedure⁴. Membership does not confer entitlement to remuneration⁵.

On the proposal of the Commission, the ECCG may invite representatives of other organisations which have the promotion of consumer interests as one of their principal objectives and actively work at European level to this end, to be associated to its work⁶. The ECCG may also invite any person having special expertise on a point on the agenda to participate in its work as an expert⁷.

The ECCG meets in the form and according to the timetable determined by the Commission. The meetings of the ECCG are chaired by the Commission, which also provides secretarial services for the ECCG and organises its work⁸. The discussions in the ECCG are based on requests for opinion made by the Commission⁹. The ECCG must adopt its own rules of procedure on the basis of proposals made by the Commission¹⁰. The members of the ECCG representing national consumer organisations must inform and consult the associations they are representing¹¹. The ECCG must present a report on its activities to the assembly of consumer organisations convened annually by the Commission¹².

1 EC Commission Decision 2003/709 (OJ L258, 10.10.2003, p 35) arts 1, 2. The ECCG replaces the Consumer Committee which was set up by EC Commission Decision 95/260 (OJ L162, 13.7.95, p 37).

2 EC Commission Decision 2003/709 (OJ L258, 10.10.2003, p 35) art 3. The European Commission must publish the list of full members and alternates in the C Series of the Official Journal of the European Union, for the purposes of information: art 3.

3 Ibid in accordance with the procedure laid down in ibid art 3: see the text to note 2 supra.

4 Ibid art 4.

5 Ibid art 5.

6 Ibid art 6.

7 Ibid art 6.

8 Ibid art 7.1.

9 Ibid art 7.2. The Commission may fix the deadline within which the opinion is to be delivered: art 7.2. The members and alternates must not divulge any information obtained from their work when the Commission informs them that the opinion requested or question raised is of a confidential nature: art 8.

10 Ibid art 7.3.

11 Ibid art 7.4. Each member must put in place effective reporting mechanisms to inform systematically all consumer organisations at national level on the work of the ECCG and must convey their views in return: art 7.4.

12 Ibid art 7.5.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(vi) EU Institutions/443. Scientific committees.

443. Scientific committees.

A Scientific Steering Committee in the field of consumer health and food safety was established in 1997¹. It has now been replaced by the European Food Safety Authority ('EFSA')². Its duties

include providing scientific advice and technical support for the European Union's legislation and policies in all fields which have a direct or indirect impact on food and feed safety; and the scientific opinions of EFSA are provided by scientific committees and panels³.

The following Scientific Committees have been established within the European Commission:

- 639 (1) the Scientific Committee on Consumer Products;
- 640 (2) the Scientific Committee on Health and Environmental Risks; and
- 641 (3) the Scientific Committee on Emerging and Newly-Identified Health Risks⁴.

1 EC Commission Decision 97/404 (OJ L27.6.97, p 85) art 1.

2 European Parliament and EC Council Regulation 178/2002 (OJ L31, 1.2.2002, p 1) (amended by European Parliament and EC Council Regulation 1642/2003 (OJ L245, 29.9.2003, p 4)). See also EC Commission Regulation 1304/2003 (OJ L185, 24.7.2003, p 6) on the procedure applied by EFSA to requests for scientific opinions referred to it. The five scientific committees in the field of food and food safety and animal health and welfare established under EC Commission Decision 97/579 (OJ L237, 28.8.97, p 18) were transferred to EFSA in May 2003.

3 See European Parliament and EC Council Regulation 178/2002 (OJ L31, 1.2.2002, p 1) arts 22, 28.

4 EC Commission Decision 2004/210 (OJ L66, 4.3.2004, p 45).

UPDATE

443 Scientific committees

NOTE 2--EC Council Regulation 178/2002 further amended by EC Commission Regulations 575/2006 (OJ L100, 8.4.2006 p 3), 2002/2008 (OJ L60, 5.3.2008, p 17).

TEXT AND NOTE 4--Decision 2004/210 replaced: EC Commission Decision 2008/721 (OJ L241, 10.9.2008, p 21) (amended by EC Commission Decision 2009/566 (OJ L196, 28.7.2009, p 61).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(vii) Voluntary Consumer Organisations/444. National Consumer Council.

(vii) Voluntary Consumer Organisations

444. National Consumer Council.

The National Consumer Council¹ ('NCC') was set up by the government in 1975 to safeguard the interests of consumers and to ensure that these interests are represented to, and taken account of, by decision makers.

In order to achieve the above objectives, the NCC:

- 642 (1) carries out research to find future consumer issues;
- 643 (2) where change is needed, develops policy solutions and campaigns and works with providers of goods and services to implement the solutions.

The NCC has no statutory powers and does not deal with individual complaints.

The work of the NCC is largely funded by the government; and its 12 board members are appointed by the Secretary of State. The Scottish and Welsh Consumer Councils are funded through the NCC but they decide their own work and priorities; but the General Consumer Council for Northern Ireland is funded directly by the Northern Ireland Department of Economic Development.

- 1 The National Consumer Council may be contacted at 20 Grosvenor Gardens, London SW1W 0DH.

UPDATE

444 National Consumer Council

TEXT AND NOTES--The NCC is replaced by a new body corporate called the National Consumer Council or, in Welsh, Cyngor Defnyddwyr Cenedlaethol: Consumers, Estate Agents and Redress Act 2007 s 1(1). The Council must establish and maintain committees, known as territorial committees, for Scotland, Wales, and Northern Ireland: s 1(2), (3). As to membership of the Council, its staff, territorial, regional and other committees, procedure, funding and accounts, and status, see s 1(4), Sch 1.

The Council may impose restrictions or conditions or give general or specific directions on the way in which the territorial committees exercise their functions for the purposes of facilitating or improving co-ordination in the carrying out of the Council's functions: s 2(1)-(3). A territorial committee also has the purposes of providing advice and information to the Council about consumer matters affecting the area for which the committee is established, advice to the Council about the exercise of its functions in so far as they affect that area, and such other purposes as the Council may determine: s 2(4).

'Consumer matters' means the interests of consumers, and any matter connected with those interests: Consumers, Estate Agents and Redress Act 2007 s 3(5). 'Consumer' means a person who purchases, uses or receives, in Great Britain, goods or services which are supplied in the course of a business carried on by the person supplying or seeking to supply them (s 3(2)(a)); and includes both an existing consumer and a future consumer (s 3(3)). For the purposes of s 3(2), a person who uses services includes, in relation to relevant postal services, an addressee, 'goods' includes land or an interest in land, 'business' includes a profession and the activities of any government department, local or public authority or other public body: s 3(4).

The Council must prepare, publish and consult on a draft forward work programme for each financial year, and consider any representations made in response to the consultation, and the forward work programme must include a statement of priorities in relation to designated consumers (ie consumers in relation to gas conveyed through pipes or electricity conveyed by distribution systems or transmission systems, and consumers in relation to relevant postal services) and the main activities and projects to be undertaken in respect of them: Consumers, Estate Agents and Redress Act 2007 ss 4, 5.

In exercising its functions the Council must have regard to (1) the forward work programme published under s 5; (2) the interests of consumers in different areas; (3) the interests of consumers that are one or more of disabled or chronically sick individuals, individuals of pensionable age, individuals with low incomes, individuals residing in rural areas (but this is not to be taken as implying that regard may not be had to the interests of other descriptions of consumers); and (4) the need to use its resources in the most efficient and economic way; and must exercise its functions in the manner which it considers is best calculated to contribute to the achievement of sustainable development: Consumers, Estate Agents and Redress Act 2007 s 6.

The Council must produce and publish an annual report on its activities for each financial year, including details of the progress of projects described in the forward work programme, any voluntary activities undertaken, and any other matters which the Secretary of State directs it to include: s 7.

The Council's core functions are (a) the representative function, under which it may provide advice and information, make proposals about consumer matters and represent the views of consumers to specified persons (Consumers, Estate Agents and Redress Act 2007 s 8); (b) the research function, under which it must obtain and keep under review information about consumer matters, information about the views of consumers on such matters, and information of any other specified description (s 9); and (c) the information function, under which it must facilitate the dissemination of advice and information to consumers about the Council itself and its functions, and about consumer matters (s 10).

The Council has power to investigate a consumer complaint which raises a matter of general relevance (ie a matter raising a novel issue which affects or may affect consumers generally or consumers of a particular description, or any other issue which has or may have an important effect on consumers generally or consumers of a particular description: Consumers, Estate Agents and Redress Act 2007 s 11. Particular provision is made for the investigation by the Council of complaints made by vulnerable designated consumers (s 12) and relating to the disconnection of gas or electricity (s 13). It must refer certain complaints to the Gas and Electricity Markets Authority (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 708 et seq) or to the Postal Services Commission (see POST OFFICE vol 36(2) (Reissue) PARA 10F) (ss 14, 15) and may investigate any matters relating to the number and location of public post offices (s 16).

The Council may prepare and publish a report on any matter within the scope of its functions: Consumers, Estate Agents and Redress Act 2007 s 17. The Secretary of State may direct it to prepare and submit to him a report in respect of any specified matter relating to consumer matters and he may publish any such report: s 18. The Council may issue advice or guidance with a view to improving standards of service to consumers and promoting best practice in connection with complaint handling, or on any other matters affecting the interest of consumers, and it may publish advice and information about consumer matters if it appears that publication would promote the interests of consumers: s 19.

It has a duty to enter into co-operation arrangements with designated bodies (ie the Office of Fair Trading ('OFT'), the Financial Services Consumer Panel, the Office of Communications Consumer Panel and any person designated by the Secretary of State by order: Consumers, Estate Agents and Redress Act 2007 s 20. The Council may make arrangements to co-operate with or give assistance to any person if it considers that to do so would facilitate or be conducive to the exercise of its own functions (s 21); it may provide for any person advice or assistance, including research or other services, as respects any matter in which the Council has skill, experience or expertise (s 22); and it may do whatever it sees fit, apart from borrowing money, in the interests of performing its functions: s 23.

The Council has power to serve notice on any specified person (ie the Office of Fair Trading, a designated regulator, any person who supplies goods or services in the course of a business carried on by that person, and any other person specified or of a description specified by the Secretary of State by order for these purposes).requiring such a person to provide the Council with specified information required by it for the purpose of exercising its functions: Consumers, Estate Agents and Redress Act 2007 s 24. Where a regulated provider in the electricity, gas, postal services or water sector fails to comply with such a notice, the Council may refer the matter to a designated

investigator which, in turn, must consider any representations made by the Council or by the regulated provider and must determine whether the provider was entitled to refuse to provide the information: s 25, Sch 2. Where a person ('the defaulter') refuses to comply with a notice under s 24, the Council may apply to the court for an order requiring compliance with the notice: s 26. An authorised person (ie the OFT, a designated regulator, or a person specified by the Secretary of State), may by notice require information from the Council if the information is required by such authorised person for the purpose of exercising its functions, and in doing so, must have regard to the desirability of minimising the costs, or any other detriment, to the Council: s 27. The Secretary of State may make regulations prescribing exemptions from the requirements to provide information to the Council by virtue of s 24 and from the requirement by the Council to provide information to the OFT, designated regulators, and specified persons: s 28. The disclosure of information obtained by the Council is restricted: see s 29.

The Secretary of State may make an order giving the Council additional functions if he thinks that it is in the interests of consumers to do so: Consumers, Estate Agents and Redress Act 2007 s 37.

As to provision for compensation for loss of office of members of the NCC, and for the transfer of its property, rights and liabilities see ss 34-36.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(vii) Voluntary Consumer Organisations/445. Consumers' Association.

445. Consumers' Association.

The Consumers' Association (which works under the name 'Which?') is a registered charity financed by members' subscriptions, donations and fees for advisory services¹. It is established (inter alia):

- 644 (1) to promote for the benefit of the public impartial and scientific analysis of and research into:
- 43
- 51. (a) the standards of goods and services available to members of the public as consumers;
- 52. (b) ways in which the quality and availability of such goods and services may be maintained and improved for the public benefit and to publish and disseminate the results of such analysis and research to the public;
- 44
- 645 (2) to advance and disseminate knowledge of the laws of the United Kingdom and other countries and, in particular, the law relating to consumer protection in the United Kingdom and other countries;
- 646 (3) to carry out research into the law of consumer protection in the United Kingdom and other countries and to publish and disseminate the results of such research to the public.

Which? publishes magazines, books and websites containing the results of comparative tests of products and services, advice to consumers on their legal rights and other matters.

The Consumers' Association may, subject to certain conditions, apply for an injunction, including an interim injunction, against any person appearing to it to be using, or

recommending use of, an unfair term drawn up for general use in contracts concluded with consumers².

1 Which? may be contacted at 2 Marylebone Road, London NW1 4DF.

2 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12(1), (2) (amended by virtue of the Enterprise Act 2002 s 2); and PARA 460 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(vii) Voluntary Consumer Organisations/446. British Standards Institution.

446. British Standards Institution.

The British Standards Institution, incorporated by royal charter in 1929, is an independent body which undertakes the preparation and promulgation of standards for the production of goods and the provision of certification, testing, information and training services¹. The Institution has now expanded into the areas of oil and petroleum and metals and minerals inspection and testing. The Institution is committed to research and development activities in order to prepare standards for British, European and international use through the consensus process.

'British Standard Specifications', which are devised after due consultation with representatives of manufacturers, distributors and users, lay down testing requirements, specifications or measurements with which a product should comply².

The 'Kitemark', a registered trade mark, is only available under licence from the Institution and is an independent indorsement that a product complies with a publicly available specification.

1 The British Standards Institution may be contacted at British Standards House, 389 Chiswick High Road, London W4 4AL.

2 Compliance with standards by manufacturers is usually voluntary; but making a false claim of compliance may be an offence (see the Trade Descriptions Act 1968 s 2(1)(g); and PARA 481 head (7) post). In certain cases, however, compliance with British Standard Specifications is compulsory: see eg the Wheeled Child Conveyances (Safety) Regulations 1997, SI 1997/2866, reg 3(1); and PARA 582 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(vii) Voluntary Consumer Organisations/447. Design Council.

447. Design Council.

The Design Council, a publicly funded body and registered charity established in 1944¹ and relaunched in 1994 following a major review, is a think tank, a campaigning organisation and a national authority on the use of design². By working with leading organisations and key opinion formers within business, education and government, the Council identifies, develops and promotes the best use of design by the United Kingdom, in the world context, to improve prosperity and well being. The Council provides online knowledge and design resources and in 2002 embarked on a series of projects involving designers working directly with selected businesses, schools and public services organisations with a view to integrating design thinking and methods into their strategies.

1 The Design Council, when established, was called the Council of Industrial Design, its name being changed to the Design Council in 1972. In 1957 the first Design Centre Awards for consumer goods, later called the Design Council Awards, were presented; and in 1976 the Design Council was granted a royal charter, establishing its status as the United Kingdom's national authority on design. The old black and white 'selected for the Design Centre' triangle which was first issued in 1958 was discontinued in 1988. In 1997 Millennium Products, the Design Council's initiative aimed at promoting British products and services, was launched.

2 The Council may be contacted at 34 Bow Street, London WC2E 7DL. The Design Council is not an organisation representing designers only.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(vii) Voluntary Consumer Organisations/448. Advertising Standards Authority.

448. Advertising Standards Authority.

The Advertising Standards Authority ('the Authority') is an independent, self-regulatory body set up in 1962 to promote and enforce the highest standards in all non-broadcast advertisements by supervising the industry's system of self-regulation¹. In 2004 the Authority also took over the regulation of broadcast advertising². The Authority ensures that anyone who commissions, prepares and publishes advertisements³ within the United Kingdom observes the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP code)⁴ in respect of non-broadcast advertising or the Radio Advertising Standards Code⁵ and the Television Advertising Standards Code⁶ in respect of broadcast advertising⁷.

The objects of the codes are to ensure that advertisements and promotions are legal, decent, honest and truthful, are prepared with a sense of responsibility to consumers and to society, respect the principles of fair competition generally accepted in business and do not bring advertising into disrepute.

The Authority enforces its decisions by asking advertisers of non-broadcast advertisements or promotions which break the code to be changed or removed from publication, or it may refer any complaint which falls directly under legislation to the appropriate law enforcement body. Persistent offenders can be required to have their marketing material vetted before publication. For broadcast advertisements, the responsibility for withdrawing, changing or rescheduling a commercial lies with the broadcasters who are obliged under their OFCOM licences to enforce the rulings of the Authority.

1 The Advertising Standards Authority may be contacted at Mid City Place, 71 High Holborn, London WC1V 6QT.

2 On 1 November 2004, OFCOM contracted out to the Authority the regulation of broadcast advertising. As to OFCOM see PARA 403 ante.

3 I.e., in respect of non-broadcast advertising: (1) advertisements in newspapers, magazines, brochures, leaflets, circulars, mailings, emails, text transmissions, fax transmissions, catalogues, follow-up literature and other electronic and printed material; (2) posters and other promotional media in public places, including moving images; (3) cinema and video commercials; (4) advertisements in non-broadcast electronic media; (5) viewdata services; (6) marketing databases containing consumers' personal information; (7) sales promotions; and (8) advertisement promotions. In respect of radio broadcast advertising, the code covers any items, including spot advertisements and promotions with advertisers, which are broadcast in return for payment or valuable consideration to a licensee or which seek to sell to listeners any products or services, but does not cover product placement. In respect of television advertising, the code covers any publicity by advertisers in breaks during or between programmes, irrespective of whether payment is made, and teleshopping channels, windows and spots.

It is for the Authority to decide whether material is part of an advertisement or not, the court having power to interfere only if the true and only reasonable conclusion contradicts the Authority's judgment: *R v Advertising Standards Authority Ltd, ex p Charles Robertson (Developments) Ltd* (1999) Times, 26 November.

4 The British Code of Advertising, Sales Promotion and Direct Marketing (the CAP code) (11th Edn), which came into force on 4 March 2003 and replaced all previous editions. The CAP Code (11th Edn) covers: (1) general principles; (2) substantiation; (3) legality; (4) decency; (5) honesty; (6) truthfulness; (7) matters of opinion; (8) fear and distress; (9) safety; (10) violence and anti-social behaviour; (11) political advertising; (12) protection of privacy; (13) testimonials and endorsements; (14) prices; (15) availability of products; (16) guarantees; (17) comparisons; (18) denigration and unfair advantage; (19) imitation; (20) recognising marketing communications and identifying marketers; (21) advertisement features; and (22) free offers. There are new rules for non-broadcast alcohol advertisements coming into force in October 2005.

The Sales Promotion Rules (11th Edn) cover: (a) introduction; (b) protection of consumers, safety and suitability; (c) children; (d) availability; (e) administration; (f) free offers and free trials; (g) prize promotions and the law; (h) significant conditions for promotions; (i) other rules for prize promotions; (j) front page flashes; (k) charity-linked promotions; and (l) trade incentives. The direct marketing rules cover distance selling and database practice.

There are specific rules relating to: (i) alcoholic drinks; (ii) children; (iii) motoring; (iv) environmental claims; (v) health and beauty products and therapies; (vi) weight control; (vii) employment and business opportunities; (viii) financial products; (ix) betting and gaming; and (x) tobacco, rolling papers and filters.

5 The BCAP Radio Advertising Standards Code. This is an updated edition of the former Radio Authority's Advertising and Sponsorship Code. The Radio Advertising Standards Code covers: (1) transparency and clear separation of advertising; (2) misleadingness; (3) superlative claims; (4) environmental claims; (5) fair comparisons; (6) denigration; (7) scheduling; (8) good taste, decency and offence to public feeling; (9) harm; (10) children and younger listeners; (11) sexual discrimination; (12) racial discrimination; (13) protection of privacy and exploitation of the individual; (14) political, industrial and public controversy; (15) superstition and appeals to fear; (16) price claims and VAT; (17) testimonials; (18) guarantees; (19) use of the word free; (20) direct marketing and distance selling; (21) premium rate telephone services; (22) competitions, lotteries, betting and gaming; (23) presenters in advertising; (24) sound effects; (25) financial products and services; (26) charity advertising; (27) medicines, treatments and health; (28) sanitary protection products; (29) family planning services; (30) pregnancy testing kits and services; (31) contraceptives; (32) anti-AIDS and anti-drugs messages; (33) tobacco products; (34) alcoholic drinks; (35) food and beverages; (36) slimming products, treatment and establishments; (37) dating, escort, introduction or marriage agencies services; (38) sex shops, stripograms etc; (39) prostitution, sexual services and obscene and restricted material; (40) firearms and weaponry; (41) motor vehicles; (42) advertising by solicitors; (43) services offering advice on consumer problems.

6 The BCAP Television Advertising Standards Code. This is an updated edition of the ITC Advertising Standards Code. The Television Advertising Standards Code covers: (1) compliance; (2) programmes and advertising; (3) unacceptable products and services; (4) political and controversial issues; (5) misleading advertising; (6) harm and offence; (7) children; (8) medicines, treatments, health claims, nutrition; (9) finance and investments; (10) religion, faith, systems of belief; (11) other categories. There are also rules on the scheduling of advertising and an Advertising Standards Code for Text Services.

7 The advertising codes are the responsibility of the Committee of Advertising Practice (Broadcast) and the Committee of Advertising Practice (Non-broadcast) and are independently administered by the Authority. The system is financed by a levy of 0.1% on display advertising expenditure and airtime and 0.2% of the Royal Mail's Mailsort contract. Advertisers must prove any claims which they may make; it is not for the Authority or anyone else to disprove them. Decisions on complaints are made by the ASA Council, which is split into two groups, one adjudicating on broadcast complaints and one on non-broadcast complaints.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(3) REGULATION OF CONSUMER PROTECTION/(vii) Voluntary Consumer Organisations/449. Press Complaints Commission.

449. Press Complaints Commission.

The Press Complaints Commission¹ is an independent body which investigates complaints² from members of the public about items in newspapers or magazines which have broken one or

more of the provisions of the Code of Practice drawn up by the newspaper and periodical industry and ratified by the Commission³. The Commission's remit does not include:

- 647 (1) legal or contractual matters or matters which are the subject of legal proceedings;
- 648 (2) advertisements, promotions or competitions and other parts of newspapers and magazines which are not considered editorial content;
- 649 (3) taste, decency and the choice, subject to the Code of Practice, of what is published, all of which are the responsibility of individual editors;
- 650 (4) complaints from those not directly involved; and
- 651 (5) unduly delayed complaints.

The Commission is unable to seek financial compensation for persons lodging a complaint⁴.

1 The Press Complaints Commission consists of 17 members: the independent chairman, and the remainder made up of independent members and senior editors drawn from across the newspaper and magazine publishing industry. All members of the Commission are appointed by an independent Appointments Commission. The Press Complaints Commission may be contacted at 1 Salisbury Square, London EC4Y 8JB.

2 Complainants should first write a letter of complaint to the editor of the publication in which the article complained of was published with a view to the obtaining of a correction or apology for any inaccuracy. If, however, a complainant receives no reply or is unhappy with the editor's reply, he should refer the matter to the Commission, which will then take the matter further.

3 The Code of Practice covers the following areas: (1) accuracy of material; (2) opportunity to reply; (3) privacy; (4) harassment; (5) intrusion into grief or shock; (6) children; (7) children in sex cases; (8) hospitals; (9) reporting of crime; (10) clandestine devices and subterfuge; (11) victims of sexual assault; (12) discrimination; (13) financial journalism; (14) confidential sources; (15) witness payments in criminal trials; and (16) payment to criminals. In the case of heads (3), (4), (6)-(10), (16) supra there may be exceptions where they can be demonstrated to be in the public interest, which includes detecting or exposing crime or serious impropriety, protecting public health and safety, and preventing the public from being misled by some statement or action of an individual or organisation. Where, however, the public interest is invoked, the Press Complaints Commission will require a full explanation by the editor demonstrating how the public interest was served. As to head (3) supra see *Douglas v Hello! Ltd* [2005] EWCA Civ 595, [2005] All ER (D) 280 (May).

4 See *How to Complain* published by the Commission. The Commission may in suitable cases decide whether censure is warranted without actually making a formal determination whether there has been a breach of the Code: see *R v Press Complaints Commission, ex p Stewart-Brady* [1997] EMLR 185, CA (application for judicial review of Press Complaints Commission's decision not to censure a newspaper that published an indistinct photograph of the applicant taken with a long-lens camera).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(4) RIGHTS AS BETWEEN THE PARTIES/(i) Protection against Unfair Terms/A. UNFAIR CONTRACT TERMS GENERALLY/450. Restrictions under the Unfair Contract Terms Act 1977 on agreements excluding or restricting obligations.

(4) RIGHTS AS BETWEEN THE PARTIES

(i) Protection against Unfair Terms

A. UNFAIR CONTRACT TERMS GENERALLY

450. Restrictions under the Unfair Contract Terms Act 1977 on agreements excluding or restricting obligations.

Except in the case of an international supply contract¹ and in the case of a contract the applicable law to which is the law of any part of the United Kingdom only by choice² of the parties, and apart from that choice would be the law of some country outside the United Kingdom³, the following restrictions apply:

- 652 (1) liability⁴ for breach of the obligations⁵ arising from the seller's implied undertakings as to title, freedom from incumbrances and quiet possession⁶ cannot be excluded or restricted by reference to any contract term⁷;
- 653 (2) liability for breach of the obligations arising from the seller's implied undertakings as to conformity of goods⁸ with description or sample or as to their quality or fitness for a particular purpose⁹ cannot be excluded or restricted by reference to any contract term as against a person dealing as consumer¹⁰; as against a person dealing otherwise than as consumer such liability can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness¹¹;
- 654 (3) where one of the contracting parties deals as consumer or on the other's written standard terms of business¹², then, as against that party, the other cannot by reference to any contract term:
- 45
 - 53. (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach¹³; or
 - 54. (b) claim to be entitled to render a contractual performance substantially different from that which was reasonably expected of him or in respect of the whole or any part of his contractual obligation, to render no performance at all¹⁴,
- 46
 - 655 except in so far as, in any of the cases mentioned in heads (3)(a) and (3)(b) above, the contract term satisfies the requirement of reasonableness¹⁵;
 - 656 (4) liability for breach of the obligations arising from the transferor's undertaking, in the case of a transfer of property in goods, that he has a right to transfer such property and, in the case of an agreement to transfer such property, that he will have such a right when the property is to be transferred¹⁶, cannot be excluded or restricted by reference to a contract term¹⁷.

These restrictions have effect notwithstanding any contract term which applies, or purports to apply, the law of some country outside the United Kingdom where:

- 657 (i) the term appears to the court or arbitrator to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the Unfair Contract Terms Act 1977¹⁸; and/or
- 658 (ii) in the making of the contract one of the parties dealt as consumer and he was then habitually resident in the United Kingdom and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf¹⁹.

1 See the Unfair Contract Terms Act 1977 s 26(1). For these purposes, 'international supply contract' means a contract which: (1) is either a contract of sale of goods or is one under or in pursuance of which the possession or ownership of goods passes; and (2) is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different states, the Channel Islands and the Isle of Man being treated for this purpose as different states from the United Kingdom: s 26(3)(a), (b). A contract falls within s 26(3) only if either: (a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one state to the territory of another; or (b) the acts constituting the offer and acceptance have been done in the territories of different states; or (c) the contract provides for the goods to be delivered to the territory of a state other than within whose territory those acts were done: s 26(4)(a)-(c). See *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep 645. Where the goods were to be manufactured and delivered in England, the relevant contract, which was signed in Abu Dhabi, was not an

international supply contract: see *Amiri Flight Authority v BAE Systems plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep 767; and CONTRACT vol 9(1) (Reissue) PARA 834.

2 As to the determination of the proper law of a contract see PARA 24 ante; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 349 et seq.

3 See the Unfair Contract Terms Act 1977 s 27(1) (amended by the Contracts (Applicable Law) Act 1990 s 5, Sch 4 para 4); and CONTRACT vol 9(1) (Reissue) PARA 835.

4 In the case of both contract and tort, the Unfair Contract Terms Act 1977 ss 2-7 (as amended) apply (except where the contrary is stated in s 6(4): see note 11 infra) only to business liability: s 1(3). For these purposes, 'business liability' means liability for breach of obligations or duties arising: (1) from things done or to be done by a person in the course of a business, whether his own business or another's; or (2) from the occupation of premises used for business purposes of the occupier: s 1(3)(a), (b). References to liability are to be read accordingly: s 1(3). 'Business' includes a profession and the activities of any government department or local or public authority: s 14.

5 To the extent that the exclusion or restriction of any liability is prevented there is also prevented any contract term: (1) making the liability or its enforcement subject to restrictive or onerous conditions; (2) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy; (3) excluding or restricting rules of evidence or procedure: *ibid* s 13(1)(a)-(c). To that extent, in cases of the liabilities under heads (1), (2) in the text, there is also prevented any contract term excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty: s 13(1). For these purposes, 'notice' includes an announcement, whether or not in writing, and any other communication or pretended communication: s 14. An agreement in writing to submit present or future differences to arbitration is not to be treated as excluding or restricting any liability: s 13(2). A person is not bound by any contract term prejudicing or taking away rights of his which arise under or in connection with the performance of another contract, so far as those rights extend to the enforcement of another's liability which that other is prevented from excluding or restricting: s 10. Section 10 does not apply to a contract to settle disputes which concerns the performance of an earlier contract, and furthermore it does not apply where the parties to both contracts are the same: *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53, [1991] 4 All ER 1.

6 In the obligations arising under the Sale of Goods Act 1979 s 12 (as amended): see PARA 69 ante.

7 Unfair Contract Terms Act 1977 s 6(1)(a) (amended by the Sale of Goods Act 1979 s 63, Sch 2 para 19(a)). In relation to a contract made on or after 18 May 1973 (ie the date on which the Supply of Goods (Implied Terms) Act 1973 came into force: see s 18(3)), and before 1 February 1978 (ie the date on which the Unfair Contract Terms Act 1977 came into force: see s 31(1)), such a term would be void: see the Sale of Goods Act 1979 s 55(3), Sch 1 paras 1, 11.

8 For these purposes, 'goods' has the same meaning as in the Sale of Goods Act 1979 (see PARA 30 ante): Unfair Contract Terms Act 1977 s 14 (amended by the Sale of Goods Act 1979 Sch 2 para 20).

9 In the obligations arising under the Sale of Goods Act 1979 s 13 (as amended) (see PARAS 72-74 ante), s 14 (as amended) (see PARA 77 et seq ante) or s 15 (as amended) (see PARAS 93-94 ante). See *Cavendish Woodhouse Ltd v Manley* (1984) 148 JP 299, DC (where a customer bought a suite of furniture in a sale, the cash sale invoice given to him at the time containing the statement 'bought as seen'; it was held that the statement 'bought as seen' was not void by virtue of the Unfair Contract Terms Act 1977 s 6 (as amended) because it did not purport to exclude the implied terms in the Sale of Goods Act 1979 s 13 (as amended) and s 14 (as amended), the statement 'bought as seen' merely confirming that the purchaser had seen the goods); cf *Hughes v Hall* [1981] RTR 430, DC (where the words 'sold as seen and inspected' were held to mean that the seller intended to avoid his undertaking as to quality).

10 Unfair Contract Terms Act 1977 s 6(2)(a) (amended by the Sale of Goods Act 1979 Sch 2 para 19(b)). For these purposes, a party to a contract 'deals as consumer' in relation to another party if: (1) he neither makes the contract in the course of a business nor holds himself out as doing so; and (2) the other party does make the contract in the course of a business; and (unless the person is an individual) (3) in the case of a contract governed by the law of sale of goods, or by the Unfair Contract Terms Act 1977 s 7 (as amended) (miscellaneous contracts under which goods pass: see CONTRACT vol 9(1) (Reissue) PARA 827), the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption: s 12(1), (1A) (s 12(1A) added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 14(1), (2)). But the buyer is not in any circumstances to be regarded as dealing as consumer: (a) if he is an individual and the goods are secondhand goods sold at public auction at which individuals have the opportunity of attending the sale in person; (b) if he is not an individual and the goods are sold by auction or by competitive tender: Unfair Contract Terms Act 1977 s 12(2) (substituted by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 14(1), (3)). Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not: Unfair Contract Terms Act 1977 s 12(3).

11 Ibid s 6(3). As to the test of reasonableness see PARA 451 post. The liabilities referred to in s 6 (as amended) are not only the business liabilities defined by s 1(3) (see note 4 supra), but also include those arising under any contract of sale of goods: s 6(4).

12 See ibid s 3(1). See also *McCrone v Boots Farm Sales Ltd* 1981 SLT 103, Ct of Sess (standard form contract under the Unfair Contract Terms Act 1977 s 17 includes any contract which includes a set of fixed terms applied by their proposer to contracts of the kind in question); *Macrae and Dick Ltd v Philip* 1982 SLT (Sh Ct) 5.

13 Unfair Contract Terms Act 1977 s 3(2)(a).

14 Ibid s 3(2)(b).

15 Ibid s 3(2). As to the avoidance of liability for negligence see ss 1, 2 (as amended) (see CONTRACT vol 9(1) (Reissue) PARA 822); as to unreasonable indemnity clauses see s 4 (see CONTRACT vol 9(1) (Reissue) PARA 824); and as to guarantees of consumer goods see s 5 (see CONTRACT vol 9(1) (Reissue) PARA 825).

16 Ie liability arising under the Supply of Goods and Services Act 1982 s 2: see PARA 70 ante.

17 Unfair Contract Terms Act 1977 s 7(3A) (added by the Supply of Goods and Services Act 1982 s 17(2)). Liability in respect of: (1) the right to transfer ownership of the goods or give possession; or (2) the assurance of quiet possession to a person in pursuance of the contract, cannot, in a case to which the Unfair Contract Terms Act 1977 s 7(3A) (as added) does not apply, be excluded or restricted by reference to any such term, except in so far as the term satisfies the requirement of reasonableness: Unfair Contract Terms Act 1977 s 7(4) (amended by the Supply of Goods and Services Act 1982 s 17(3)).

18 Unfair Contract Terms Act 1977 s 27(2)(a).

19 Ibid s 27(2)(b).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

450-451 Restrictions under the Unfair Contract Terms Act 1977 on agreements excluding or restricting obligations, The test of reasonableness

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(4) RIGHTS AS BETWEEN THE PARTIES/(i) Protection against Unfair Terms/A. UNFAIR CONTRACT TERMS GENERALLY/451. The test of reasonableness.

451. The test of reasonableness.

In relation to a contract term, the requirement of reasonableness¹ is that the term must have been a fair and reasonable one to be included, having regard to the circumstances which were, or ought reasonably to have been, known to, or in the contemplation of, the parties when the

contract was made². In determining³ whether a contract term satisfies the requirement of reasonableness, regard is to be had, in particular⁴, to the following matters:

- 659 (1) the strength of the bargaining positions of the parties relative to each other⁵, taking into account, among other things, of alternative means by which the customer's requirements could have been met⁶;
- 660 (2) whether the customer received an inducement to agree to the term or, in accepting it, had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term⁷;
- 661 (3) whether the customer knew or ought reasonably to have known of the existence and extent of the term, having regard, among other things, to any custom of the trade and any previous course of dealing between the parties⁸;
- 662 (4) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable⁹;
- 663 (5) whether the goods¹⁰ were manufactured, processed or adapted to the special order of the customer¹¹.

Where, by reference to a contract term or notice¹², a person seeks to restrict liability to a specified sum of money, and the question arises¹³ whether the term or notice satisfies the requirement of reasonableness, regard is to be had, in particular¹⁴, to:

- 664 (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
- 665 (b) how far it was open to him to cover himself by insurance¹⁵.

In relation to a notice, not being a notice having contractual effect, the requirement of reasonableness is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or, but for the notice, would have arisen¹⁶.

It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does¹⁷.

1 Ie for the purposes of the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended) (see PARA 450 ante; and CONTRACT vol 9(1) (Reissue) PARA 820 et seq) and the Misrepresentation Act 1967 s 3 (as substituted) (see PARA 465 post; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 803, 828).

2 Unfair Contract Terms Act 1977 s 11(1). See *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495.

3 Ie for the purposes of the Unfair Contract Terms Act 1977 s 6 (as amended) (see PARA 450 ante) or s 7 (as amended) (miscellaneous contracts under which goods pass: see PARA 450 ante; and CONTRACT vol 9(1) (Reissue) PARA 827).

4 Particular regard is to be had to the specified circumstances in determining the reasonableness of a term purporting to exclude or restrict liability for breach of the conditions implied by the Sale of Goods Act 1979 ss 13-15 (as amended) (see PARA 72 et seq ante): see the Unfair Contract Terms Act 1977 s 11(2), Sch 2. This does not, however, prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract: s 11(2). For the meaning of 'liability' see PARA 450 note 4 ante.

5 In commercial matters, where parties are not of unequal bargaining power and where risks are normally borne by insurance, the apportionment of risks by the parties will generally be upheld by the courts: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 843, 851, [1980] 1 All ER 556 at 561, 570, HL. See also *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 300, [1967] 1 All ER 699 at 708, HL; *RW Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep 602 (standard terms negotiated by trade organisations acting for buyers and sellers). Cf *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep 645 (boat negligently built by seller resulting in its total loss); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*

[1983] 2 AC 803, [1983] 2 All ER 737, HL (term imposed unilaterally by seller who was at fault and better able to insure against the risk). As to the effect of unequal bargaining power see *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 623-624, [1974] 1 WLR 1308 at 1316, HL, per Lord Diplock.

6 Unfair Contract Terms Act 1977 Sch 2 para (a).

7 Ibid Sch 2 para (b).

8 Ibid Sch 2 para (c).

9 Ibid Sch 2 para (d).

10 As to the meaning of 'goods' see PARA 450 note 8 ante.

11 Unfair Contract Terms Act 1977 Sch 2 para (e).

12 As to the meaning of 'notice' see PARA 450 note 5 ante.

13 Ie under the provisions of the Unfair Contract Terms Act 1977 or any other enactment.

14 Ie without prejudice to ibid s 11(2) (see note 4 supra), in the case of contract terms.

15 Ibid s 11(4).

16 Ibid s 11(3).

17 Ibid s 11(5). Where, for reliance on it, a contract term has to satisfy the requirement of reasonableness, it may be found to do so and be given effect accordingly, notwithstanding that the contract has been terminated either by breach or by a party electing to treat it as repudiated: s 9(1). Where, on a breach, the contract is nevertheless affirmed by a party entitled to treat it as repudiated, this does not of itself exclude the requirement of reasonableness in relation to any contract term: s 9(2).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

450-451 Restrictions under the Unfair Contract Terms Act 1977 on agreements excluding or restricting obligations, The test of reasonableness

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(4) RIGHTS AS BETWEEN THE PARTIES/(i) Protection against Unfair Terms/B. UNFAIR TERMS IN CONTRACTS BETWEEN SELLERS OR SUPPLIERS AND CONSUMERS/(A) In general/452. Contractual terms.

B. UNFAIR TERMS IN CONTRACTS BETWEEN SELLERS OR SUPPLIERS AND CONSUMERS

(A) IN GENERAL

452. Contractual terms.

The Unfair Terms in Consumer Contracts Regulations 1999¹ apply:

- 666 (1) in relation to unfair terms² in contracts concluded between a seller or a supplier³ and a consumer⁴;
- 667 (2) notwithstanding any contract term which applies or purports to apply the law of a non-member state⁵, if the contract has a close connection with the territory of the member states⁶;

but they do not apply to contractual terms which reflect:

- 668 (a) mandatory statutory or regulatory provisions, including such provisions under the law of any member state or in Community⁷ legislation having effect in the United Kingdom without further enactment;
- 669 (b) the provisions or principles of international Conventions to which the member states or the Community are or is party⁸.

1 The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see *infra*; and PARA 453 et seq post. The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended), implement EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) (see PARA 393 ante). See also *R (on the application of Khatun) v Newham London Borough Council* [2004] EWCA Civ 55, [2005] QB 37, [2004] 3 WLR 417 (seller or supplier includes local authority). Some transactions may be subject to both the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended), and the Unfair Contract Terms Act 1977 s 3 (see PARA 450 ante), in which case a provision may fail under either or both sets of rules; but other transactions may be subject to only one of the two types of rule.

2 For these purposes, 'unfair terms' means the contractual terms referred to in the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5 (as amended) (see PARA 453 post): reg 3(1).

3 For these purposes, 'seller or supplier' means any natural or legal person who, in contracts covered by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned: reg 3(1).

4 *Ibid* reg 4(1). For these purposes, 'consumer' means any natural person who, in contracts covered by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended), is acting for purposes which are outside his trade, business or profession: reg 3(1). Under EC Council Directive 93/13 art 2(b), the term 'consumer' refers only to natural persons not legal persons: Case C-541/99 *Cape Snc v Idealservice Srl*; Case C-542/99 *Idealservice MN RE Sas v OMAI Srl* [2002] All ER (EC) 657, [2001] ECR I-9049, ECJ. In the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 4(1), the references to a seller or a supplier include references to a distance supplier and to an intermediary: reg 3(1A) (added by the Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095). 'Distance supplier' means: (1) a supplier under a distance contract within the meaning of the Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095; or (2) a supplier of unsolicited financial services within reg 15 of those Regulations; and 'intermediary' has the same meaning as in those Regulations: Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 3(1B) (added by SI 2004/2095). See FINANCIAL SERVICES.

5 For these purposes, 'member state' means a state which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992; Cm 2073; OJ L1, 3.1.94, p 3), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)) (the 'EEA Agreement'): Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 3(1). As to the European Economic Area and the EEA Agreement see PARA 386 note 1 ante.

6 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 9. Regulation 9 is also consistent with the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980) ('the Rome Convention'): see PARA 24 ante; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 350.

7 For these purposes, 'the Community' means the European Community: Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 3(1).

8 *Ibid* reg 4(2).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

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453. Unfair terms.

A contractual term which has not been individually negotiated is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer¹. A term is always to be regarded as not having been individually negotiated where it has been drafted in advance² and the consumer has, therefore, not been able to influence the substance of the term³. It is for any seller or supplier⁴ who claims that a term was individually negotiated to show that it was⁵.

Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, the Unfair Terms in Consumer Contracts Regulations 1999⁶ apply to the rest of a contract if an overall assessment⁷ of it indicates that it is a pre-formulated⁸ standard contract⁹.

Any contractual term providing that a consumer bears the burden of proof in respect of showing whether a distance supplier¹⁰ or an intermediary¹¹ complied with any or all of the obligations placed upon him resulting from the Directive¹² on distance marketing of consumer financial services and any rule¹³ or enactment implementing it is always to be regarded as unfair¹⁴.

1 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(1). For the meaning of 'consumer' see PARA 452 note 4 ante; and for an indicative and non-exhaustive list of terms which may be regarded as unfair see PARA 454 post. A clause in an agreement for a loan imposing on a defaulting borrower a duty to pay interest under the contract not only between default in payment and judgment but also between judgment and payment was held not to cause significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which was contrary to the requirement of good faith: see *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 All ER 97, revsg [2000] QB 672, [2000] 2 All ER 759, CA (decided under the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (revoked)). Any contractual term providing that a consumer bears the burden of proof in respect of showing whether a distance supplier or an intermediary complied with any or all of the obligations placed on him resulting from European Parliament and EC Council Directive 2002/65 (OJ L271, 9.10.2002, p 16) concerning the distance marketing of consumer financial services, and any rule or enactment implementing it must always be regarded as unfair: Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(6) (added by SI 2004/2095). For this purpose, 'rule' means a rule made by the Financial Services Authority under the Financial Services and Markets Act 2000 or by a designated professional body within the meaning of s 326(2) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 749): Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(7) (added by SI 2004/2095). For the meaning of 'distance supplier' see PARA 452 note 4 ante. See *Bairstow Eves London Central Ltd v Smith and Darlingsons (a firm)* [2004] EWHC 263 (QB), [2004] All ER (D) 354 (Feb).

2 The expression 'drafted in advance' would appear to envisage that the requisite term is in writing and that its contents were settled before negotiations began with the consumer; but the recitals to EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) (see PARA 393 ante) clearly include an oral contract.

3 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(2).

4 For the meaning of 'seller or supplier' see PARA 452 note 3 ante.

5 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(4). Regulation 5 does not stipulate that the agreement must be signed; and the recitals to EC Council Directive 93/13 clearly include an oral contract.

6 le the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see PARAS 452 ante, 454 et seq post.

7 It is submitted that 'overall assessment' is intended to allow consideration for the purposes of assessment of both those terms which have been individually negotiated and those which have not.

8 It is submitted that 'pre-formulated' is intended to indicate the totality of terms which are not individually negotiated.

9 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(3).

10 As to the meaning of 'distance supplier' see PARA 452 note 4 ante.

11 As to the meaning of 'intermediary' see PARA 452 note 4 ante.

12 'The Directive' means European Parliament and Council Directive 2002/65 (OJ L271, 9.10.2002, p 16) concerning the distance marketing of consumer financial services and amending EC Council Directive 90/619 (OJ L330, 29.11.90, p 50), European Parliament and EC Council Directive 97/7 (OJ L144, 4.6.97, p 19) and European Parliament and EC Council Directive 98/27 (OJ L166, 11.6.98, p 51): Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(7) (added by SI 2004/2095).

13 'Rule' means a rule made by the Financial Services Authority under the Financial Services and Markets Act 2000 or by a designated professional body within the meaning of s 326(2): Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(7) (added by SI 2004/2095). As to the Financial Services Authority see PARAS 408 ante, 458 note 4 post.

14 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(6) (added by SI 2004/2095).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

453 Unfair terms

NOTE 12--Directive 98/27 replaced: European Parliament and EC Council Directive 2009/22 (OJ L110, 1.5.2009, p 33); references to the repealed directive should be construed as references to Directive 2009/22 and read in accordance with the correlation table in Annex III: art 9.

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454. Indicative and non-exhaustive list of terms which may be regarded as unfair.

The following is an indicative and non-exhaustive list of terms¹ which may be regarded as unfair², namely terms which have the object or effect of:

- 670 (1) excluding or limiting the legal liability of a seller or supplier³ in the event of the death of a consumer⁴ or personal injury to the latter resulting from an act or omission of that seller or supplier⁵;
- 671 (2) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him⁶;
- 672 (3) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone⁷;
- 673 (4) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract⁸;
- 674 (5) requiring any consumer who fails to fulfil his obligations to pay a disproportionately high sum in compensation⁹;
- 675 (6) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract¹⁰;
- 676 (7) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so¹¹;
- 677 (8) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early¹²;
- 678 (9) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract¹³;
- 679 (10) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract¹⁴;
- 680 (11) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided¹⁵;
- 681 (12) providing for the price of the goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without, in both cases, giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded¹⁶;
- 682 (13) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract¹⁷;
- 683 (14) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality¹⁸;
- 684 (15) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his¹⁹;
- 685 (16) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement²⁰;

686 (17) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract²¹.

The provisions of heads (7), (10) and (12) above do not apply to:

687 (a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;

688 (b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency²².

1 As to the terms to which these provisions apply see PARA 452 ante.

2 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(5).

3 For the meaning of 'seller or supplier' see PARA 452 note 3 ante.

4 For the meaning of 'consumer' see PARA 452 note 4 ante.

5 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(5), Sch 2 para 1(a).

6 Ibid Sch 2 para 1(b).

7 Ibid Sch 2 para 1(c).

8 Ibid Sch 2 para 1(d).

9 Ibid Sch 2 para 1(e).

10 Ibid Sch 2 para 1(f).

11 Ibid Sch 2 para 1(g). Schedule 2 para 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately: Sch 2 para 2(a).

12 Ibid Sch 2 para 1(h).

13 Ibid Sch 2 para 1(i).

14 Ibid Sch 2 para 1(j). Schedule 2 para 1(j) is without hindrance to: (1) terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately; (2) terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract: Sch 2 para 2(b).

15 Ibid Sch 2 para 1(k).

16 Ibid Sch 2 para 1(l). Schedule 2 para 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described: Sch 2 para 2(d).

17 Ibid Sch 2 para 1(m).

18 Ibid Sch 2 para 1(n).

19 Ibid Sch 2 para 1(o).

20 Ibid Sch 2 para 1(p).

21 Ibid Sch 2 para 1(q). See *Picardi v Cuniberti* [2002] EWHC 2923 (TCC), [2003] All ER (D) 322 (Jan) (a procedure which the consumer was required to follow and which caused irreversible expenditure in prosecuting or defending it is something which may hinder the consumer's right to take legal action).

22 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, Sch 2 para 2(c).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

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455. Assessment of unfair terms.

The unfairness¹ of a contractual term² is³ to be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent⁴.

In so far as it is in plain, intelligible language⁵, the assessment of fairness of a term is not to relate:

- 689 (1) to the definition of the main subject matter of the contract⁶; or
- 690 (2) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange⁷.

1 As to when a contractual term is to be regarded as unfair see PARA 453 ante; and for an indicative and non-exhaustive list of terms which may be regarded as unfair see PARA 454 ante.

2 As to the terms to which these provisions apply see PARA 452 ante.

3 Ie without prejudice to the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12 (as amended): see PARA 460 post.

4 Ibid reg 6(1).

5 As to the requirement to express written terms in plain, intelligible language see PARA 456 post.

6 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 6(2)(a). As to the difficulty of identifying terms which 'define the main subject matter of the contract' see Macdonald 'Mapping the Unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts' [1994] JBL 441 at 460-462; Brownsword and Howells 'The implementation of the EC Directive on Unfair Terms in Consumer Contracts - some unresolved questions' [1995] JBL 243 at 248-252. As to which pre-contractual representations become terms of the contract see CONTRACT vol 9(1) (Reissue) PARA 767 et seq; and as to the incorporation of terms by signature or notice see CONTRACT vol 9(1) (Reissue) PARA 685 et seq.

7 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 6(2)(b). This is consistent with the common law rule that a court will not inquire into the adequacy of the consideration: see *CONTRACT* vol 9(1) (Reissue) PARAS 736, 791. A default clause in a contract for a home loan, setting out the terms on which interest was payable, was not considered to be one of the important terms of the agreement which that party would seriously consider in deciding whether or not to accept the loan: see *Director General of Fair Trading v First National Bank plc* [2000] 1 All ER 240 at 248-249, [2000] 1 WLR 99 at 106-107; affd [2001] UKHL 52, [2002] 1 All ER 97 (decided under the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (revoked)).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see *Consumers, Estate Agents and Redress Act 2007* s 59; and *PARA 663A*.

455 Assessment of unfair terms

NOTE 4--See *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC), [2008] 2 All ER (Comm) 831 (clause providing for arbitration in Denmark not unfair when consumer had chosen to engage Danish workmen and would be able to pay for interpreters).

NOTE 7--See *Office of Fair Trading v Abbey National plc* [2008] EWHC 875 (Comm), [2008] All ER (D) 349 (Apr) (assessment of charges or terms did not impinge on adequacy of totality of benefits received by bank in exchange for package of services). Where a sum is contractually payable on the happening of a number of events, including a breach of contract by the payer, the sum is capable of being a penalty when the circumstances giving rise to payment is the breach of contract, but not when the circumstances giving rise to payment is otherwise: *Office of Fair Trading v Abbey National plc (No 2)* [2008] EWHC 2325 (Comm), [2009] 1 All ER (Comm) 717. Charges imposed by banks on holders of personal current accounts who have unauthorised overdrafts are exempt from review by virtue of reg 6(2)(b): *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, [2009] 3 WLR 1215, [2009] All ER (D) 271 (Nov). See *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), [2009] All ER (D) 110 (Jul) (fairness of terms relating to third party renewal of letting arrangements).

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456. Written terms and guarantees: their form and interpretation.

A seller or supplier¹ must ensure that any written term² of a contract is expressed in plain, intelligible language³.

If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer⁴ prevails, save in the case of proceedings⁵ brought for an injunction to prevent the continued use of unfair terms⁶.

Where goods are sold or otherwise supplied⁷ to a consumer⁸ which are offered with a consumer guarantee⁹, the guarantor, and any other person who offers for sale or supply to consumers the goods which are the subject of the guarantee¹⁰, must ensure¹¹ that the guarantee sets out¹² in

plain intelligible language and, where those goods are offered within the United Kingdom, in English¹³:

- 691 (1) the contents of the guarantee; and
- 692 (2) the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor¹⁴.

1 For the meaning of 'seller or supplier' see PARA 452 note 3 ante.

2 As to the terms to which these provisions apply see PARA 452 ante; and as to oral terms see PARA 453 notes 2, 5 ante. The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 7 is silent as to terms which have been individually negotiated; sed quaere whether reg 7 would apply to such terms.

3 Ibid reg 7(1).

4 For the meaning of 'consumer' see PARA 452 note 4 ante.

5 The same in the case of proceedings brought under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12: see PARA 460 post.

6 Ibid reg 7(2). This appears to mirror the common law contra proferentem rule: see CONTRACT vol 9(1) (Reissue) PARA 776.

7 'Supply' includes supply by way of sale, lease, hire or hire purchase: Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 2.

8 'Consumer' means any natural person who in the contracts covered by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045 is acting for purposes which are outside his trade, business or profession: reg 2.

9 'Consumer guarantee' means any undertaking to a consumer by a person acting in the course of his business, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising: ibid reg 2. The consumer guarantee takes effect at the time the goods are delivered as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and the associated advertising: reg 15(1).

10 Ibid reg 15(4).

11 As to non-compliance with these requirements see PARA 460 post.

12 On request by the consumer, the guarantee must within a reasonable time be made available in writing or in another durable medium available and accessible to him: Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 15(3).

13 Ibid reg 15(5).

14 Ibid reg 15(2).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

456 Written terms and guarantees: their form and interpretation

NOTE 14--See SI 2002/3045 reg 15(2A) (added by SI 2008/1277).

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457. Effect of unfair term.

An unfair term¹ in a contract concluded with a consumer² by a seller or supplier³ is not binding on the consumer⁴.

The contract continues to bind the parties if it is capable of continuing in existence without the unfair term⁵.

1 As to the terms to which these provisions apply see PARA 452 ante; as to when a contractual term is to be regarded as unfair see PARA 453 ante; and for an indicative and non-exhaustive list of terms which may be regarded as unfair see PARA 454 ante.

2 For the meaning of 'consumer' see PARA 452 note 4 ante.

3 For the meaning of 'seller or supplier' see PARA 452 note 3 ante.

4 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 8(1).

5 Ibid reg 8(2). Cf severance of illegal provisions, sometimes called 'the blue pencil test': see CONTRACT vol 9(1) (Reissue) PARA 877. Where absence of the unfair term would remove all the consideration supplied by the consumer, the contract will fall, there being at most a unilateral offer by the supplier. As to unilateral contracts see CONTRACT vol 9(1) (Reissue) PARA 606; and as to the recovery of any money transferred on the grounds of a total failure of consideration see RESTITUTION vol 40(1) (2007 Reissue) PARA 87 et seq.

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

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(B) ENFORCEMENT

458. Consideration of complaints by the Office of Fair Trading.

It is the duty of the Office of Fair Trading ('OFT')¹ to consider any complaint made to it that any contract term² drawn up for general use is unfair³, unless the complaint appears to the OFT to be frivolous or vexatious or a qualifying body⁴ has notified the OFT in writing that it agrees to consider the complaint⁵.

The OFT must give reasons for its decision to apply or not to apply, as the case may be, for an injunction⁶ in relation to any complaint which it is required⁷ to consider⁸.

In deciding whether or not to apply for an injunction in respect of a term which the OFT considers to be unfair, it may, if it considers it appropriate to do so, have regard to any undertakings given to it by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers⁹.

1 As to the Office of Fair Trading see PARA 407 ante.

2 As to the terms to which these provisions apply see PARA 452 ante.

3 As to when a contractual term is to be regarded as unfair see PARA 453 ante; and for an indicative and non-exhaustive list of terms which may be regarded as unfair see PARA 454 ante.

4 For these purposes, 'qualifying body' means a person specified in the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 3(1), Sch 1 (as amended): reg 3(1). The persons so specified are the Information Commissioner (see PARA 406 ante), the Gas and Electricity Markets Authority (see PARA 424 ante), the Office of Communications (see PARA 426 ante), the Director General of Water Services (as from a day to be appointed, the Water Services Regulation Authority) (see PARA 427 ante), the Office of Rail Regulation (see PARA 425 ante), every weights and measures authority in Great Britain (see PARA 398 ante), the Financial Services Authority (see PARA 408 ante), and the Consumers' Association (see PARA 445 ante): Sch 1 Pt I (paras 1-10), Pt II (para 11) (Sch 1 Pt I substituted by SI 2001/1186; and amended by the Railways and Transport Safety Act 2003 s 16(4), (5), Sch 3 para 4; and SI 2003/3182); Interpretation Act 1978 s 17(2)(b). For the meaning of 'local weights and measures authority' see PARA 398 ante. The functions of the Financial Services Authority under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended), are to be treated as functions of the Financial Services Authority under the Financial Services and Markets Act 2000: Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 16 (added by SI 2001/1186; and amended by SI 2001/3649).

5 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 3(1), 10(1) (amended by virtue of the Enterprise Act 2002 s 2).

6 Ie under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12 (as amended): see PARA 460 post.

7 Ie under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARA 452 et seq ante.

8 Ibid regs 3(1), 10(2) (amended by virtue of the Enterprise Act 2002 s 2). The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 10(2), (3) (as amended) (see infra) applies to a qualifying body which is under a duty to consider a complaint as it applies to the OFT: see reg 11(2) (amended by virtue of the Enterprise Act 2002 s 2); and PARA 459 post.

9 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 3(1), 10(3) (amended by virtue of the Enterprise Act 2002 s 2). See also note 8 supra. For the meaning of 'consumer' see PARA 452 note 4 ante.

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

458 Consideration of complaints by the Office of Fair Trading

NOTE 4--SI 1999/2083 Sch 1 Pt I further amended: SI 2006/523.

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459. Consideration of complaints by qualifying bodies.

If the Information Commissioner¹, the Gas and Electricity Markets Authority², the Financial Services Authority³, the Office of Communications⁴, the Director General of Water Services⁵, the Office of Rail Regulation⁶ or a weights and measures authority⁷ in Great Britain notifies the Office of Fair Trading⁸ that he or it agrees to consider a complaint that any contract term⁹ drawn up for general use is unfair¹⁰, he or it is under a duty to consider the complaint¹¹.

1 As to the Information Commissioner see PARA 406 ante.

2 As to the Gas and Electricity Markets Authority see PARA 424 ante.

3 As to the Financial Services Authority see PARA 408 ante; and PARA 458 note 4 ante.

4 As to OFCOM see PARA 403 ante.

5 As to the Director General of Water Services see PARA 427 ante; as to the replacement of the Director General, as from a day to be appointed, by the Water Services Regulation Authority see PARA 427 note 1 ante.

6 As to the Office of Rail Regulation see PARA 425 ante.

7 For the meaning of 'local weights and measures authority' see PARA 398 ante.

8 As to the Office of Fair Trading see PARA 407 ante.

9 As to the terms to which these provisions apply see PARA 452 ante.

10 As to when a contractual term is to be regarded as unfair see PARA 453 ante; and for an indicative and non-exhaustive list of terms which may be regarded as unfair see PARA 454 ante.

11 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 3(1), 11(1), Sch 1 Pt I (regs 3(1), 11(1) amended by virtue of the Enterprise Act 2002 s 2; Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, Sch 1 Pt I substituted by SI 2001/1186; and amended by SI 2003/3182; and, as from a day to be appointed, by the Railways and Transport Safety Act 2003 s 16(4), (5), Sch 3 para 4); Interpretation Act 1978 s 17(2)(b). The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 10(2), (3) (as amended) (see PARA 458 ante) applies to a qualifying body which is under a duty to consider a complaint as it applies to the OFT: reg 11(2) (amended by virtue of the Enterprise Act 2002 s 2).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

459 Consideration of complaints by qualifying bodies

TEXT AND NOTE 5--Reference is now to the Water Services Regulation Authority: SI 1999/2083 Sch 1 Pt I (amended by SI 2006/523).

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460. Injunctions to prevent continued use of unfair terms.

The Office of Fair Trading¹ ('OFT') or any qualifying body² may apply for an injunction, including an interim injunction, against any person appearing to the OFT or that body to be using, or recommending use of, an unfair term³ drawn up for general use in contracts concluded with consumers⁴, or to be using a consumer guarantee and failing to comply with the statutory requirements⁵. A qualifying body may, however, apply for an injunction only where:

- 693 (1) it has notified the OFT in writing of its intention to apply at least 14 days before the date on which the application is made, beginning with the date on which the notification was given; or
- 694 (2) the OFT consents to the application being made within a shorter period⁶.

On such an application a county court or the High Court may grant an injunction on such terms as it thinks fit⁷. An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person⁸.

1 As to the Office of Fair Trading see PARA 407 ante.

2 For the meaning of 'qualifying body' see PARA 458 note 4 ante.

3 As to the terms to which these provisions apply see PARA 452 ante; as to when a contractual term is to be regarded as unfair see PARA 453 ante; and for an indicative and non-exhaustive list of terms which may be regarded as unfair see PARA 454 ante.

4 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 3(1), 12(1) (amended by virtue of the Enterprise Act 2002 s 2). For the meaning of 'consumer' see PARA 452 note 4 ante. See *Director General of Fair Trading v First National Bank plc* [2000] 1 All ER 240 at 248-249, [2000] 1 WLR 99 at 106-107; affd [2001] UKHL 52, [2002] 1 All ER 97 (decided under the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (revoked)).

5 Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 15(6). As to the statutory requirements see PARA 456 ante.

6 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 3(1), 12(2) (amended by virtue of the Enterprise Act 2002 s 2).

7 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 3(1), 12(3); Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 15(7).

8 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12(4).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

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461. Power to obtain documents and information.

The Office of Fair Trading¹ ('OFT') may exercise the power conferred by the following provisions for the purpose of:

- 695 (1) facilitating its consideration of a complaint that a contract term² drawn up for general use is unfair³; or
- 696 (2) ascertaining whether a person has complied with an undertaking or court order as to the continued use, or recommendation for use, of a term in contracts concluded with consumers⁴.

The Information Commissioner⁵, the Gas and Electricity Markets Authority⁶, the Financial Services Authority⁷, the Office of Communications⁸, the Director General of Water Services⁹, the Office of Rail Regulation¹⁰ or a weights and measures authority¹¹ in Great Britain (a 'qualifying body') may exercise the power conferred by the following provisions for the purpose of:

- 697 (a) facilitating his or its consideration of a complaint that a contract term drawn up for general use is unfair; or
- 698 (b) ascertaining whether a person has complied with an undertaking given to the qualifying body or to the court following an application by the qualifying body or a court order made on an application by that body,

as to the continued use, or recommendation for use, of a term in contracts concluded with consumers¹².

The OFT may require any person to supply it, and a qualifying body may require any person to supply to him or it:

- 699 (i) a copy of any document which that person has used or recommended for use, at the time the notice¹³ is given, as a pre-formulated standard contract in dealings with consumers;
- 700 (ii) information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers¹⁴.

The power conferred by the above provisions is to be exercised by a notice in writing which may specify the way in which, and the time within which, it is to be complied with and may be varied or revoked by a subsequent notice¹⁵.

Nothing in the above provisions compels a person to supply any document or information which he would be entitled to refuse to produce or give in civil proceedings before the court¹⁶.

If a person makes default in complying with such a notice, a county court or the High Court may, on the application of the OFT or of the qualifying body, make such order as the court thinks fit for requiring the default to be made good; and any such order may provide that all the costs or expenses of and incidental to the application are to be borne by the person in default or by any officers of a company or other association who are responsible for its default¹⁷.

- 1 As to the Office of Fair Trading see PARA 407 ante.
- 2 As to the terms to which these provisions apply see PARA 452 ante.
- 3 As to when a contractual term is to be regarded as unfair see PARA 453 ante; and for an indicative and non-exhaustive list of terms which may be regarded as unfair see PARA 454 ante.
- 4 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 3(1), 13(1) (amended by virtue of the Enterprise Act 2002 s 2). For the meaning of 'consumer' see PARA 452 note 4 ante.
- 5 As to the Information Commissioner see PARA 406 ante.
- 6 As to the Gas and Electricity Markets Authority see PARA 424 ante; and FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 708 et seq.
- 7 As to the Financial Services Authority see PARAS 408, 458 note 4 ante.
- 8 As to the Office of Communications see PARA 426 ante.
- 9 As to the Director General of Water Services see PARA 427 ante. As to the replacement of the Director General, as from a day to be appointed, by the Water Services Regulation Authority see PARA 427 note 1 ante.
- 10 As to the Office of Rail Regulation see PARA 425 ante.
- 11 For the meaning of 'local weights and measures authority' see PARA 398 ante.
- 12 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 3(1), 13(2), Sch 1 Pt I (Sch 1 Pt I substituted by SI 2001/1186; and amended by SI 2003/3182; and, as from a day to be appointed, by the Railways and Transport Safety Act 2003 s 16(4), (5), Sch 3 para 4); Interpretation Act 1978 s 17(2)(b).
- 13 Ie the notice under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 13(4): see the text to note 15 infra.
- 14 Ibid regs 3(1), 13(3) (amended by virtue of the Enterprise Act 2002 s 2).
- 15 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 13(4).
- 16 Ibid reg 13(5).
- 17 Ibid regs 3(1), 13(6) (amended by virtue of the Enterprise Act 2002 s 2).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

461 Power to obtain documents and information

TEXT AND NOTE 9--Reference is now to the Water Services Regulation Authority: SI 1999/2083 Sch 1 Pt I (amended by SI 2006/523).

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462. Notification of undertakings and orders.

A qualifying body¹ must notify the Office of Fair Trading²:

- 701 (1) of any undertaking given to it by or on behalf of any person as to the continued use of a term³ which that body considers to be unfair⁴ in contracts concluded with consumers⁵;
- 702 (2) of the outcome of any application made by it⁶ for an injunction to prevent the continued use of unfair terms and of the terms of any undertaking given to, or order made by, the court;
- 703 (3) of the outcome of any application made by it to enforce a previous order of the court⁷.

1 For the meaning of 'qualifying body' see PARA 458 note 4 ante.

2 As to the Office of Fair Trading see PARA 407 ante.

3 As to the terms to which these provisions apply see PARA 452 ante.

4 As to when a contractual term is to be regarded as unfair see PARA 453 ante; and for an indicative and non-exhaustive list of terms which may be regarded as unfair see PARA 454 ante.

5 For the meaning of 'consumer' see PARA 452 note 4 ante.

6 Ie under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12: see PARA 460 ante.

7 Ibid reg 14 (amended by virtue of the Enterprise Act 2002 s 2).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

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463. Publication, information and advice.

The Office of Fair Trading¹ ('OFT') must arrange for the publication in such form and manner as it considers appropriate, of:

- 704 (1) details of any undertaking or order notified to it²;
- 705 (2) details of any undertaking given to it by or on behalf of any person as to the continued use of a term which the OFT considers to be unfair³ in contracts concluded with consumers⁴;

706 (3) details of any application made by the OFT⁵ for an injunction to prevent the continued use of unfair terms, and of the terms of any undertaking given to, or order made by, the court;

707 (4) details of any application made by the OFT to enforce a previous order of the court⁶.

The OFT must inform any person on request whether a particular term⁷ has been:

708 (a) the subject of an undertaking given to the OFT or notified to it by a qualifying body⁸; or

709 (b) the subject of an order of the court made on application by it or notified to it by a qualifying body;

and it must give that person details of the undertaking or a copy of the order, as the case may be, together with a copy of any amendments which the person giving the undertaking has agreed to make to the term in question⁹.

The OFT may arrange for the dissemination in such form and manner as it considers appropriate of such information and advice concerning the operation of the statutory provisions relating to unfair terms in consumer contracts¹⁰ as may appear to it to be expedient to give to the public and to all persons likely to be affected by those provisions¹¹.

1 As to the Office of Fair Trading see PARA 407 ante.

2 Ie under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 14: see PARA 462 ante.

3 As to when a contractual term is to be regarded as unfair see PARA 453 ante; and for an indicative and non-exhaustive list of terms which may be regarded as unfair see PARA 454 ante.

4 For the meaning of 'consumer' see PARA 452 note 4 ante.

5 Ie under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 12 (as amended): see PARA 460 ante.

6 Ibid reg 15(1) (amended by virtue of the Enterprise Act 2002 s 2).

7 Ie a particular term to which the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended), applies: see PARA 452 ante.

8 For the meaning of 'qualifying body' see PARA 458 note 4 ante.

9 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 15(2) (amended by virtue of the Enterprise Act 2002 s 2).

10 Ie the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARA 452 et seq ante.

11 Ibid reg 15(3) (amended by virtue of the Enterprise Act 2002 s 2).

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(4) RIGHTS AS BETWEEN THE PARTIES/(ii) Rights in connection with Misrepresentation/464. Representations.

(ii) Rights in connection with Misrepresentation

464. Representations.

During the course of the formation of a contract¹ one of the persons who are to become parties to the contract may make representations to another such person. A representation is a statement made by one party ('the representor') to another party ('the representee') which relates, by way of affirmation, denial, description or otherwise, to a matter of fact or present intention. If untrue, it may be termed a misrepresentation.

A representation of fact may or may not be intended to have contractual force. If it is so intended, it will also amount to a contractual term²; but, if it is not so intended, a positive statement³ is termed a mere representation⁴.

Except where a representation of intention amounts to a representation of fact⁵, it can normally have no effect on a contract between the representor and the representee unless it amounts to a contractual promise⁶. Exceptionally, however, a representation of intention may have an effect on the contract, notwithstanding that it does not amount to a contractual promise, by reason of the doctrines of waiver⁷ and equitable estoppel⁸.

A misrepresentation may sometimes amount to a tort; if it is made fraudulently, the tort of deceit may be committed⁹, whereas, if it is made carelessly, there may be the tort of negligent misstatement¹⁰. Moreover, the scope of (tortious) negligent misstatements may overlap with the category in the law of contract of carelessly made (negligent) misrepresentations¹¹; but these two categories must be kept separate because of their different incidents¹².

1 As to the formation of a contract see CONTRACT vol 9(1) (Reissue) PARA 629 et seq.

2 See CONTRACT vol 9(1) (Reissue) PARA 769. As to the possible legal effects of a mere representation see MISREPRESENTATION AND FRAUD.

3 Except in the case of special classes of contracts (see CONTRACT vol 9(1) (Reissue) PARA 701), mere non-disclosure does not prima facie amount to a misrepresentation: see MISREPRESENTATION AND FRAUD. Cf the principle of dealing in good faith: see CONTRACT vol 9(1) (Reissue) PARA 613.

4 As to the distinction between contractual terms and mere representations see CONTRACT vol 9(1) (Reissue) PARA 768.

5 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 705 et seq.

6 As to contractual promises see CONTRACT vol 9(1) (Reissue) PARA 769.

7 See CONTRACT vol 9(1) (Reissue) PARAS 1025-1028.

8 See CONTRACT vol 9(1) (Reissue) PARAS 1030-1035.

9 *Derry v Peek* (1889) 14 App Cas 337, HL; and see MISREPRESENTATION AND FRAUD; TORT.

10 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; and see CONTRACT vol 9(1) (Reissue) PARAS 610, 759.

11 See the Misrepresentation Act 1967 s 2(1); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801.

12 See *Howard Marine & Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574, [1978] 2 All ER 1134, CA.

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(4) RIGHTS AS BETWEEN THE PARTIES/(ii) Rights in connection with Misrepresentation/465. Avoidance of provision excluding liability for misrepresentation.

465. Avoidance of provision excluding liability for misrepresentation.

If a contract contains a term which would exclude or restrict any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made or any remedy available to another party to the contract by reason of such a misrepresentation, that term is of no effect except in so far as it satisfies the requirements of reasonableness as stated in the Unfair Contract Terms Act 1977¹; and it is for those claiming that the term satisfies that requirement to show that it does².

1 See as stated in the Unfair Contract Terms Act 1977 s 11(1): see PARA 451 ante.

2 See the Misrepresentation Act 1967 s 3 (substituted by the Unfair Contract Terms Act 1977 s 8(1)); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 803, 828.

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(4) RIGHTS AS BETWEEN THE PARTIES/(ii) Rights in connection with Misrepresentation/466. Rescission for misrepresentation.

466. Rescission for misrepresentation.

Where a person has entered into a contract as a result of a misrepresentation¹ made to him by another party to it, he may, subject to certain limitations, rescind the contract²; and, in addition or as an alternative, he may have a claim for damages³.

1 See PARA 464 ante.

2 See *Directors etc of Central Rly Co of Venezuela v Kisch* (1867) LR 2 HL 99 (fraud); *Cooper v Joel* (1859) 1 De GF & J 240, CA (innocent representation); *Mapes v Jones* (1974) 232 Estates Gazette 717; the Misrepresentation Act 1967 s 1; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 812 et seq.

3 See *ibid* s 2; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834.

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(4) RIGHTS AS BETWEEN THE PARTIES/(iii) Rights in connection with Contracts for the Sale of Goods and the Supply of Services/467. Contracts for the sale of goods.

(iii) Rights in connection with Contracts for the Sale of Goods and the Supply of Services

467. Contracts for the sale of goods.

In contracts for the sale of goods the following terms are to be implied:

710 (1) in a contract of sale, other than one in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should only transfer such title as he or a third person may have:

47

55. (a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and, in the case of an agreement to sell, he will have such a right at the time when the property is to pass¹;

56. (b) an implied warranty that the goods are free, and will remain free until the time when the property is to pass, from any charge or incumbrance not disclosed or known to the buyer before the contract is made²;

57. (c) an implied warranty that the buyer will enjoy quiet possession of the goods, except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or incumbrance so disclosed or known³;

48

711 (2) in a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have:

49

58. (a) an implied warranty that all charges or incumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made⁴; and

59. (b) an implied warranty that neither the seller, nor, in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person, nor anyone claiming through or under the seller or that third person otherwise than under a charge or incumbrance disclosed or known to the

buyer before the contract is made, will disturb the buyer's quiet possession of the goods⁵;

50

712 (3) in the case of a sale by description, an implied condition that the goods will correspond with the description⁶;

713 (4) where the seller sells goods in the course of a business, an implied condition that the goods supplied under the contract are of satisfactory quality, but the condition so implied does not extend to any matter making the quality of goods unsatisfactory:

51

60. (a) which is specifically drawn to the buyer's attention before the contract is made;

61. (b) where the buyer examines the goods before the contract is made, which that examination ought to reveal; or

62. (c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample⁷;

52

714 (5) where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller or, where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit broker to the seller, to that credit broker, any particular purpose for which the goods are being bought, an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit broker⁸;

715 (6) in the case of a sale by sample, that is to say where there is an express or implied term to that effect in the contract, an implied condition that the bulk will correspond with the sample in quality and that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample⁹.

Liability for breach of the obligations arising under heads (1) and (2) above cannot be excluded or restricted by reference to any contract term¹⁰; and, as against a person dealing as consumer, liability for breach of the obligations arising under heads (3) to (6) above cannot be excluded or restricted by reference to any contract term¹¹.

Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of the contract¹².

1 See the Sale of Goods Act 1979 s 12(1) (as amended); and PARA 69 ante.

2 See *ibid* s 12(2)(a) (as amended); and PARA 69 ante.

3 See *ibid* s 12(2)(b) (as amended); and PARA 69 ante.

4 See *ibid* s 12(3), (4) (as amended); and PARA 69 ante.

5 See *ibid* s 12(3), (5) (as amended); and PARA 69 ante.

6 See *ibid* s 13(1), (2) (as amended); and PARAS 72-74, 307 ante.

7 See *ibid* s 14(2), (2C) (s 14(2) as substituted; s 14(2C) as added); and PARA 80 ante. Except as provided by s 14 (as amended) and s 15 (as amended) (see the text and note 9 *infra*) and subject to any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract of sale: see s 14(1) (as amended); and PARA 77 ante. See *Bramhill v Edwards* [2004] EWCA Civ 403, [2004] All ER (D) 42 (Apr).

8 See the Sale of Goods Act 1979 s 14(3) (as amended); and PARA 78 ante.

9 See ibid s 15(1)-(3) (as amended); and PARAS 93-94 ante.

10 See the Unfair Contract Terms Act 1977 s 6(1)(a); and PARA 450 ante.

11 See ibid s 6(2)(a); and PARA 450 ante.

12 See the Sale of Goods Act 1979 s 10(1); and PARA 68 ante.

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

467 Contracts for the sale of goods

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(4) RIGHTS AS BETWEEN THE PARTIES/(iii) Rights in connection with Contracts for the Sale of Goods and the Supply of Services/468. Contracts for the transfer of goods.

468. Contracts for the transfer of goods.

In contracts for the transfer of goods¹ the following terms are to be implied²:

716 (1) in a contract for the transfer of goods, other than one in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the transferor should transfer only such title as he or a third person may have:

53

63. (a) an implied condition on the part of the transferor that, in the case of a transfer of the property in the goods, he has a right to transfer the property and, in the case of an agreement to transfer the property in the goods, he will have such a right at the time when the property is to be transferred³;

64. (b) an implied warranty that the goods are free, and will remain free until the time when the property is to be transferred, from any charge or incumbrance not disclosed or known to the transferee before the contract is made⁴; and

65. (c) an implied warranty that the transferee will enjoy quiet possession of the goods, except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or incumbrance so disclosed or known⁵;

54

717 (2) in a contract for the transfer of goods in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the transferor should transfer only such title as he or a third person may have:

55

66. (a) an implied warranty that all charges or incumbrances known to the transferor and not known to the transferee have been disclosed to the transferee before the contract is made⁶; and

67. (b) an implied warranty that neither the transferor, nor, in a case where the parties to the contract intend that the transferor should transfer only such title as a third person may have, that person, nor anyone claiming through or under the transferor or that third person otherwise than under a charge or incumbrance disclosed or known to the transferor before the contract is made, will disturb the transferee's quiet possession of the goods⁷;

56

718 (3) where, under a contract for the transfer of goods, the transferor transfers or agrees to transfer the property in the goods by description, an implied condition that the goods will correspond with the description⁸;

719 (4) where, under a contract for the transfer of goods, the transferor transfers the property in goods in the course of a business, an implied condition that the goods supplied under the contract are of satisfactory quality, but the condition so implied does not extend to any matter making the quality of goods unsatisfactory:

57

68. (a) which is specifically drawn to the transferee's attention before the contract is made;

69. (b) where the transferee examines the goods before the contract is made, which that examination ought to reveal; or

70. (c) where the property in the goods is transferred by reference to a sample, which would have been apparent on a reasonable examination of the sample⁹;

58

720 (5) where, under a contract for the transfer of goods, the transferor transfers the property in goods in the course of a business and the transferee, expressly or by implication, makes known to the transferor or, where the consideration or part of the consideration for the transfer is a sum payable by instalments and the goods were previously sold by a credit broker to the transferor, to that credit broker, any particular purpose for which the goods are being acquired, an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, but there is no such implied condition where the circumstances show that the transferee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the transferor or credit broker¹⁰;

721 (6) where, under a contract for the transfer of goods, the transferor transfers or agrees to transfer the property in the goods by reference to a sample, that is to say where there is an express or implied term to that effect in the contract concerned, an implied condition:

59

71. (a) that the bulk will correspond with the sample in quality;

72. (b) that the transferee will have a reasonable opportunity of comparing the bulk with the sample; and

73. (c) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample¹¹.

60

1 For the meaning of 'contract for the transfer of goods' see PARA 32 ante.

2 As to the extent to which implied terms in contracts for the transfer of goods may be excluded see the Supply of Goods and Services Act 1982 s 11; and PARAS 11, 102 ante.

- 3 See *ibid* s 2(1); and PARA 70 ante.
- 4 See *ibid* s 2(2)(a); and PARA 70 ante.
- 5 See *ibid* s 2(2)(b); and PARA 70 ante.
- 6 See *ibid* s 2(3), (4); and PARA 70 ante.
- 7 See *ibid* s 2(3), (5); and PARA 70 ante.
- 8 See *ibid* s 3(1), (2); and PARA 75 ante.
- 9 See *ibid* s 4(2), (3) (as substituted); and PARAS 85-86, 307 ante. Except as provided by s 4 (as amended) and s 5 (as amended) (see the text and note 11 *infra*) and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract for the transfer of goods: see s 4(1); and PARA 83 ante.
- 10 See *ibid* s 4(4)-(6); and PARA 84 ante.
- 11 See *ibid* s 5(1), (2), (4) (as amended); and PARAS 95, 307 ante.

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(4) RIGHTS AS BETWEEN THE PARTIES/(iii) Rights in connection with Contracts for the Sale of Goods and the Supply of Services/469. Contracts for the hire of goods.

469. Contracts for the hire of goods.

In contracts for the hire of goods¹ the following terms are to be implied²:

- 722 (1) an implied condition on the part of the bailor that, in the case of a bailment, he has a right to transfer possession of the goods by way of hire for the period of the bailment and, in the case of an agreement to bail, he will have such a right at the time of the bailment³;
 - 723 (2) an implied warranty that the bailee will enjoy quiet possession of the goods for the period of the bailment, except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or incumbrance disclosed or known to the bailee before the contract is made⁴;
 - 724 (3) where, under a contract for the hire of goods, the bailor bails or agrees to bail the goods by description, an implied condition that the goods will correspond with the description⁵;
 - 725 (4) where, under a contract for the hire of goods, the bailor bails goods in the course of a business, an implied condition that the goods supplied under the contract are of satisfactory quality, but the condition so implied does not extend to any matter making the quality of goods unsatisfactory:
- 61
74. (a) which is specifically drawn to the bailee's attention before the contract is made;

75. (b) where the bailee examines the goods before the contract is made, which that examination ought to reveal; or
76. (c) where the goods are bailed by reference to a sample, which would have been apparent on a reasonable examination of the sample⁶;
- 62
- 726 (5) where, under a contract for the hire of goods, the bailor bails goods in the course of a business and the bailee, expressly or by implication, makes known to the bailor in the course of negotiations conducted by him in relation to the making of the contract or to a credit broker in the course of negotiations conducted by that broker in relation to goods sold by him to the bailor before forming the subject matter of the contract, any particular purpose for which the goods are being bailed, an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, but there is no such implied condition where the circumstances show that the bailee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the bailor or credit broker⁷;
- 727 (6) where, under a contract for the hire of goods, the bailor bails or agrees to bail the goods by reference to a sample, that is to say where there is an express or implied term to that effect in the contract concerned, an implied condition:
- 63
77. (a) that the bulk will correspond with the sample in quality;
78. (b) that the bailee will have a reasonable opportunity of comparing the bulk with the sample; and
79. (c) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample⁸.
- 64

1 For the meaning of 'contract for the hire of goods' see PARA 33 ante.

2 As to the extent to which implied terms in contracts for the hire of goods may be excluded see the Supply of Goods and Services Act 1982 s 11; and PARAS 11, 102 ante.

3 See *ibid* s 7(1); and PARA 71 ante.

4 See *ibid* s 7(2); and PARA 71 ante.

5 See *ibid* s 8(1), (2); and PARAS 76, 307 ante.

6 See *ibid* s 9(2), (3) (as substituted); and PARAS 90-91 ante. Except as provided by s 9 (as amended) and s 10 (as amended) (see the text and note 8 *infra*) and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods bailed under a contract for the hire of goods: see s 9(1); and PARAS 88-89 ante.

7 See *ibid* s 9(4)-(6); and PARA 89 ante.

8 See *ibid* s 10(1), (2), (4) (as amended); and PARAS 96, 307 ante.

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(4) RIGHTS AS BETWEEN THE PARTIES/(iii) Rights in connection with Contracts for the Sale of Goods and the Supply of Services/470. Contracts for the supply of a service.

470. Contracts for the supply of a service.

In contracts for the supply of a service¹ the following terms are to be implied²:

- 728 (1) where the supplier is acting in the course of a business, an implied term that the supplier will carry out the service with reasonable care and skill³;
- 729 (2) where a supplier is acting in the course of a business and the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, an implied term that the supplier will carry out the service within a reasonable time⁴;
- 730 (3) where the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, an implied term that the party contracting with the supplier will pay a reasonable charge⁵.

1 For the meaning of 'contract for the supply of a service' see PARA 35 ante.

2 As to the extent to which implied terms in contracts for the supply of a service may be excluded see the Supply of Goods and Services Act 1982 s 16; and PARAS 11, 102 ante. See also *Devon County Council v DB Cars Ltd* [2001] EWHC Admin 521, (2002) 166 JP 38, DC, applying *R v Maginnis* [1987] AC 303, [1987] 1 All ER 907, HL.

3 See the Supply of Goods and Services Act 1982 s 13; and PARA 97 ante.

4 See *ibid* s 14(1); and PARA 98 ante.

5 See *ibid* s 15(1); and PARA 99 ante.

UPDATE

450-470 Rights as between the Parties

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/A. THE LEGISLATION/471. Former and current legislation.

(5) STATUTORY PROTECTION; IN GENERAL

(i) Trade Descriptions

A. THE LEGISLATION

471. Former and current legislation.

The first general Act dealing with false trade descriptions was the Merchandise Marks Act 1862. That Act was repealed and replaced by the more effective Merchandise Marks Act 1887, which, with its amending Acts¹, remained in force until 30 November 1968² when it was itself wholly repealed and replaced by the Trade Descriptions Act 1968³.

The current legislation is contained in the Trade Descriptions Act 1968. That Act, together with the statutory instruments made under it⁴, forms a more powerful code than the former Merchandise Marks Acts, although in some respects it re-enacts, often in extended form, provisions contained in that former legislation. Accordingly, cases decided before 30 November 1968 continue to be relevant to the interpretation of the Trade Descriptions Act 1968. The 1968 Act forms a complete code which in practice is operated alongside other consumer protection legislation, in particular that relating to weights and measures⁵ and food and drugs⁶.

1 le the Merchandise Marks Act 1887; the Merchandise Marks Act 1891; the Merchandise Marks (Prosecutions) Act 1894; the Merchandise Marks Act 1911; the Merchandise Marks Act 1926; the Patents etc (International Conventions) Act 1938; and the Merchandise Marks Act 1953 (all repealed). Those Acts were concerned with restraining false and deceptive descriptions of goods and the wrongful application of trade marks. The Final Report of the Committee on Consumer Protection ('the Molony Report') (Cmnd 1781) (see PARA 384 ante) came to the conclusion that those Acts required consolidation and simplification, that legislation affecting transactions of everyday occurrence and touching the interests of everybody, as shoppers or traders, should be contained in a single enactment and stated in language as plain and simple as modern draftsmanship could provide and that the re-enactment of those Acts was essential not only to bring into effect the changes in the law which the Committee deemed necessary in the interests of the consumer but also to promote greater ease of understanding by the public and the trade alike: see the Final Report of the Committee on Consumer Protection para 610. The Trade Descriptions Act 1968 eventually incorporated most of the Committee's recommendations and, in addition, dealt with services and prices.

2 le the date on which the Trade Descriptions Act 1968 came into force: see s 43(2).

3 See *ibid* s 41(2), Sch 2 (repealed).

4 As to the making of orders see PARA 473 post; and as to regulations made under the powers conferred by the European Communities Act 1972 s 2 and the various designation orders made thereunder see PARA 514 et seq post.

5 See WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 1 et seq.

6 See FOOD vol 18(2) (Reissue) PARA 222 et seq; MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 1 et seq.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/A. THE LEGISLATION/472. The scope of the Trade Descriptions Act 1968.

472. The scope of the Trade Descriptions Act 1968.

The Trade Descriptions Act 1968¹:

731 (1) prohibits false trade descriptions²;

- 732 (2) creates powers as to the definition of terms, the marking of goods and the displaying of information in advertisements³;
- 733 (3) prohibits certain misstatements other than false trade descriptions⁴;
- 734 (4) prohibits the importation of goods bearing a false indication of origin⁵;
- 735 (5) makes detailed provisions as to offences⁶ and for certain defences⁷;
- 736 (6) creates important powers for its enforcement⁸;
- 737 (7) deals with various miscellaneous and supplemental matters⁹.

1 As to the former and current legislation relating to trade descriptions see PARA 471 ante.

2 See the Trade Descriptions Act 1968 ss 1-6 (as amended); and PARA 475 et seq post. Regulation of trade descriptions, except in relation to food, is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2)(b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C7, Pt III para 5. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

3 See the Trade Descriptions Act 1968 ss 7-10; and PARAS 486, 489 et seq post.

4 See ibid ss 12-15 (misstatements as to price, royal approval and the supply of goods or services); and PARA 493 et seq post.

5 See ibid s 16; and PARA 497 post.

6 See ibid ss 18-23 (as amended); and PARA 498 et seq post.

7 See ibid ss 24, 25; and PARAS 504-506 post.

8 See ibid ss 26-31 (as amended); and PARA 507 et seq post. Without these powers and the provision of active enforcement authorities the Trade Descriptions Act 1968 would be largely ignored, as past experience under the former Merchandise Marks Acts had shown.

9 See the Trade Descriptions Act 1968 ss 32-41, 43 (as amended).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

472 The scope of the Trade Descriptions Act 1968

NOTE 1--Trade Descriptions Act 1968 ss 1, 5-10, 13-15, 19(4)(b), (c), 21(1), (2), 22, 24(3), 32, 37, 39(2) repealed: see SI 2008/1277 Schs 3, 4.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/A. THE LEGISLATION/473. Secretary of State's power to make orders.

473. Secretary of State's power to make orders.

Any power to make an order under the Trade Descriptions Act 1968 is exercisable by statutory instrument, which is subject to annulment in pursuance of a resolution of either House of Parliament, and includes power to vary or revoke such an order by a subsequent order¹. Any order under that Act which relates to any agricultural, horticultural or fishery produce, whether processed or not, food, feeding stuffs or ingredients of food or feeding stuffs, fertilisers or any

goods used as pesticides or for similar purposes is to be made by the Secretary of State² acting jointly with the Department for Environment, Food and Rural Affairs³.

Before making an order under certain provisions of that Act⁴, the Secretary of State must consult with such organisations as appear to him to be representative of interests substantially affected by it and must publish, in such manner as he thinks appropriate, notice of his intention to make the order and of the place where copies of the proposed order may be obtained⁵.

1 Trade Descriptions Act 1968 s 38(1).

2 The administering authority for the purposes of the Trade Descriptions Act 1968 was originally the Board of Trade. As to the Board of Trade see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 505. The Board of Trade is still mentioned in many statutes and theoretically still exists. In time, however, its functions came to be exercised mainly by its President. The office of President of the Board of Trade is now held by the Secretary of State for Trade and Industry (see PARA 15 ante), who exercises the President's functions concurrently (see PARA 15 ante): Secretary of State for Trade and Industry Order 1970, SI 1970/1537, art 2(1)(b). See further TRADE AND INDUSTRY vol 97 (2010) PARA 802.

3 Trade Descriptions Act 1968 s 38(2). The Act refers to the Ministry of Agriculture, Fisheries and Food. The Department for Environment, Food and Rural Affairs was created in June 2001 from the then Ministry of Agriculture, Fisheries and Food and from the environmental and countryside business areas of the then Department of Environment, Transport and the Regions. All functions of the Minister of Agriculture, Fisheries and Food under s 38(2) are, so far as they are exercisable in relation to Wales, transferred to the National Assembly for Wales: National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2(a), Sch 1. As to the National Assembly for Wales see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

4 Under the Trade Descriptions Act 1968 s 7 (definition orders: see PARA 486 post), s 8 (marking orders: see PARA 489 post), s 9 (information etc to be given in advertisements: see PARA 490 post), s 15 (orders defining terms in relation to false or misleading statements as to services etc: see PARA 496 post) or s 36 (country of origin: see PARA 497 post).

5 Ibid s 38(3)(a). The order may not be made until the expiration of a period of 28 days from the publication of the notice and may then be made with such modifications, if any, as the Secretary of State thinks appropriate having regard to any representations received by him: s 38(3)(b).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/A. THE LEGISLATION/474. Visiting forces and headquarters.

474. Visiting forces and headquarters.

A visiting force or headquarters, members of such a force or headquarters, persons employed in the service of such a force, and property used for the purposes of such a force or headquarters are exempt from the operation of the Trade Descriptions Act 1968 to the extent that, by virtue of the rule of law whereby enactments do not bind the Crown, such a force or headquarters, such members, such persons, or such property, would be so exempt if the force or headquarters were a part of any of the home forces¹.

1 See the Visiting Forces and International Headquarters (Application of Law) Order 1999, SI 1999/1736, art 12(1), Sch 5; and ARMED FORCES vol 2(2) (Reissue) PARA 142.

UPDATE**471-517 Trade Descriptions**

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/B. PROHIBITION OF FALSE TRADE DESCRIPTIONS/(A) The Statutory Offences/475. Prohibition of false trade descriptions.

B. PROHIBITION OF FALSE TRADE DESCRIPTIONS**(A) THE STATUTORY OFFENCES****475. Prohibition of false trade descriptions.**

Any person¹ who, in the course of a trade or business²:

- 738 (1) applies³ a false⁴ trade description⁵ to any goods⁶; or
- 739 (2) supplies⁷ or offers to supply⁸ any goods to which a false trade description is applied⁹,

is guilty¹⁰ of an offence¹¹. The offence is one of strict liability subject only to the statutory defences provided¹².

1 'Person' includes a body of persons corporate or unincorporate: Interpretation Act 1978 ss 5, 22(1), 23(1), Sch 1, Sch 2 para 4(1)(a). An agent or broker can be a person who supplies or offers to supply goods for the purposes of the Trade Descriptions Act 1968 s 1; and a supplier is still within the statutory definition of supplying in the course of a trade or business, even though the supplier makes no profit or charges no commission: *Kirwin v Anderson* (1992) 156 JP 301, DC (the purpose of the Trade Descriptions Act 1968 is to protect the consumer, irrespective of whether the goods are obtained from a principal or agent).

2 For the meaning of 'in the course of a trade or business' see PARA 477 post.

3 For the meaning of 'applies a trade description' see PARA 478 post.

4 For the meaning of 'false', in relation to a trade description, see PARA 479 post.

5 For the meaning of 'trade description' see PARA 481 post.

6 Trade Descriptions Act 1968 s 1(1)(a). As to the meaning of 'goods' see PARA 485 post. Sections 2-6 (as amended) (see PARAS 478-479, 481-482, 484, 487 post) have effect for the purposes of s 1 and for the interpretation of expressions used in s 1, wherever they occur in the Act: s 1(2).

There is a distinction between s 1(1)(a) and s 1(1)(b) (see head (2) in the text) in that it is not open to a person charged with applying a false trade description contrary to s 1(1)(a) to rely on any disclaimer: *R v Southwood* [1987] 3 All ER 556, [1987] 1 WLR 1361, CA, approving *Newman v Hackney London Borough Council* [1982] RTR 296, DC; and see *Southend Borough Council v White* (1991) 156 JP 463, DC. As to disclaimers see PARA 480 post.

A person who returns an odometer to zero is thereby applying a false trade description under the Trade Descriptions Act 1968 s 1(1)(a); and it is irrelevant that no-one is likely to be misled by a secondhand car which has zero miles on the odometer: *R v Southwood* [1987] 3 All ER 556, [1987] 1 WLR 1361, CA.

7 Where a motor vehicle which has been deposited by a person with a garage for the purposes of a service is returned by the garage to that person, it is supplied to him for the purposes of the Trade Descriptions Act 1968 s 1(1)(a), (b): *Formula One Autocentres Ltd v Birmingham City Council* (1998) 163 JP 234, DC.

8 For the meaning of 'offers to supply' see PARA 484 post.

9 Trade Descriptions Act 1968 s 1(1)(b). Section 1(1)(b) creates separate offences of 'supplying' and 'offering to supply' goods to which a false trade description has been applied: see *Miller v FA Sadd & Son Ltd*, *Miller v Pickering Bull & Co Ltd* [1981] 3 All ER 265, DC. It is sufficient that the false trade description is applied to the goods; there is no requirement of intention on the part of the seller to apply the description or to mislead the purchaser: *Swithland Motors Ltd v Peck* [1991] RTR 322, DC. Where a modification to a description is later imposed by the purchaser, the supplier is deemed to have applied that trade description to the goods: *Shropshire County Council v Simon Dudley Ltd* (1996) 161 JP 224, DC. See also *Simmons v Ravenshill* (1983) 148 JP 109, DC (description of vehicle as 'de luxe' held not to be false to a material degree). The test for determining whether a trade description is misleading is what a reasonable consumer would think, not what the person accused of the offence would himself think: *Lewin v Purity Soft Drinks Ltd* [2004] EWHC 3119 (Admin), [2004] All ER (D) 205 (Dec).

10 Is subject to the provisions of the Trade Descriptions Act 1968.

11 Ibid s 1(1). Sections 2-6 (as amended) (see PARAS 478-484 post) have effect for the purposes of s 1 and for the interpretation of expressions used in s 1, wherever they occur in the Trade Descriptions Act 1968: s 1(2). As to penalties, enforcement and other matters arising in connection with the offence see PARA 498 et seq post; and as to the exemption in relation to goods supplied or offered to be supplied in the course of certain market research experiments see PARA 476 post.

An offence is committed if point-of-sale literature does not correspond to goods sold: *Denard v Smith and Dixons Ltd* (1990) 155 JP 253, DC (advertisement of package of goods to include extra items; extra items unavailable). There is no sufficient reason to exclude professional persons from the scope of the Trade Descriptions Act 1968; accordingly, a veterinary surgeon who issues health certificates in respect of live animals which are to be exported is acting in the course of a trade or business, as the issue of the certificates is an essential, integral and direct part of the export: *Roberts v Leonard* (1995) 159 JP 711, DC.

A disclaimer, however 'bold, precise and compelling', is ineffective to a charge under the Trade Descriptions Act 1968 s 1: *May v Vincent* (1990) 154 JP 997, DC; cf *R v Bull* (1996) 160 JP 240, CA (no application of false trade description where sales invoice contained odometer reading qualified by disclaimer; but in such cases the decision may ultimately turn on the positioning of the statement in relation to the quoted mileage reading and other relevant circumstances, such as highlighting the relevant words). See also *R v Southwood* [1987] 3 All ER 556, [1987] 1 WLR 1361, CA (cited in note 6 supra).

12 *Alec Norman Garages Ltd v Phillips* [1985] RTR 164, DC (the charge under the Trade Descriptions Act 1968 s 1(1)(a) of applying a false trade description to goods did not involve the prosecution in proving dishonesty; it was a strict liability offence and the statutory defence had not been made out). See also *MacNab v Alexanders of Greenock Ltd* 1971 SLT 121; and PARA 506 post. The use of a standard disclaimer is no defence to a supplier's knowledge of the inaccuracy of a vehicle's mileage reading: *Farrand v Lazarus* [2002] EWHC 226 (Admin), [2002] 3 All ER 175, DC.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

475 Prohibition of false trade descriptions

TEXT AND NOTES--Trade Descriptions Act 1968 s 1 repealed: SI 2008/1277.

NOTE 9--*Lewin*, cited, reported at (2005) 169 JP 84.

Exemption in relation to goods supplied or offered to be supplied in the course of certain market research experiments.

476. Exemption in relation to goods supplied or offered to be supplied in the course of certain market research experiments.

The provisions prohibiting the application of a false trade description to goods¹, and the provisions requiring the marking of certain information on goods², do not apply in relation to goods supplied or offered to be supplied, whether to a participant or any other person, in the course of a market research experiment³ in respect of which certain conditions⁴ are satisfied⁵.

1 Ie the Trade Descriptions Act 1968 s 1: see PARA 475 ante.

2 Ie ibid s 8: see PARA 489 post.

3 For these purposes, 'market research experiment' means any activities conducted for the purpose of ascertaining the opinion of persons ('participants') of: (1) any goods; (2) anything in, on or with which the goods are supplied; (3) the appearance or any other characteristic of the goods or of any such thing; or (4) the name or description under which the goods are supplied: ibid s 37(1).

4 Ibid s 37 applies to any market research experiment with respect to which the following conditions are satisfied: (1) that any participant to whom any goods are supplied in the course of the experiment is informed, at or before the time at which they are supplied to him, that they are supplied for such a purpose as is mentioned in s 37(1) (see note 3 supra); and (2) that no consideration in money or money's worth is given by a participant for the goods or any goods supplied to him for comparison: s 37(2).

5 Ibid s 37(3).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

476 Exemption in relation to goods supplied or offered to be supplied in the course of certain market research experiments

TEXT AND NOTES--Trade Descriptions Act 1968 s 37 repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/B. PROHIBITION OF FALSE TRADE DESCRIPTIONS/(B) Meaning of Terms/477. Meaning of 'in the course of a trade or business'.

(B) MEANING OF TERMS

477. Meaning of 'in the course of a trade or business'.

The phrase 'in the course of a trade or business' is not defined in the Trade Descriptions Act 1968¹. Clearly the trade or business need not be retail, nor need the offender's trade or business be that of conducting the particular transaction concerned². The trade or business need not be full-time³. The words cover the business of buying as well as that of selling⁴, and are to be treated as wide in scope⁵. They do not, however, cover cases where false trade

descriptions are applied to goods otherwise than in association with a contract for the sale or supply of goods⁶, but it is not necessary that the description be applied by a directly contracting party⁷. The issue of a test certificate for a vehicle⁸ does not constitute the application of a trade description⁹.

1 Cf the Fair Trading Act 1973 s 137(2), under which 'business' includes a professional practice and includes any other undertaking which is carried on for gain or reward, or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge. A hobby cannot amount to a trade or business: *Blakemore v Bellamy* (1982) 147 JP 89, DC (full-time postman who carried out repairs and improvements to motor vehicles in his spare time was held to be engaging in a hobby activity only). See *Telford and Wrekin Council v Jordan* (2000) 165 JP 107 (car with false odometer supplied in course of business even though defendant's primary business was car repair, not supply, and car was originally intended for use by his family).

2 *Haverling London Borough v Stevenson* [1970] 3 All ER 609, [1970] 1 WLR 1375, DC (where a car-hire firm selling its used cars was held to be doing so in the course of its trade or business as a car-hire firm); distinguished on the facts in *Davies v Sumner* [1984] 3 All ER 831, [1984] 1 WLR 1301, HL (goods are not dealt with in the course of a trade or business unless there is a degree of regularity in such dealing as part of the normal practice of the business; accordingly, the trading-in of a used car by a self-employed courier who used his car almost exclusively for his business was held not to be done in the course of a business). See also *Corfield v Sevenways Garage Ltd* (1984) 148 JP 648, DC (supply of motor vehicle took place in the course of a trade or business; the fact that the supply was not part of the accused's usual business was immaterial); *Devlin v Hall* (1990) 155 JP 20, DC (self-employed taxi proprietor from whom part-time drivers would hire a vehicle and pay for the hire on a percentage basis from their earnings from the use of the vehicle sold two motor vehicles which he owned; the sale was held to be merely incidental to the business and, as there was no sufficient degree of regularity on the evidence, the sale could not be regarded as a transaction within the course of a trade or business); *Roberts v Leonard* (1995) 159 JP 711, DC (veterinary surgeon issuing health certificates in respect of live animals to be exported held to be acting in the course of a trade or business, as the issue of the certificates was an essential, integral and direct part of the export). See *Telford and Wrekin Council v Jordan* (2000) 165 JP 107 (cited in note 1 supra).

3 Cf *Stevenson v Beverley Bentinck Ltd* [1976] 2 All ER 606, [1976] 1 WLR 483, CA (meaning of 'private purchaser' in the Hire Purchase Act 1964); *Re Griffin, ex p Board of Trade* (1890) 60 LQB 235 at 237, CA, per Lord Esher MR; *Abernethie v AM and J Kleiman Ltd* [1970] 1 QB 10, [1969] 2 All ER 790, CA (meaning of 'business' in the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended)).

4 *Fletcher v Budgen* [1974] 2 All ER 1243, [1974] 1 WLR 1056, DC.

5 *Fletcher v Budgen* [1974] 2 All ER 1243, [1974] 1 WLR 1056, DC; and see *Fletcher v Sledmore* [1973] RTR 371, DC.

6 *Wickens Motors (Gloucester) Ltd v Hall* [1972] 3 All ER 759, [1972] 1 WLR 1418, DC (where the false trade description was applied well after sale, and it was held not to be applied in the course of a trade or business).

7 *Fletcher v Sledmore* [1973] RTR 371, DC.

8 Ie under what is now the Road Traffic Act 1988 s 47 (as amended): see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 657 et seq.

9 *Wycombe Marsh Garages Ltd v Fowler* [1972] 3 All ER 248, [1972] 1 WLR 1156, DC; distinguished in *R v Coventry City Justices, ex p Farrand* (1987) 152 JP 26, DC (MOT certificate held to be capable of being a representation as to approximate year of manufacture).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Descriptions/B. PROHIBITION OF FALSE TRADE DESCRIPTIONS/(B) Meaning of Terms/478.
Meaning of 'applies a trade description'.

478. Meaning of 'applies a trade description'.

A person applies a trade description¹ to goods² if he:

- 740 (1) affixes or annexes it to or in any manner marks it on or incorporates it with the goods themselves, or anything in, on or with which the goods are supplied³;
- 741 (2) places the goods in, on or with anything which the trade description has been affixed or annexed to, marked on or incorporated with, or places any such thing with the goods⁴; or
- 742 (3) uses the trade description in any manner likely to be taken as referring to the goods⁵.

An oral statement may amount to the use of a trade description⁶.

Where goods are supplied in pursuance of a request in which a trade description is used and the circumstances are such as to make it reasonable to infer that the goods are supplied as goods corresponding to that trade description, the person supplying the goods is deemed to have applied that trade description to the goods⁷.

A trade description or statement published in any newspaper, book or periodical or in any film or sound or television broadcast or in any programme included in any programme service⁸ other than a sound or television broadcasting service is not deemed to be a trade description applied or statement made in the course of a trade or business unless it is or forms part of an advertisement⁹.

1 For the meaning of 'trade description' see PARA 481 post.

2 As to the meaning of 'goods' see PARA 485 post.

3 Trade Descriptions Act 1968 s 4(1)(a). As to the implied application of a trade description by the alteration of the goods concerned see *Cottee v Douglas Seaton (Used Cars) Ltd* [1972] 3 All ER 750, [1972] 1 WLR 1408, DC. See also *Roberts v Severn Petroleum and Trading Co Ltd* [1981] RTR 312, DC.

4 Trade Descriptions Act 1968 s 4(1)(b).

5 Ibid s 4(1)(c).

6 Ibid s 4(2).

7 Ibid s 4(3). Section 4(3) applies where the buyer specifies what he wants and the seller purports to comply. It will cover many, if not all, cases of breach of contract by failure to supply the goods specified in the contract: see *Louis C Edwards & Sons (Manchester) Ltd v Miller* (19 January 1981, unreported), DC. See also *Shropshire County Council v Simon Dudley Ltd* (1996) 161 JP 224, DC (whether a trade description was applied at the time of supply). Where the offence is one where a false trade description is deemed to have been applied to goods by virtue of the Trade Descriptions Act 1968 s 4(3) and the goods were supplied in pursuance of an oral request s 19(2) (as amended) (prosecution to be brought within 12 months: see PARA 499 post) does not apply: see s 19(4)(c); and PARA 499 post.

8 Ie within the meaning of the Broadcasting Act 1990: see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328.

9 Trade Descriptions Act 1968 s 39(2) (amended by the Broadcasting Act 1990 s 203(1), Sch 20 para 11). As to trade descriptions used in advertisements see PARA 487 post.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

478 Meaning of 'applies a trade description'

TEXT AND NOTES 7-9--Trade Descriptions Act 1968 ss 19(4)(c), 39(2) repealed: see SI 2008/1277 Schs 3, 4.

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479. Meaning of 'false'.

A false trade description is a trade description¹ which is false to a material degree². It is no defence to prove that a trade description which is in fact false does not mislead the public³. Where, however, there is a doubt as to whether a description is false, non-deception of the public may be a material factor⁴. Mere promises as to the future can be neither true nor false, and thus, if unfulfilled, cannot amount to false trade descriptions⁵.

A trade description which, though not false, is misleading, that is to say likely to be taken for such an indication of any of the matters which may constitute a trade description⁶ as would be false to a material degree, is deemed to be a false trade description⁷. Anything which, though not a trade description, is likely to be taken for an indication of any of those matters and, as such an indication, would be false to a material degree, is deemed to be a false trade description⁸. A false indication, or anything likely to be taken as an indication which would be false, that any goods⁹ comply with a standard specified or recognised by any person or implied by the approval of any person is deemed to be a false trade description, if there is no such person or no standard so specified, recognised or implied¹⁰.

1 For the meaning of 'trade description' see PARA 481 post.

2 Trade Descriptions Act 1968 s 3(1). See *Donnelly v Rowlands* [1971] 1 All ER 9, [1970] 1 WLR 1600, DC; *R v South Western Justices and Hallcrest Garages Ltd, ex p Wandsworth London Borough* (1983) 147 JP 212, DC (motor vehicle described as having one owner; five persons had in fact been registered as keeping the vehicle; held to be a false description); *Divisional Trading Officer v Kingsley Clothing Ltd* [1989] RPC 695, DC (offer to supply shirts to which a registered trade mark the property of a third person had been falsely applied). Notwithstanding the Trade Descriptions Act 1968 s 3(1), a trade description which indicates the fineness, whether in parts per 1,000 or otherwise, of any precious metal is a false trade description if that indication is false to any extent or degree, except by understating the fineness: see the Hallmarking Act 1973 s 1(4); and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 477. As to descriptions relating to fineness see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 477.

3 *Kat v Diment* [1951] 1 KB 34, [1950] 2 All ER 657, DC; *Chidwick v Beer* [1974] RTR 415, DC. The fact that the public has not been misled may go to mitigation: *Chidwick v Beer* supra.

4 *Kingston-upon-Thames Royal London Borough Council v FW Woolworth & Co Ltd* [1968] 1 QB 802, [1968] 1 All ER 401, DC.

5 See *Beckett v Cohen* [1973] 1 All ER 120, [1972] 1 WLR 1593, DC; *R v Sunair Holidays Ltd* [1973] 2 All ER 1233, [1973] 1 WLR 1105, CA; *British Airways Board v Taylor* [1976] 1 All ER 65, [1976] 1 WLR 13, HL. These were cases under the Trade Descriptions Act 1968 s 14 (false or misleading statements as to services etc: see PARA 495 post), but the same principles must apply to goods as to services. Thus, not every breach of an implied

condition under the Sale of Goods Act 1979 (see PARA 69 et seq ante) is an offence under the Trade Descriptions Act 1968 s 1: *R v Ford Motor Co Ltd* [1974] 3 All ER 489, [1974] 1 WLR 1220, CA.

6 le any of the matters mentioned in the Trade Descriptions Act 1968 s 2 (as amended): see PARA 481 post.

7 Ibid s 3(2). See *Corfield v Sevenways Garage Ltd* (1984) 148 JP 648, DC (recorded mileage in MOT certificate); *Dixons Ltd v Barnett* (1988) 153 JP 268, DC (statement of true scientific magnification of telescope only; no statement of maximum useful magnification which was significantly less than scientific magnification; statement, whilst not false, was likely to mislead the ordinary customer); *Surrey County Council v Clark* (1991) 156 JP 798, DC (no false indication but get-up of product rendered the impression conveyed to the consumer misleading).

8 Trade Descriptions Act 1968 s 3(3). This is a wide sweeping-up provision which makes anything which might be taken as a trade description and which is false into a false trade description.

9 As to the meaning of 'goods' see PARA 485 post.

10 Trade Descriptions Act 1968 s 3(4).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

479 Meaning of 'false'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--Hallmarking Act 1973 s 1(4) repealed, s 1(4A)-(4D) added: SI 2008/1277.

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480. Disclaimers.

The Trade Descriptions Act 1968 is silent on the effect of disclaimers¹. Disclaimers as to the accuracy of trade descriptions applied to goods may, however, operate either to prevent the description from being false or as an ingredient in a defence²; but they can be effective only if they are as bold, precise and compelling as the trade description itself and are brought to the notice of any person to whom the goods may be supplied to the same extent as the trade description which is otherwise false³.

¹ It has been recommended that the matter of disclaimers be left to be regulated by case law rather than by amending the Trade Descriptions Act 1968: see *Review of the Trade Descriptions Act 1968* (Cmnd 6628).

² *Tarleton Engineering Co Ltd v Natrass* [1973] 3 All ER 699, [1973] 1 WLR 1261, DC; *Wolkind and Northcott v Pura Foods Ltd* (1987) 151 JP 492, DC (product marketed as 'vegetable lard'; although 'lard' tended to suggest 'pig fat', use of word 'vegetable' acted as disclaimer). There is a distinction between the Trade Descriptions Act 1968 s 1(1)(a) (see PARA 475 head (1) ante) and s 1(1)(b) (see PARA 475 head (2) ante) in that it is not open to a person charged with applying a false trade description contrary to s 1(1)(a) to rely on any disclaimer: *R v Southwood* [1987] 3 All ER 556, [1987] 1 WLR 1361, CA, approving *Newman v Hackney London Borough Council*

[1982] RTR 296, DC. The words of a disclaimer may, however, be used to show that an accused is not using the trade description to refer to the goods within the meaning of the Trade Descriptions Act 1968 s 4(1)(c) (see PARA 478 head (3) ante): *Newham London Borough Council v Singh and Sandhu* (1987) 152 JP 239, DC (false odometer reading). See also *R v Shrewsbury Crown Court, ex p Venables* [1994] Crim LR 61, DC (where there is a sale between two car dealers, a trade description could be disclaimed by the understanding between them, although this does not displace the principle laid down in *R v Southwood* supra). As to defences under the Trade Descriptions Act 1968 s 24 (mistake, accident etc) see PARA 504 post.

3 *Norman v Bennett* [1974] 3 All ER 351, [1974] 1 WLR 1229, DC; *Zawadski v Sleigh* [1975] RTR 113, DC; *R v Hammertons Cars Ltd* [1976] 3 All ER 758, [1976] 1 WLR 1243, CA; *Waltham Forest London Borough Council v TG Wheatley (Central Garage) Ltd* [1978] RTR 157, DC; *Corfield v Starr* [1981] RTR 380, DC; *Blunden v Gravelle Ltd* (1986) 151 JP 701, DC (notice in office of dealer not an effective disclaimer); *Lewin v Fuell* (1990) 155 JP 206, DC (oral disclaimer insufficient to negate false trade description applied to goods when exposed for supply); *Kent County Council v Price* (1993) 157 JP 1161, DC (written notice together with oral statement could be sufficient disclaimer); *Farrand v Lazarus* [2002] EWHC 226 (Admin), [2002] 3 All ER 175 (pro forma disclaimer common to all cars offered for sale not emphatic enough to be effective).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/B. PROHIBITION OF FALSE TRADE DESCRIPTIONS/(B) Meaning of Terms/481. Meaning of 'trade description'.

481. Meaning of 'trade description'.

A trade description is an indication, direct or indirect, and by whatever means given, of any of the following matters with respect to any goods¹ or parts of goods²:

- 743 (1) quantity³, size or gauge⁴;
- 744 (2) method of manufacture, production, processing or reconditioning⁵;
- 745 (3) composition⁶;
- 746 (4) fitness for purpose, strength, performance, behaviour or accuracy⁷;
- 747 (5) any physical characteristics not included in heads (1) to (4) above⁸;
- 748 (6) testing by any person and results of testing⁹;
- 749 (7) approval by any person or conformity with a type approved by any person¹⁰;
- 750 (8) place or date of manufacture, production, processing or reconditioning¹¹;
- 751 (9) person by whom manufactured, produced, processed or reconditioned¹²;
- 752 (10) other history, including previous ownership or use¹³.

The above matters are to be taken:

- 753 (a) in relation to any animal, to include sex, breed or cross, fertility and soundness¹⁴; and
- 754 (b) in relation to any semen, to include the identity and characteristics of the animal from which it was taken and measure of dilution¹⁵.

¹ As to the meaning of 'goods' see PARA 485 post.

2 Trade Descriptions Act 1968 s 2(1). In relation to goods which are intended: (1) for dispatch to a destination outside the United Kingdom and any designated country within the meaning of the Weights and Measures Act 1985 s 24(2)(b) (see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 107); (2) for use as stores within the meaning of the Customs and Excise Management Act 1979 (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 413) in a ship or aircraft on a voyage or flight to an eventual destination outside the United Kingdom; (3) for use by Her Majesty's forces or by a visiting force within the meaning of any of the provisions of the Visiting Forces Act 1952 Pt I (ss 1-12 (as amended): see ARMED FORCES vol 2(2) (Reissue) PARA 138 et seq); or (4) for industrial use within the meaning of the Weights and Measures Act 1985 (see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 169) or for constructional use, the Trade Descriptions Act 1968 s 1 (see PARA 475 ante) applies as if there were omitted from the matters included in s 2(1) those specified in s 2(1)(a) (see head (1) in the text) and, if the Secretary of State by order specifies any other of those matters for these purposes with respect to any description of goods s 1 applies, in relation to goods of that description which are intended for dispatch to a destination outside the United Kingdom and such country, if any, as may be specified in the order, as if the matters so specified were also omitted from those included in s 2(1): s 32(1) (renumbered and amended by the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 12, Table Pt I; and the Weights and Measures Act 1985 s 97, Sch 12 para 4(1)). For these purposes, 'constructional use', in relation to any goods, means the use of those goods in constructional work, or, if the goods are explosives within the meaning of the Manufacture and Storage of Explosives Regulations 2005, SI 2005/1082 (see EXPLOSIVES), in mining, quarrying or demolition work, in the course of the carrying on of a business: Trade Descriptions Act 1968 s 32(2) (added by the Weights and Measures Act 1985 Sch 12 para 4(2); and amended by the Manufacture and Storage of Explosives Regulations 2005, SI 2005/1082, reg 28(1), Sch 5 Pt 1 para 11). At the date at which this volume states the law no such order had been made. As to the making of orders see PARA 473 ante. 'Ship' includes any boat and any other description of vessel used in navigation: Trade Descriptions Act 1968 s 39(1).

3 For these purposes, 'quantity' includes length, width, height, area, volume, capacity, weight and number: *ibid* s 2(3). Quaere whether a container which, by its size, gives a misleading indication of the volume of its contents may constitute a false trade description, even though the correct volume is stated on it.

4 *Ibid* s 2(1)(a).

5 *Ibid* s 2(1)(b).

6 *Ibid* s 2(1)(c). 'Composition' is wide enough to cover the different articles which are comprised in a package of goods, eg where a gas cooker is described as being supplied with a hand-held battery torch: *British Gas Corpn v Lubbock* [1974] 1 All ER 188, [1974] 1 WLR 37, DC. 'Composition' also includes the way in which items supplied are arranged and assembled: *Queensway Discount Warehouses Ltd v Burke* (1985) 150 JP 17, DC (self-assembly furniture).

7 Trade Descriptions Act 1968 s 2(1)(d). There have been a number of cases relating to this aspect of a trade description. They show that the courts construe the definition widely, as covering any description which a reasonable consumer would take as relating to any of the matters specified: see eg *Munday v Union Motors* (16 July 1970, unreported), DC ('good' a trade description of a car); *Robertson v Diccio* [1972] RTR 431, DC ('beautiful car' a trade description not only of the external appearance but also the mechanical condition); *Fletcher v Sledmore* [1973] RTR 371, DC ('good little engine' a trade description); *Chidwick v Beer* [1974] RTR 415 ('excellent condition throughout' held, although not meaning the same as 'perfect condition', to be a false trade description where the vehicle purchased had major defects). See also *Kensington and Chelsea Royal London Borough Council v Riley* [1973] RTR 122, DC; *Furniss v Scott* [1973] RTR 314, DC; *Furness v Scholes* [1974] RTR 133, DC; *Hawkins v Smith* [1978] Crim LR 578; *Routledge v Ansa Motors (Chester-le-Street) Ltd* [1980] RTR 1, DC ('used 1975' vehicle); *Dixons Ltd v Barnett* (1988) 153 JP 268, DC (statement of true scientific magnification of telescope only; no statement of maximum useful magnification which was significantly less than scientific magnification). There may even be implied descriptions of the specified matters: see *Cottee v Douglas Seaton (Used Cars) Ltd* [1972] 3 All ER 750, [1972] 1 WLR 1408, DC (disguised corrosion a false indication of strength).

8 Trade Descriptions Act 1968 s 2(1)(e). See also *British Gas Corpn v Lubbock* [1974] 1 All ER 188, [1974] 1 WLR 37, DC (accessory for gas cooker).

9 Trade Descriptions Act 1968 s 2(1)(f). This does not cover the issue of an inaccurate vehicle test certificate, at least where the inaccuracy is no more than an opinion in good faith: *Wycombe Marsh Garages Ltd v Fowler* [1972] 3 All ER 248, [1972] 1 WLR 1156, DC. A false claim by a dealer that a car had a valid test certificate would, however, fall within the Trade Descriptions Act 1968 s 2(1)(f).

10 *Ibid* s 2(1)(g). This would cover a use of a certification trade mark, such as the 'wool mark' or the British Standards 'Kitemark'. See *Downland Bedding Co Ltd v Retail Trading Standard Association Inc* [1959] Crim LR 217, DC. As to certification marks see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 165 et seq; and as to motor vehicle approval marks see PARA 483 post; and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 269.

11 Trade Descriptions Act 1968 s 2(1)(h). A false indication of place of origin is an offence under s 1(1). The description 'port' and 'madeira' applied to any wine or other liquor, other than wine the produce of Portugal and the island of Madeira respectively, is deemed to be a false trade description within the meaning of the Trade Descriptions Act 1968; but it is a good defence to any proceedings under the Act in respect of such a description if it is proved that the wine or other liquor to which the description is applied is intended solely for exportation from the United Kingdom: Anglo-Portuguese Commercial Treaty Act 1914 s 1 (amended by the Trade Descriptions Act 1968 s 41(1), Sch 1 para 1). A qualification of the word is not enough: see *Sandeman v Gold* [1924] 1 KB 107, DC ('Tarragona port'). See also *Holmes v Pipers Ltd* [1914] 1 KB 57, DC. The description 'port' applied to wine the produce of Portugal, imported into the United Kingdom, is deemed to be a false trade description within the meaning of the Trade Descriptions Act 1968 if the wine, on importation into the United Kingdom, was not accompanied by a certificate issued by the competent Portuguese authorities to the effect that it was a wine to which by the law of Portugal the description 'port' may be applied and the Trade Descriptions Act 1968 applies accordingly; but it is a good defence to any proceedings under the Trade Descriptions Act 1968 in respect of such a description if it is proved that the wine to which the description is applied is intended solely for exportation from the United Kingdom: Anglo-Portuguese Commercial Treaty Act 1916 s 1(1) (amended by the Trade Descriptions Act 1968 Sch 1 para 2). The Anglo-Portuguese Commercial Treaty Act 1916 s 1(1) (as amended) is in addition to, and not in derogation of, any of the provisions of the Anglo-Portuguese Commercial Treaty Act 1914: Anglo-Portuguese Commercial Treaty Act 1916 s 1(2). There may also be a civil right of action for passing off in respect of false appellations of origin, as in the 'champagne', 'sherry' and 'scotch whisky' cases cited in TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 319.

12 Trade Descriptions Act 1968 s 2(1)(i). Normally this would cover the use of a trade mark of a particular manufacturer, producer etc: see s 34 (as amended); and PARA 488 post. The supply of petrol to a garage bearing a particular company's livery is an application of a trade description: *Roberts v Severn Petroleum and Trading Co Ltd* [1981] RTR 312, DC. See also *Stone v Burn* [1911] 1 KB 927, DC (wrong beer in labelled bottles an offence, notwithstanding attempt to relabel bottles with correct trade mark).

13 Trade Descriptions Act 1968 s 2(1)(j). This covers vehicle mileometer readings: see *Tarleton Engineering Co Ltd v Natrass* [1973] 3 All ER 699, [1973] 1 WLR 1261, DC; *Taylor v Smith* [1974] RTR 190, DC; *R v Hammertons Cars Ltd* [1976] 3 All ER 758, [1976] 1 WLR 1243, CA. To describe a new car as 'new' when it is registered in a dealer's name is an offence: *R v Anderson* (1987) 152 JP 373, CA.

14 Trade Descriptions Act 1968 s 2(2)(a).

15 Ibid s 2(2)(b).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

481 Meaning of 'trade description'

NOTE 2--Trade Descriptions Act 1968 s 32(1), (2) repealed: SI 2008/1277.

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482. Descriptions excluded from the definition of 'trade description'.

Notwithstanding anything in the statutory definition of 'trade description'¹, any description or mark applied in pursuance of any of certain enactments relating to agriculture² is deemed not to be a trade description³.

Where:

- 755 (1) provision is made under the Food Safety Act 1990⁴ or the Consumer Protection Act 1987⁵ prohibiting the application of a description except to goods in the case of which the requirements specified in that provision are complied with, that description, when applied to such goods, is deemed not to be a trade description⁶;
- 756 (2) by virtue of any provision made under Part V of the Medicines Act 1968⁷, anything which, in accordance with the Trade Descriptions Act 1968, constitutes the application of a trade description to goods is subject to any requirements or restrictions imposed by that provision, any particular description specified in that provision, when applied to goods in circumstances to which those requirements or restrictions are applicable, is deemed not to be a trade description⁸.

Regulations may provide that certain marks⁹ are deemed not to be trade descriptions; and there is power to exempt goods sold for export¹⁰. There are also matters which, notwithstanding the extent of the meaning of 'trade description', do not come within it¹¹.

1 le notwithstanding anything in the Trade Descriptions Act 1968 s 2(1), (2): see PARA 481 ante.

2 le any description or mark applied in pursuance of the Agricultural Produce (Grading and Marking) Act 1928 s 2 (as amended) (see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARAS 1118-1119), the Plant Varieties and Seeds Act 1964 (see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 906 et seq), the Agriculture and Horticulture Act 1964 or any Community grading rules made under Pt III (ss 11-24 (as amended): see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1147 et seq), the Consumer Protection Act 1987 (see PARA 518 et seq post) and the Plant Varieties Act 1997 (see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1175 et seq): Trade Descriptions Act 1968 s 2(4)(b)-(d), (g), (h) (amended by the European Communities Act 1972 s 4, Sch 3 Pt III, Sch 4 para 4(2); the Consumer Protection Act 1987 s 48(1), Sch 4 para 2(1)(a); and the Plant Varieties Act 1997 s 51(4)).

3 Trade Descriptions Act 1968 s 2(4). In addition, the following descriptions are deemed not to be trade descriptions: (1) any statement made in respect of, or mark applied to, any material in pursuance of the Agriculture Act 1970 Pt IV (ss 66-87) (as amended) (fertilisers and feeding stuffs: see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 941 et seq); (2) any name or expression to which a meaning has been assigned under s 70 (as amended) (see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 946) when applied to any material in the circumstances specified in s 70 (as amended); (3) any mark prescribed by a system of classification compiled under the Agriculture Act 1967 s 5 (carcasses: see FOOD vol 18(2) (Reissue) PARA 507); and (4) any designation, mark or description applied in pursuance of a scheme brought into force under the Agriculture Act 1970 s 6(1) (repealed) or an order made under s 25(1) (repealed): Trade Descriptions Act 1968 s 2(4) (amended by the Agriculture Act 1970 ss 6(4), 87(3), 113(3), Sch 5 Pt V).

4 As to the Food Safety Act 1990 see FOOD.

5 As to the Consumer Protection Act 1987 see PARA 518 et seq post.

6 Trade Descriptions Act 1968 s 2(5)(a) (renumbered by the Medicines Act 1968 s 135(1), Sch 5 para 16; amended by the Consumer Protection Act 1987 Sch 4 para 2(1)(b); and the Food Safety Act 1990 s 59(1), Sch 3 para 6). In *HP Bulmer Ltd and Showerings Ltd v J Bollinger SA and Champagne Lanson Père et Fils* [1977] 2 CMLR 625, [1978] RPC 79, CA, it was held that 'champagne' was not a trade description because regulations forbade the use of the name except in relation to certain goods.

7 le any provision made under the Medicines Act 1968 Pt V (ss 85-91) (as amended) (containers, packages and identification of medicinal products: see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 152 et seq) or made under any provisions of Pt V (ss 85-91) (as amended) as applied by an order under s 104 (as amended) or s 105 (as amended) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 9).

8 Trade Descriptions Act 1968 s 2(5)(b) (added by the Medicines Act 1968 Sch 5 para 16).

9 Eg descriptions or marks applied to: (1) eggs in pursuance of any Community provision (see the Eggs (Marketing Standards) Regulations 1995, SI 1995/1544, reg 9; and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1121); (2) indications of fibre content of a textile complying with the Textile Products (Indication of Fibre Content) Regulations 1986, SI 1986/26, reg 10 (see PARA 515 post); and (3) aerosol dispensers marked with a reverse epsilon (see the Aerosol Dispensers (EEC Requirements) Regulations 1977, SI 1977/1140, reg 12(2); and PARA 575 post).

10 See the Trade Descriptions Act 1968 s 32 (as amended); and PARA 481 note 2 ante.

11 See *Cadbury Ltd v Halliday* [1975] 2 All ER 226, [1975] 1 WLR 649, DC (where the words 'extra value' applied to bars of chocolate were held not to be a trade description). A price is not a trade description, but misleading indications as to price may be caught by other provisions: see PARA 702 et seq post. For disclaimers as to the accuracy of a trade description see PARA 480 ante. Inadequate information is not the same as false information: see *Jenkins v A Cohen & Co Ltd* [1971] 2 All ER 1384, [1971] 1 WLR 1280, DC.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

482 Descriptions excluded from the definition of 'trade description'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTE 8--Also, head (3) where any description of a veterinary medicinal product is required to be applied to the product by an authorisation for the product granted under the Veterinary Medicines Regulations 2006, SI 2006/2407 (now replaced by the Veterinary Medicines Regulations 2009, SI 2009/2297), that description, when applied to the product, is not deemed to be a trade description: Trade Descriptions Act 1968 s 2(5)(c) (added by SI 2006/2407).

NOTE 9--SI 1995/1544 replaced, in relation to England, by the Eggs and Chicks (England) Regulations 2009, SI 2009/2163, and in relation to Wales by the Eggs and Chicks (Wales) Regulations 2009, SI 2009/793.

NOTE 10--Trade Descriptions Act 1968 ss 32(1), (2) repealed: SI 2008/1277.

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483. Motor vehicle approval marks.

Where any international agreement to which the United Kingdom is a party, or a Community obligation¹, provides:

757 (1) for markings to be applied²:

65

80. (a) to motor vehicle parts³ of any description to indicate conformity with a type approved by any country; or

81. (b) to a motor vehicle⁴ to indicate that the vehicle is fitted with motor vehicle parts of any description and either that the parts conform with a type approved by any country or that the vehicle is such that, as so fitted, it conforms with a type so approved⁵; and

66

758 (2) for motor vehicle parts, or, as the case may be, motor vehicles, bearing those markings to be recognised as complying with the requirements imposed by the law of another country⁶,

the Secretary of State may by regulations designate the markings as approval marks; and any markings so designated are deemed, for the purposes of the Trade Descriptions Act 1968, to be a trade description, whether or not the markings fall within the definition of that expression⁷ in that Act⁸.

Any person who, without being authorised by the competent authority⁹ to apply any approval mark, applies that mark or a mark so nearly resembling it as to be calculated to deceive is guilty of an offence¹⁰, whether or not he would be guilty of such an offence apart from this provision¹¹.

1 'Community obligation' means such an obligation within the meaning of the European Communities Act 1972 s 1, Sch 1 Pt II: Interpretation Act 1978 s 5, Sch 1.

2 The term 'applies a marking' is not defined in the Road Traffic Act 1988; but cf the meaning of 'applies a trade description' in the Trade Descriptions Act 1968 (see PARA 478 ante).

3 For these purposes, 'motor vehicle part' means any article made or adapted for use as part of a mechanically propelled vehicle, or a vehicle drawn by a mechanically propelled vehicle, or for use as part of the equipment of any such vehicle, and is to be treated as including any equipment for the protection of drivers or passengers in or on a motor vehicle notwithstanding that it does not form part of or of the equipment of, that vehicle: Road Traffic Act 1988 s 80(4). For the meaning of 'mechanically propelled vehicle' see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 211.

4 For these purposes, 'motor vehicle' means a mechanically propelled vehicle or a vehicle designed or adapted for towing by a mechanically propelled vehicle: *ibid* s 80(4).

5 *Ibid* s 80(1)(a).

6 *Ibid* s 80(1)(b).

7 *Ie* the definition of 'trade description' in the Trade Descriptions Act 1968 s 2 (as amended): see PARA 481 ante.

8 Road Traffic Act 1988 s 80(1). At the date at which this volume states the law no regulations had been so made but, by virtue of the Road Traffic (Consequential Provisions) Act 1988 s 2(2) and the Interpretation Act 1978 s 17(2)(b), the Motor Vehicles (Designation of Approval Marks) Regulations 1979, SI 1979/1088 (as amended) have effect as if so made: see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 714.

The conditions subject to which approval of any type may be given on behalf of the United Kingdom or the use of approval marks indicating conformity with a type approved by the United Kingdom may be authorised may include such conditions as to testing or inspection and the payment of fees as the Secretary of State may impose: Road Traffic Act 1988 s 80(3).

9 For these purposes, 'the competent authority' means: (1) as respects any approval mark indicating conformity with a type approved by the United Kingdom, the Secretary of State; and (2) as respects any approval mark indicating conformity with a type approved by any other country, the authority having power under the law of that country to authorise the use of that mark: *ibid* s 80(4).

10 *Ie* under the Trade Descriptions Act 1968: see PARA 498 et seq post.

11 Road Traffic Act 1988 s 80(2).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

483 Motor vehicle approval marks

NOTES 5, 6, 8, 11--Road Traffic Act 1988 s 80(1), (2) amended: SI 2008/1277.

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484. Meaning of 'offers to supply'.

A person exposing goods¹ for supply or having goods in his possession for supply² is deemed to offer to supply them³.

1 As to the meaning of 'goods' see PARA 485 post.

2 Where goods are appropriated under a contract by the vendor to the purchaser and invoiced, they cannot be said to be 'in [the vendor's] possession for supply' within the Trade Descriptions Act 1968 s 6, when they are merely held by him for the purpose of delivery or collection pursuant to the contract. The words 'in his possession for supply' in s 6 are to be read sui generis with the words 'exposing ... for supply' in s 6 and in the context of an offer to supply goods, as opposed to a concluded contract: *Miller v FA Sadd & Son Ltd*, *Miller v Pickering Bull & Co Ltd* [1981] 3 All ER 265, DC, per curiam.

3 Trade Descriptions Act 1968 s 6. Section 6 renders irrelevant for the purposes of the Trade Descriptions Act 1968 the distinction in the law of contract between an 'offer' and a mere 'invitation to treat': cf *Fisher v Bell* [1961] 1 QB 394, [1960] 3 All ER 731, DC; *Partridge v Crittenden* [1968] 2 All ER 421, [1968] 1 WLR 1204, DC (cases on comparable statutes without an equivalent provision). See also *Towers & Co Ltd v Gray* [1961] 2 QB 351, [1961] 2 All ER 68, DC; *Preston v Albuery* [1964] 2 QB 796, [1963] 3 All ER 897, DC. For cases under the Trade Descriptions Act 1968 see *Stainthorpe v Bailey* [1980] RTR 7, DC; and *R v R McMillan Aviation Ltd and McMillan* [1981] Crim LR 785.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

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485. Meaning of 'goods'.

For the purposes of the Trade Descriptions Act 1968, 'goods' includes:

- (1) ships¹ and aircraft, things attached to land and growing crops²;
- (2) a package of goods³.

1 For the meaning of 'ship' see PARA 481 note 2 ante.

2 Trade Descriptions Act 1968 s 39(1).

3 See *British Gas Corp v Lubbock* [1974] 1 All ER 188, [1974] 1 WLR 37, DC (where a trade description was held to apply to a gas cooker described as being supplied with a hand-held battery torch).

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471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

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486. Meaning of expressions assigned by order.

Where it appears to the Secretary of State:

- 759 (1) that it would be in the interest of persons to whom any goods¹ are supplied;
or
- 760 (2) that it would be in the interest of persons by whom any goods are exported and would not be contrary to the interest of persons to whom such goods are supplied in the United Kingdom,

that any expressions used in relation to the goods should be understood as having definite meanings, the Secretary of State may by order assign such meanings either:

- 761 (a) to those expressions when used in the course of a trade or business² as, or as part of, a trade description³ applied to the goods; or
- 762 (b) to those expressions when so used in such circumstances as may be specified in the order;

and, where such a meaning is so assigned, the expression is deemed, for the purposes of the Trade Descriptions Act 1968, to have⁴ that meaning⁵.

1 As to the meaning of 'goods' see PARA 485 ante.

2 For the meaning of 'in the course of a trade or business' see PARA 477 ante.

3 For the meaning of 'trade description' see PARA 481 ante.

4 I.e. when used as mentioned in the Trade Descriptions Act 1968 s 7(i) (see head (a) in the text) or, as the case may be s 7(ii) (see head (b) in the text).

5 Ibid s 7. At the date at which this volume states the law no order had been so made. As to the making of orders see PARA 473 ante.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

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(C) TRADE DESCRIPTIONS USED IN ADVERTISEMENTS AND TRADE MARKS

487. Trade descriptions used in advertisements.

Where in an advertisement¹ a trade description² is used in relation to any class of goods³, then:

763 (1) for the purpose of determining whether the offence of applying a false⁴ trade description to any goods⁵ has been committed⁶; or

764 (2) where goods of the class are supplied or offered to be supplied by a person publishing or displaying the advertisement, also for the purpose of determining whether the offence of supplying or offering to supply any goods to which a false trade description is applied⁷ has been committed⁸,

the trade description is to be taken as referring to all goods of the class, whether or not in existence at the time the advertisement is published⁹.

A false statement is made when it is communicated to someone, so that, in the case of a written advertisement, it is made when the advertisement is read by each reader¹⁰.

1 For these purposes, 'advertisement' includes a catalogue, a circular and a price list: Trade Descriptions Act 1968 s 39(1).

2 For the meaning of 'trade description' see PARA 481 ante.

3 In determining, for these purposes, whether any goods are of a class to which a trade description used in an advertisement relates, regard must be had not only to the form and content of the advertisement but also to the time, place, manner and frequency of its publication and all other matters making it likely or unlikely that a person to whom the goods are supplied would think of the goods as belonging to the class in relation to which the trade description is used in the advertisement: Trade Descriptions Act 1968 s 5(3). As to the meaning of 'goods' see PARA 485 ante.

4 For the meaning of 'false', in relation to a trade description, see PARA 479 ante.

5 Is an offence under the Trade Descriptions Act 1968 s 1(1)(a): see PARA 475 head (1) ante.

6 Ibid s 5(2)(a).

7 Is an offence under ibid s 1(1)(b): see PARA 475 head (2) ante.

8 Ibid s 5(2)(b).

9 Ibid s 5(1), (2).

10 *Wings Ltd v Ellis* [1985] AC 272, [1984] 3 All ER 577, HL, disapproving in part *R v Thomson Holidays Ltd* [1974] QB 592, [1974] 1 All ER 823, CA. Thus, an advertisement contravening the Trade Descriptions Act 1968 s 5 results in many offences, one in relation to each person reading the advertisement.

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471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

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488. Trade marks containing trade descriptions.

It is clear that the use of a trade mark may be a trade description¹. The fact that a trade description is a trade mark or part of a trade mark² does not prevent it from being a false³ trade description when applied to any goods⁴, except where certain conditions are satisfied⁵.

1 For the meaning of 'trade description' see PARA 481 ante.

2 For the meaning of 'trade mark' see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 57.

3 For the meaning of 'false' see PARA 479 ante.

4 As to the meaning of 'goods' see PARA 485 ante.

5 Trade Descriptions Act 1968 s 34 (amended by the Trade Marks Act 1994 s 106(1), Sch 4 para 4(a)). The conditions referred to relate to trade marks established before the Trade Descriptions Act 1968 came into force. For such a mark to be excepted, it must be established that: (1) the mark could have been lawfully applied to the goods if the Trade Descriptions Act 1968 had not been passed; (2) that on 30 May 1968 (ie the day on which the Trade Descriptions Act 1968 was passed) the trade mark was registered under the Trade Marks Act 1938 (repealed) (see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 1 et seq) or was in use to indicate a connection in the course of trade (see PARA 477 ante) between the goods and the proprietor of the trade mark; (3) that the trade mark as applied is used to indicate such a connection between the goods and the proprietor of the trade mark or, in the case of a registered trade mark, a person licensed to use it; and (4) that the person who is the proprietor of the trade mark is the same person as, or a successor in title of, the proprietor on 30 May 1968: Trade Descriptions Act 1968 s 34(a)-(d) (amended by the Trade Marks Act 1994 Sch 4 para 4(b)).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/C. INFORMATION TO BE PROVIDED AS TO GOODS/489. Marking orders.

C. INFORMATION TO BE PROVIDED AS TO GOODS

489. Marking orders.

Where it appears to the Secretary of State necessary or expedient in the interest of persons to whom any goods¹ are supplied that the goods should be marked with or accompanied by any information, whether or not amounting to or including a trade description², or instruction relating to the goods, he may³ by order impose requirements for securing that the goods are so marked or accompanied, and regulate or prohibit the supply of goods with respect to which the requirements are not complied with⁴. Such requirements may extend to the form and manner in which the information or instruction is to be given⁵. Where such an order is in force with respect to goods of any description, any person who, in the course of any trade or business⁶, supplies or offers to supply goods of that description in contravention of the order is guilty of an offence⁷.

1 As to the meaning of 'goods' see PARA 485 ante. A requirement imposed by an order under the Trade Descriptions Act 1968 s 8 (see infra) or s 9 (see PARA 490 post) in relation to any goods is not to be confined to goods manufactured or produced in any one country or any one of a number of countries or to goods manufactured or produced outside any one or more countries, unless: (1) it is imposed with respect to a description of goods in the case of which the Secretary of State is satisfied that the interest of persons in the United Kingdom to whom goods of that description are supplied will be sufficiently protected if the requirement is so confined; and (2) the Secretary of State is satisfied that the order is compatible with the international obligations of the United Kingdom: s 10(1). As to the Secretary of State see PARA 15 ante.

2 For the meaning of 'trade description' see PARA 481 ante.

3 Is subject to the provisions of the Trade Descriptions Act 1968.

4 Ibid s 8(1). As to the making of orders see PARA 473 ante. An order under s 8 may make different provision for different circumstances and, in the case of goods supplied in circumstances where the information or instruction required by the order would not be conveyed until after delivery, may require the whole or part of it to be also displayed near the goods: s 8(3). In exercise of the power so conferred the Secretary of State has made the Trade Descriptions (Sealskin Goods) (Information) Order 1980, SI 1980/1150: see PARA 491 post. As to where component parts, requiring to be marked, are made up into a whole, not requiring to be marked see *Littlewoods Mail Order Stores Ltd v Storey* [1962] 2 QB 286, [1962] 2 All ER 865, DC (decided under comparable earlier legislation).

5 Trade Descriptions Act 1968 s 8(1).

6 For the meaning of 'in the course of a trade or business' see PARA 477 ante.

7 Trade Descriptions Act 1968 s 8(2). As to penalties, enforcement and other matters arising in connection with the offence see PARA 498 et seq post; as to the relaxation of the requirements of an order in cases of hardship see PARA 492 post; and as to the exemption in relation to goods supplied or offered to be supplied in the course of certain market research experiments see PARA 476 ante.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/C. INFORMATION TO BE PROVIDED AS TO GOODS/490. Information etc to be given in advertisements.

490. Information etc to be given in advertisements.

Where it appears to the Secretary of State necessary or expedient in the interest of persons to whom any goods¹ are to be supplied that any description of advertisements² of the goods

should contain or refer to any information, whether or not amounting to or including a trade description³, relating to the goods, he may⁴ by order impose requirements as to the inclusion of that information, or of an indication of the means by which it may be obtained, in such description of advertisements as may be specified in the order⁵. Where an advertisement of any goods to be supplied in the course of any trade or business⁶ fails to comply with a requirement so imposed, any person who publishes the advertisement is guilty of an offence⁷.

1 As to the meaning of 'goods' see PARA 485 ante. As to the special requirements in relation to goods produced in any one country, or any one of a number of countries, see PARA 489 note 1 ante.

2 As to the meaning of 'advertisement' see PARA 487 note 1 ante.

3 For the meaning of 'trade description' see PARA 481 ante.

4 Is subject to the provisions of the Trade Descriptions Act 1968.

5 Ibid s 9(1). As to the making of orders see PARA 473 ante. An order under s 9 may specify the form and manner in which any such information or indication is to be included, and may make different provision for different circumstances: s 9(2). In exercise of the power so conferred the Secretary of State has made the Trade Descriptions (Sealskin Goods) (Information) Order 1980, SI 1980/1150: see PARA 491 post. As to the Secretary of State see PARA 15 ante.

6 For the meaning of 'in the course of a trade or business' see PARA 477 ante.

7 Trade Descriptions Act 1968 s 9(3). As to penalties, enforcement and other matters arising in connection with the offence see PARA 498 et seq post; and as to the relaxation of the requirements of an order in cases of hardship see PARA 492 post.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/C. INFORMATION TO BE PROVIDED AS TO GOODS/491. Information relating to sealskin goods.

491. Information relating to sealskin goods.

The following requirements have effect in relation to all sealskin goods¹ first imported into, or made in, the United Kingdom on or after 1 January 1981:

765 (1) subject to head (2) below, the goods must be marked with information sufficient to convey to persons acquiring the goods by retail, or proposing so to acquire them:

67

82. (a) that the goods are sealskin goods; and

83. (b) in what country the relevant seals² were taken or, if there is no such country or it is not otherwise reasonably practicable to identify any such country, in what geographical location they were taken;

68

766 (2) where the nature or characteristics of any sealskin goods are such that it is not reasonably practicable to mark them in accordance with the requirements of

- head (1) above, those requirements are to be treated as complied with if a label or other document which contains the information mentioned in head (1) above is attached to or accompanies the goods;
- 767 (3) such information must be given:
- 69
84. (a) conspicuously and legibly in uniform lettering in English; and
85. (b) separately from any other information given on or in relation to the goods³.
- 70

No person is to supply or offer to supply any sealskin goods first imported into, or made in, the United Kingdom on or after 1 January 1981 in the course of a trade or business⁴ unless the above requirements are complied with in relation to the goods⁵.

In relation to any advertisement⁶ directed to retail customers⁷ to the effect that they may acquire sealskin goods by placing an order for that purpose, without first inspecting the goods, with a person whose name and address is given in the advertisement, the following requirements have effect:

- 768 (i) the advertisement must include such information as is mentioned in head (1) above; and
- 769 (ii) such information, must, in the case of a written advertisement, be given in the manner mentioned in head (3)(a) above and, in the case of an oral advertisement, be given clearly and audibly,

and, in either case, must be given separately from any other information given in the advertisement⁸.

1 For these purposes, 'sealskin goods' means goods which either consist of sealskins or are goods of any other description the whole or any part of which are made of sealskin or of any material derived from sealskin or of which sealskin forms a part: Trade Descriptions (Sealskin Goods) (Information) Order 1980, SI 1980/1150, art 1(2)(a). 'Sealskin' includes any fur comprised in or derived from such skin: art 1(2)(b).

2 For these purposes, 'the relevant seals', in relation to any sealskin goods, means the seals whose skins are those: (1) of which the goods consist; (2) from which the goods or any part of them are made; or (3) from which there was derived, or which form a part of, any material of which the goods or any part of them are made: ibid art 1(2)(c).

3 Ibid arts 2, 3.

4 For the meaning of 'in the course of a trade or business' see PARA 477 ante.

5 Trade Descriptions (Sealskin Goods) (Information) Order 1980, SI 1980/1150, arts 2, 4.

6 Ie other than an advertisement contained in: (1) a catalogue or work of reference of more than 30 printed pages of which copies were first made available for publication in the ordinary course of business before 1 January 1981; (2) a periodical published before that date, being a periodical ordinarily published at regular intervals of more than seven days; (3) a direct mail advertisement first issued before that date; or (4) a cinematograph film or radio or television broadcast first exhibited or broadcast before that date: ibid art 5(2).

7 For these purposes, 'retail customers' means persons intending to acquire sealskin goods by retail otherwise than in the course of a trade or business in dealing in such goods: ibid art 5(1).

8 Ibid art 5(1)-(3).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/C. INFORMATION TO BE PROVIDED AS TO GOODS/492. Relaxation or discontinuation of requirements.

492. Relaxation or discontinuation of requirements.

Where any requirements with respect to any goods¹ are for the time being imposed by an order² of the Secretary of State and he is satisfied, on the representation of persons appearing to him to have a substantial interest in the matter, that greater hardship would be caused to such persons if the requirements continued to apply than is justified by the interest of persons to whom such goods are supplied, he may relax or discontinue the requirement by a further order³.

1 As to the meaning of 'goods' see PARA 485 ante.

2 Ie under the Trade Descriptions Act 1968 s 8 (see PARA 489 ante) or s 9 (see PARA 490 ante).

3 Ibid s 10(2). The power so to relax or discontinue requirements may be exercised without the consultation and notice required by s 38(3) (see PARA 473 ante): s 10(2). As to the Secretary of State see PARA 15 ante.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

492 Relaxation or discontinuation of requirements

TEXT AND NOTES--Trade Descriptions Act 1968 s 10 repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/D. FALSE REPRESENTATIONS AS TO GOODS OR SERVICES/493. False representations as to royal approval or award.

D. FALSE REPRESENTATIONS AS TO GOODS OR SERVICES

493. False representations as to royal approval or award.

If, in the course of any trade or business¹, any person:

- 770 (1) gives, by whatever means, any false indication, direct or indirect, that any goods² or services supplied by him or any methods adopted by him are or are of a kind supplied to or approved by Her Majesty or any member of the royal family³, he is guilty⁴ of an offence⁵;

771 (2) uses, without Her Majesty's authority, any device or emblem signifying the Queen's Award to Industry or anything so nearly resembling such a device or emblem as to be likely to deceive, he is guilty⁶ of an offence⁷.

1 For the meaning of 'in the course of a trade or business' see PARA 477 ante.

2 As to the meaning of 'goods' see PARA 485 ante.

3 As to the royal family see CROWN AND ROYAL FAMILY vol 12(1) (Reissue) PARA 27 et seq.

4 He is subject to the provisions of the Trade Descriptions Act 1968.

5 Ibid s 12(1). As to penalties, enforcement and other matters arising in connection with the offence see PARA 498 et seq post.

6 See note 4 supra.

7 Trade Descriptions Act 1968 s 12(2). See also note 5 supra.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/D. FALSE REPRESENTATIONS AS TO GOODS OR SERVICES/494. False representations as to supply of goods or services.

494. False representations as to supply of goods or services.

If, in the course of any trade or business¹, any person gives, by whatever means, any false indication, direct or indirect, that any goods² or services supplied by him are of a kind supplied to any person, he is guilty³ of an offence⁴.

1 For the meaning of 'in the course of a trade or business' see PARA 477 ante.

2 As to the meaning of 'goods' see PARA 485 ante.

3 He is subject to the provisions of the Trade Descriptions Act 1968.

4 Ibid s 13. As to penalties, enforcement and other matters arising in connection with the offence see PARA 498 et seq post. As to false or misleading statements about the supply of services, accommodation etc see PARA 495 post; as to false or misleading statements about property matters see PARA 791 et seq post; and as to misleading price indications see PARA 702 et seq post. Where the buyer deals as consumer, any public statements on the specific characteristics of the goods may be a relevant factor in establishing whether the goods are of satisfactory quality for the purposes of the Sale of Goods Act 1979 s 14(2A) (as added): see s 14(2D)-(2F) (as added); and PARA 81 ante.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

494 False representations as to supply of goods or services

TEXT AND NOTES--Trade Descriptions Act 1968 s 13 repealed: SI 2008/1277.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/D. FALSE REPRESENTATIONS AS TO GOODS OR SERVICES/495. False or misleading statements as to services, accommodation etc.

495. False or misleading statements as to services, accommodation etc.

It is an offence¹ for any person in the course of any trade or business²:

- 772 (1) to make a statement³ which he knows⁴ to be false⁵; or
- 773 (2) recklessly⁶ to make a statement which is false⁷,

as to any of the following matters:

- 774 (a) the provision, in the course of any trade or business, of any services⁸, accommodation or facilities⁹;
- 775 (b) the nature of any services, accommodation or facilities provided in the course of any trade or business¹⁰;
- 776 (c) the time at which, manner in which or persons by whom any services, accommodation or facilities are so provided¹¹;
- 777 (d) the examination, approval or evaluation by any person of any services, accommodation or facilities so provided¹²; or
- 778 (e) the location or amenities of any accommodation so provided¹³.

For these purposes, anything, whether or not a statement as to any of the above matters, likely to be taken for such a statement as to any of those matters as would be false is deemed to be a false statement as to that matter¹⁴.

¹ As to penalties, enforcement and other matters arising in connection with the offence see PARA 498 et seq post.

² For the meaning of 'in the course of a trade or business' see PARA 477 ante. See also *R v Breeze* [1973] 2 All ER 1141, [1973] 1 WLR 994, CA (where it was held that a false claim of a proper qualification to perform services is within the course of a trade or business of providing those services); *R v Bow Street Magistrates' Court, ex p Joseph* (1986) 150 JP 650, DC (the Law Society does not offer services to the public nor does it carry on any commercial operation; it cannot be said to operate in the course of a trade or business).

³ In the case of a brochure or similar publication, a statement is made each time it is read and, accordingly, a fresh offence may be committed each time the brochure is read: *R v Thomson Holidays Ltd* [1974] QB 592, [1974] 1 All ER 823, CA; *Wings Ltd v Ellis* [1985] AC 272, [1984] 3 All ER 577, HL.

⁴ Knowledge or recklessness is an ingredient of the offence, although, in general, mens rea is not required for offences under the Trade Descriptions Act 1968: see PARA 506 post.

5 Ibid s 14(1)(a). For these purposes, 'false' means false to a material degree: s 14(4). Cf para 479 ante. If the statement is accurate at the time it is made, subsequent events cannot render it false: *Sunair Holidays Ltd v Dodd* [1970] 2 All ER 410, [1970] 1 WLR 1037, DC. An accused may be convicted of an offence under the Trade Descriptions Act 1968 s 14(1)(a) where he had no knowledge of the falsity of the statement at the time of its publication but knew of the falsity at the time it was read by the complainant: *Wings Ltd v Ellis* [1985] AC 272, [1984] 3 All ER 577, HL. An airline company is guilty of an offence under the Trade Descriptions Act 1968 s 14(1)(a) where it falsely states the details of a return flight to a passenger: *R v Avro plc* (1993) 157 JP 759, CA. As to false claims by estate agents see *Wall v Rose and Sargent* (1997) 162 JP 38, DC. See also *R v Bow Street Magistrates' Court, ex p Joseph* (1986) 150 JP 650, DC (cited in note 2 supra).

6 A statement made regardless of whether it is true or false is deemed to be made recklessly, whether or not the person making it had reasons for believing that it might be false: Trade Descriptions Act 1968 s 14(2)(b). See *Sunair Holidays Ltd v Dodd* [1970] 2 All ER 410, [1970] 1 WLR 1037, DC; *R v Clarksons Holidays Ltd* (1972) 57 Cr App Rep 38, CA; *MFI Warehouses Ltd v Natrass* [1973] 1 All ER 762, [1973] 1 WLR 307, DC; *R v Sunair Holidays Ltd* [1973] 2 All ER 1233, [1973] 1 WLR 1105, CA; *British Airways Board v Taylor* [1976] 1 All ER 65, [1976] 1 WLR 13, HL; *Cowburn v Focus Television Rentals Ltd* (1983) 147 JP 201, DC (failure to comply with promotional offer to supply free of charge 20 feature films to any person who hired a video recorder); *Best Travel Co Ltd v Patterson* (1986) 151 JP 619, DC (holiday brochure falsely stated that a hotel had a 'bar/lounge/breakfast room'; the rooms in question had not been completed on the due date and the travel company had made no inquiries between the date when the brochure was prepared and the date when the booking was made as to the completion of the rooms; no disclosure about the failure to complete the rooms was in fact made until the customer collected the travel documents; the travel company's failure to make inquiries and to allow the uncorrected brochure to remain with the travel agents amounted to recklessness); *Yugotours Ltd v Wadsley* (1988) 153 JP 345, DC (in proceedings against a company the Trade Descriptions Act 1968 s 14(1)(b) does not require specific evidence of recklessness on the part of any person who is to be regarded as its directing will or mind); *Airtours plc v Shipley* (1994) 158 JP 835, DC.

7 Trade Descriptions Act 1968 s 14(1)(b). See *Smallshaw v PKC Associates Ltd* (1994) 159 JP 730, DC (statement in holiday insurance leaflet as to amount of compensation in the event of delay in travel and further statement in insurance certificate; leaflet had to be read separately from the certificate); *R v Piper* (1995) 160 JP 116, CA (as there is potential for overlap between the Trade Descriptions Act 1968 s 14(1)(a) and s 14(1)(b), the statement of offence should be limited to whether an accused has committed an offence under s 14(1)(a) or s 14(1)(b), with details of the offence confined to identifying the statement on which the prosecution relies and the way in which it is false). As to false or misleading statements about property matters see PARA 791 et seq post; and as to misleading price indications see PARA 702 et seq post.

8 For these purposes, 'services' does not include anything done under a contract of service: Trade Descriptions Act 1968 s 14(4). In relation to any services consisting of or including the application of any treatment or process or the carrying out of any repair, the matters specified in s 14(1) are to be taken to include the effect of the treatment, process or repair: s 14(3). A guarantee (see *Breed v Cluett* [1970] 2 QB 459, [1970] 2 All ER 662, DC) and a timeshare marketing presentation (see *Global Marketing Europe v Berkshire County Council Trading Standards Department* [1995] Crim LR 431, DC) may amount to the provision of a service. As to free gift and refund offers see *Newell and Taylor v Hicks* (1983) 148 JP 308, DC (followed in *Kinchin v Ashton Park Scooters Ltd* (1984) 148 JP 540, DC); *Dixons Ltd v Roberts* (1984) 148 JP 513, DC. See also *Ashley v Sutton London Borough* (1994) 159 JP 631, DC, distinguishing *Newell and Taylor v Hicks* supra (book containing information on how to win at gambling constituted supply of services, as it was information being sold rather than book itself). An accused may be convicted of an offence under the Trade Descriptions Act 1968 s 14(1) when he makes a statement referring to past services as well as to services provided, if the statement is connected or associated with the supply of the services in question: *R v Bevelectric Ltd* (1992) 157 JP 323, CA. See *R v Holland* [2002] EWCA Crim 2022, (2003) 167 JP 138 (statements about holiday club business and its attributes were statements about provision of services).

9 Trade Descriptions Act 1968 s 14(1)(i). See *Westminster City Council v Ray Alan (Manshops) Ltd* [1982] 1 All ER 771, [1982] 1 WLR 383, DC (where a closing down sale was held not to be a facility, as 'facility' should be construed ejusdem generis with 'services' and 'accommodation').

10 Trade Descriptions Act 1968 s 14(1)(ii).

11 Ibid s 14(1)(iii).

12 Ibid s 14(1)(iv).

13 Ibid s 14(1)(v). See *Thomson Travel Ltd v Roberts* (1984) 148 JP 666, DC (hotel described as being 'right on the beach'; 'beach' was man-made sandpit).

14 Trade Descriptions Act 1968 s 14(2)(a). Cf s 3(3) (false trade descriptions applied to goods): see PARA 479 ante.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

495 False or misleading statements as to services, accommodation etc

TEXT AND NOTES--Trade Descriptions Act 1968 s 14 repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/D. FALSE REPRESENTATIONS AS TO GOODS OR SERVICES/496. Meanings of expressions assigned by order.

496. Meanings of expressions assigned by order.

Where it appears to the Secretary of State that it would be in the interest of persons for whom any services, accommodation or facilities¹ are provided in the course of any trade or business² that any expressions used with respect to such matters should be understood as having definite meanings, he may by order assign such meanings to those expressions when used as, or as part of, statements³ relating to those services, accommodation or facilities⁴. Where such a meaning is so assigned to an expression, it is deemed⁵ to have that meaning when so used⁶.

1 As to making false or misleading statements in relation to the provision of services, accommodation and facilities see PARA 495 ante.

2 For the meaning of 'in the course of a trade or business' see PARA 477 ante.

3 I.e. such statements as are mentioned in the Trade Descriptions Act 1968 s 14: see PARA 495 ante.

4 Ibid s 15. As to the making of orders see PARA 473 ante. At the date at which this volume states the law no such order had been made. As to the Secretary of State see PARA 15 ante.

5 I.e. for the purposes of the Trade Descriptions Act 1968.

6 Ibid s 15.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

496 Meanings of expressions assigned by order

TEXT AND NOTES--Trade Descriptions Act 1968 s 15 repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade

Descriptions/E. REQUIREMENTS AS TO IMPORTED GOODS/497. Importation of goods bearing false indication of origin.

E. REQUIREMENTS AS TO IMPORTED GOODS

497. Importation of goods bearing false indication of origin.

Where a false¹ trade description² is applied³ to any goods⁴ outside the United Kingdom and the false indication, or one of the false indications, given, or likely to be taken as given, by it is an indication of the place of manufacture, production, processing or reconditioning of the goods or any part of them, the goods may not be imported into the United Kingdom⁵. For these purposes, goods are deemed to have been manufactured or produced in the country in which they last underwent a treatment or process resulting in a substantial change⁶.

This prohibition does not, of itself, require any indication of country of origin to be applied to goods, but failure to give such an indication may result in an offence under other requirements⁷.

1 For the meaning of 'false', in relation to a trade description, see PARA 479 ante.

2 For the meaning of 'trade description' see PARA 481 ante.

3 For the meaning of 'applies a trade description' see PARA 478 ante.

4 As to the meaning of 'goods' see PARA 485 ante.

5 Trade Descriptions Act 1968 s 16. Section 16 does not create an offence, but, if goods are imported contrary to s 16, they are liable to forfeiture under the Customs and Excise Management Act 1979 s 49 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 993); and the importer is liable to a penalty under s 50 (as amended) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 994).

6 Trade Descriptions Act 1968 s 36(1). The Secretary of State may by order specify: (1) in relation to any description of goods, what treatment or process is to be regarded for these purposes as resulting or not resulting in a substantial change; (2) in relation to any description of goods different parts of which were manufactured or produced in different countries, or of goods assembled in a country different from that in which their parts were manufactured or produced, in which of those countries the goods are to be regarded as having been manufactured or produced: s 36(2). In exercise of the power so conferred the Secretary of State has made the Trade Descriptions (Country of Origin) (Cutlery) Order 1981, SI 1981/122, which provides that, in the case of any piece of cutlery of which the whole or any part is made of silver-plated stainless steel and which would have been suitable for supply by retail for domestic use without that piece or part, as the case may be, having been silver-plated, the process of silver-plating of such cutlery, or any ancillary process, is to be regarded as not resulting in a substantial change: arts 2(1), 3. For these purposes, 'cutlery' means knives, forks, spoons, ladles, servers, slicers, sharpening steels and other similar articles: art 2(2). As to the making of orders see PARA 473 ante. As to the Secretary of State see PARA 15 ante.

7 Eg under the Trade Descriptions (Sealskin Goods) (Information) Order 1980, SI 1980/1150: see PARA 491 ante.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/F. PROSECUTION, LIABILITY AND PENALTIES/498. Penalty for offences.

F. PROSECUTION, LIABILITY AND PENALTIES

498. Penalty for offences.

A person guilty of an offence under the Trade Descriptions Act 1968 for which no other penalty is specified is liable on conviction on indictment to a fine or imprisonment¹ for a term not exceeding two years, or to both, or on summary conviction to a fine not exceeding the prescribed sum². In other instances, where an offence is triable only summarily, the penalty may be a fine at a particular level on the standard scale³.

1 A custodial sentence should not be given unless there is an element of dishonesty: *R v Haesler* [1973] RTR 486, CA. See also *R v Hewitt* (1991) 13 Cr App Rep (S) 131, CA (need for custodial sentence for such an offence which may easily go undetected).

2 Trade Descriptions Act 1968 s 18 (amended by virtue of the Magistrates' Courts Act 1980 s 32(2)). The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1) (as substituted): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

A person should not be sentenced on the basis that he knew that he was committing an offence without first being given an opportunity to call evidence on the point: *R v Lester* (1975) 63 Cr App Rep 144, CA. When calculating the level of the fine for an offence under the Trade Descriptions Act 1968 s 13 (see PARA 494 ante), the commercial nature of the offence and the defendant's ability to pay must be taken into account: *R v Docklands Estates Ltd* [2000] All ER (D) 923, CA. See *R v Richards* [2004] EWCA Crim 192, [2004] 2 Cr App Rep (S) 264 (custodial sentence wrong in principle where defendants were car dealers who had been negligent, as opposed to rogue, traders).

3 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and MAGISTRATES vol 29(2) (Reissue) PARA 807.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/F. PROSECUTION, LIABILITY AND PENALTIES/499. Time limit for prosecutions.

499. Time limit for prosecutions.

No prosecution for an offence under the Trade Descriptions Act 1968 may be commenced after the expiration of three years from the commission of the offence¹ or one year from its discovery² by the prosecutor, whichever is the earlier³. Notwithstanding the general provisions as to limitation of time in magistrates' courts⁴, a magistrates' court may try an information for an offence under the Trade Descriptions Act 1968 if the information was laid at any time within

12 months from the commission of the offence⁵. The only offence which must be tried summarily is that of wilful obstruction of authorised officers⁶.

1 Where the offence is the supply of goods to which a false trade description is applied, the offence is committed at the time of the actual supply, not the preceding contract: see *Rees v Munday* [1974] 3 All ER 506, [1974] 1 WLR 1284, DC.

2 Is the discovery of the material facts necessary to found the prosecution. A police officer cannot gain time by laying an information while still researching those facts and without, at the time of laying such information, having decided to proceed: *R v Brentford Justices, ex p Wong* [1981] QB 445, [1981] 1 All ER 884, DC.

3 Trade Descriptions Act 1968 s 19(1). See *Newham London Borough v Co-operative Retail Services Ltd* (1984) 149 JP 421, DC; *R v Pain* (1985) 82 Cr App Rep 141, CA (original indictment contained several counts of conspiracy to defraud; new counts alleging conspiracy to contravene the Trade Descriptions Act 1968 s 1(1)(b) substituted at the trial; substituted counts fell outside the time limit in s 19); *R v Beaconsfield Justices, ex p Johnson and Sons Ltd* (1985) 149 JP 535, DC (date of discovery of offence by the prosecutor).

4 Is notwithstanding the Magistrates' Courts Act 1980 s 127(1): see MAGISTRATES vol 29(2) (Reissue) PARA 589.

5 Trade Descriptions Act 1968 s 19(2) (amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 75). The distinction drawn between offences by way of oral trade descriptions and others, provided for in the Trade Descriptions Act 1968 s 19(4), would no longer seem to have any effect: see the Magistrates' Courts Act 1980 s 127; and MAGISTRATES vol 29(2) (Reissue) PARA 589.

6 Is an offence under the Trade Descriptions Act 1968 s 29(1): see PARA 511 post.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

499 Time limit for prosecutions

NOTE 1--A false trade description can be applied to goods even before they are sold: *R (on the application of Donnachie) v Cardiff Magistrates' Court* [2007] EWHC 1846 (Admin), [2007] 1 WLR 3085 (offence committed at point odometer reading on vehicle altered).

NOTE 2--See *R (on the application of Donnachie) v Cardiff Magistrates' Court* [2007] EWHC 1846 (Admin), [2007] All ER (D) 437 (Jul) (discovery by prosecutor occurred before particular local authority employee became aware of offence as others working with or for him had knowledge of offence earlier).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/F. PROSECUTION, LIABILITY AND PENALTIES/500. Offences by corporations.

500. Offences by corporations.

Where an offence under the Trade Descriptions Act 1968 has been committed by a body corporate and is proved to have been committed with the consent and connivance of, or to be attributable to any neglect¹ on the part of, any director², manager³, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he

as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly⁴.

1 For the meaning of 'neglect' for this purpose see *R v R McMillan Aviation Ltd and McMillan* [1981] Crim LR 785.

2 In relation to any body corporate established by or under any enactment for the purpose of carrying on under national ownership any industry or part of an industry or undertaking, being a body corporate whose affairs are managed by its members, 'director' means a member of that body corporate: Trade Descriptions Act 1968 s 20(2).

3 'Manager' means a person who is connected with the management of the affairs of the company as a whole: see *Gibson v Barton* (1875) LR 10 QB 329; *Registrar of Restrictive Trading Agreements v WH Smith & Son Ltd* [1969] 3 All ER 1065, [1969] 1 WLR 1460, CA; *Tesco Supermarkets Ltd v Natrass* [1971] 1 QB 133 at 142, [1970] 3 All ER 357 at 364, DC (revsd without affecting this point [1972] AC 153, [1971] 2 All ER 127, HL); *R v Boal* [1992] QB 591, [1992] 3 All ER 177, CA; and COMPANIES vol 14 (2009) PARA 607.

4 Trade Descriptions Act 1968 s 20(1). As to the penalties for offences see PARA 498 ante. See *Lewin v Bland* (1983) 148 JP 69, DC (managing director had acted quite properly in entrusting work to a senior employee; he was under no duty to check that the task had been properly carried out); *Hirschler v Birch* (1986) 151 JP 396, DC (cases of delegation are to be considered on their facts; director who ventured for the first time into the field of purchasing high level braking lights for motor vehicles and accordingly should have been on his guard failed to check whether his co-director had consulted an authoritative source as to the legality of the goods); *Southend Borough Council v White* (1991) 156 JP 463, DC (accused charged with 'neglect', whereas his conduct was quite deliberate; conduct would more appropriately have been charged as 'consent or connivance').

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/F. PROSECUTION, LIABILITY AND PENALTIES/501. Accessories to offences committed abroad.

501. Accessories to offences committed abroad.

Any person who, in the United Kingdom, assists in or induces the commission in any other country of an act in respect of goods¹ which, if the act were committed in the United Kingdom, would be an offence under the provisions prohibiting false trade descriptions² is guilty of an offence³, but only if either:

- 779 (1) the false trade description concerned is an indication, or anything likely to be taken as an indication, that the goods or any part of the goods were manufactured, produced, processed or reconditioned in the United Kingdom⁴; or
- 780 (2) the false trade description concerned consists of or comprises an expression, or anything likely to be taken as an expression, to which a meaning is assigned by an order made by the Secretary of State⁵ and, where that meaning is assigned only in circumstances specified in the order, the trade description is used in those circumstances⁶.

Any person who, in the United Kingdom, assists in or induces the commission outside the United Kingdom of an act which, if committed in the United Kingdom, would be an offence

under the provisions relating to false representations as to royal approval or awards⁷ is guilty of an offence⁸.

- 1 As to the meaning of 'goods' see PARA 485 ante.
- 2 Is an offence under the Trade Descriptions Act 1968 s 1: see PARA 475 ante. For the meaning of 'false', in relation to a trade description, see PARA 479 ante; and for the meaning of 'trade description' see PARA 481 ante.
- 3 Ibid s 21(1). As to offences see PARA 498 et seq ante.
- 4 Ibid s 21(1)(a).
- 5 Is an order made by virtue of ibid s 7(b): see PARA 486 head (2) ante.
- 6 Ibid s 21(1)(b). A person is not guilty of an offence under s 21(1), if, by virtue of s 32 (see PARA 481 ante), the act, although committed in the United Kingdom, would not be an offence under s 1, had the goods been intended for dispatch to the other country: s 21(2).
- 7 Is an offence under ibid s 12: see PARA 493 ante.
- 8 Ibid s 21(3).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

501 Accessories to offences committed abroad

TEXT AND NOTES--Trade Descriptions Act 1968 s 21(1), (2) repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/F. PROSECUTION, LIABILITY AND PENALTIES/502. Restriction on institution of proceedings and admission of evidence.

502. Restriction on institution of proceedings and admission of evidence.

Where any act or omission constitutes both an offence under the Trade Descriptions Act 1968 and an offence under any provision contained in or having effect by virtue of Part IV of the Weights and Measures Act 1985¹, proceedings for the offence may not be instituted under the Weights and Measures Act 1985² without the service of the requisite notice³ nor after the expiration of the specified period⁴.

Where any act or omission constitutes both an offence under the Trade Descriptions Act 1968 and an offence under the food and drugs laws⁵, evidence on behalf of the prosecution concerning any sample procured for analysis is not admissible unless the relevant provisions⁶ of those laws have been complied with⁷.

In other cases the Secretary of State may by order provide that, in proceedings for an offence under the Trade Descriptions Act 1968 in relation to such goods as may be specified in the order, evidence on behalf of the prosecution concerning any sample procured for analysis is not to be admissible unless the sample has been dealt with in such manner as may be specified in the order⁸.

- 1 le the Weights and Measures Act 1985 Pt IV (ss 21-46) (as amended) (regulation of certain transactions in goods): see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 54 et seq.
- 2 le except by virtue of *ibid* s 23: see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 62.
- 3 le such a notice as is required by *ibid* s 83(3): see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 226.
- 4 Trade Descriptions Act 1968 s 22(1)(a) (amended by the Weights and Measures Act 1985 s 97, Sch 12 para 3(a), (b)). The specified period is that mentioned in the Weights and Measures Act 1985 s 83(3)(a) (see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 226): Trade Descriptions Act 1968 s 22(1)(a) (as so amended).
The Weights and Measures Act 1985 ss 35, 36, 37(1), (2) (see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARAS 235-237) apply, with the necessary modifications, as if the offence under the Trade Descriptions Act 1968 were an offence under the Weights and Measures Act 1985 Pt IV (ss 21-46) (as amended) or any instrument made thereunder: Trade Descriptions Act 1968 s 22(1)(b) (amended by the Weights and Measures Act 1985 Sch 12 para 3(a), (c)).
- 5 For these purposes, 'the food and drugs laws' means the Food Safety Act 1990 (see FOOD) and the Medicines Act 1968 (see MEDICINAL PRODUCTS AND DRUGS) and any instrument made thereunder: Trade Descriptions Act 1968 s 22(2A) (added by the Food Safety Act 1990 s 59(1), Sch 3 para 7).
- 6 For these purposes, 'the relevant provisions' means: (1) the Food Safety Act 1990 s 31 (regulation of sampling and analysis etc: see FOOD vol 18(2) (Reissue) PARA 270) and regulations made thereunder; and (2) so much of the Medicines Act 1968 ss 112(9), 115(2), (8), Sch 3 (as amended) (sampling: see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 171) as is applicable to the circumstances in which the sample was procured, or any provisions replacing any of those provisions by virtue of the Food Safety Act 1990 s 17 (enforcement of Community provisions: see FOOD vol 18(2) (Reissue) PARA 215) or the Medicines Act 1968 Sch 3 para 27 (power to modify sampling provisions: see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 171): Trade Descriptions Act 1968 s 22(2A) (as added: see note 5 *supra*).
- 7 *Ibid* s 22(2).
- 8 *Ibid* s 22(3). At the date at which this volume states the law no such order had been made. As to the making of orders see PARA 473 *ante*. As to the Secretary of State see PARA 15 *ante*.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

502 Restriction on institution of proceedings and admission of evidence

TEXT AND NOTES--Trade Descriptions Act 1968 s 22 repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/F. PROSECUTION, LIABILITY AND PENALTIES/503. Offences due to fault of another person.

503. Offences due to fault of another person.

Where the commission by any person of an offence under the Trade Descriptions Act 1968 is due to the act or default of some other person¹, that other person² is guilty of the offence; and a person may be charged with and convicted of the offence whether or not proceedings are taken against the first-mentioned person³.

1 As to whether the offence is committed due to the act or default of some other person see *Tarleton Engineering Co Ltd v Natrass* [1973] 3 All ER 699, [1973] 1 WLR 1261, DC.

2 The 'other person' may be an employee of a body corporate: *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127, HL. The wording of the Trade Descriptions Act 1968 s 23 is to be given its plain and ordinary meaning and, in contemplating the commission of an offence by one person due to the act or default of some other person s 23 does not confine criminality to someone who is engaged in the same trade as the principal offender. The conviction of a private individual is not, therefore, precluded merely because he is not a person acting in the course of a trade or business; sed quaere whether that is so only if his act or default is done with full knowledge that what he was doing was false or whether the result may be otherwise if the act or default is neither reckless nor careless: *Olgeirsson v Kitching* [1986] 1 All ER 746, [1986] 1 WLR 304, DC.

3 Trade Descriptions Act 1968 s 23. It is a basic requirement of s 23 that an offence has been committed by the principal offender: see *Cottee v Douglas Seaton (Used Cars) Ltd* [1972] 3 All ER 750, [1972] 1 WLR 1408, DC (where the respondent repaired a car and concealed the damage, then sold the car to W who sold it to S; in respect of the sale by W to S it was held that W had a defence to a charge under the Trade Descriptions Act 1968 s 1(1)(b) (see PARA 475 head (2) ante), as he had no knowledge of the defect; and that the respondent had, therefore, not committed an offence under s 23). See also *Coupe v Guyett* [1973] 2 All ER 1058, [1973] 1 WLR 669, DC (where the manager of a car repair workshop made a false statement; and, as the owner of the workshop, who had no knowledge of the false statement, was acquitted, the manager could not be guilty by virtue of the Trade Descriptions Act 1968 s 23). Where the person first named in s 23 has no defence except the statutory defence under s 24 (see PARA 504 post), he is to be regarded as having committed the offence for the purpose of s 23; but, if he has a defence on the merits s 23 cannot operate to render another person guilty: *Coupe v Guyett* supra. See also *Rotherham Metropolitan Borough Council v Raysun (UK) Ltd* (1988) 153 JP 37, DC (wax crayons described as poisonless but found to contain excessive amounts of toxic material).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/G. DEFENCES/504. Mistake or accident; due diligence.

G. DEFENCES

504. Mistake or accident; due diligence.

In any proceedings for an offence under the Trade Descriptions Act 1968 it is a defence for the person charged to prove:

- 781 (1) that the commission of the offence was due to a mistake¹ or to reliance on information supplied to him or to the act or default of another person², an accident or some other cause beyond his control³; and
- 782 (2) that he took all reasonable precautions⁴ and exercised all due diligence⁵ to avoid the commission of such an offence by himself or any person under his control⁶.

If in any case the defence involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person, the person charged is not entitled, without the leave of the court, to rely on the defence unless, within a period ending seven clear days before the hearing, he has served on

the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession⁷.

In any proceedings for an offence under the Trade Descriptions Act 1968 of supplying or offering to supply goods to which a false trade description is applied⁸ it is a defence for the person charged to prove that he did not know, and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods⁹.

1 The mistake must be that of the person charged: *Birkenhead and District Co-operative Society Ltd v Roberts* [1970] 3 All ER 391, [1970] 1 WLR 1497, DC.

2 The 'other person' may be an employee of the company charged with the offence (*Beckett v Kingston Bros (Butchers) Ltd* [1970] 1 QB 606, [1970] 1 All ER 715, DC), as long as that person is not in the position of 'ego' or 'alter ego' of the company (*Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127, HL). The accused must prove that he has done everything reasonably possible to establish the identity of the person whose act or default it was: *McGuire v Sittingbourne Co-operative Society Ltd* [1976] Crim LR 268, DC.

3 Trade Descriptions Act 1968 s 24(1)(a).

4 See *Sherratt v Gerald's the American Jewellers Ltd* (1970) 68 LGR 256, DC; *Richmond-upon-Thames London Borough Council v Motor Sales (Hounslow) Ltd* (1971) 135 JP 239n; *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127, HL; *Natrass v Timpson Shops Ltd* [1973] Crim LR 197, DC; *Aitchison v Reith and Anderson (Dingwall and Tain) Ltd* 1974 SLT 282; *Hicks v Sullam Ltd* (1983) 147 JP 493, DC; *Lewin v Rothersthorpe Road Garage Ltd* (1983) 148 JP 87, DC; *Davis v Allan* (1985) 149 JP 266, DC; *Rotherham Metropolitan Borough Council v Raysun (UK) Ltd* (1988) 153 JP 37, DC; *Horner v Sherwoods of Darlington Ltd* (1989) 154 JP 299, DC; *Lewin v Fuell* (1990) 155 JP 206, DC; *Ealing London Borough v Taylor* (1994) 159 JP 460, DC.

5 In the case of a company, the persons who must exercise due diligence are those who can be identified with the controlling mind of the company: *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127, HL; *Denard v Abbas* (1986) 151 JP 421, DC (standard of diligence to be determined by reference to nature and place of trading and size of transactions; matters relating to accused's personal attributes, ie intelligence, poor command of English, familiarity with trade, not relevant). As to the exercise of due diligence see the cases cited in note 4 supra.

6 Trade Descriptions Act 1968 s 24(1)(b). See *Hurley v Martinez & Co Ltd* (1990) 154 JP 821, DC (where the defendant who had sold bottles of wine inaccurately labelled as being 8% alcohol whilst the true figure was 7.2% had not carried out any tests or analysis of the alcoholic strength of the wine, whether on a random basis or not, but had relied on the tests carried out by the producers in Germany; the question to be asked was whether a risk that an event such as happened was sufficiently great to demand that a small local dealer should carry out sampling, bearing in mind the expense, nature of analysis and the large number of lines supplied by the accused; statutory defence held to have been made out). For an analysis of the operation of the defence of due diligence see DG Fidler 'The due diligence defence' (1998) 148 NLJ 328.

7 Trade Descriptions Act 1968 s 24(2).

8 Ie an offence under *ibid* s 1(1)(b): see PARA 475 head (2) ante.

9 *Ibid* s 24(3). The test of reasonable diligence in s 24(3) is reasonable care in all the circumstances: *Texas Homecare Ltd v Stockport Metropolitan Borough Council* (1987) 152 JP 83, DC (where reasonable diligence required the trader to establish some kind of system, whether by random sampling or otherwise but which did not need to be fool-proof or require examination of every item, to ascertain whether the goods conformed to the description; there was no such system in operation). The burden of proof of satisfying the defence given by the Trade Descriptions Act 1968 s 24(3) is on the accused on the balance of probabilities: *Wandsworth Borough Council v Fontana* (1983) 148 JP 196, DC. As to disclaimers see PARA 480 ante. See also *Crook v Howells Garages (Newport) Ltd* [1980] RTR 434, DC; *Simmons v Ravenshill* (1983) 148 JP 109, DC; *Suffolk County Council v Rexmore Wholesale Services Ltd* (1994) 159 JP 390, DC.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

504 Mistake or accident; due diligence

TEXT AND NOTES 7-9--Trade Descriptions Act 1968 s 24(2), (3) repealed: see SI 2008/1277, Schs 3, 4.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/G. DEFENCES/505. Innocent publication of advertisement.

505. Innocent publication of advertisement.

In proceedings for an offence under the Trade Descriptions Act 1968 committed by the publication of an advertisement¹ it is a defence for the person charged to prove that he is a person whose business it is to publish or arrange for the publication of advertisements and that he received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to an offence².

1 For the meaning of 'advertisement' see PARA 487 note 1 ante.

2 Trade Descriptions Act 1968 s 25.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/G. DEFENCES/506. Mens rea not necessary.

506. Mens rea not necessary.

In general, the Trade Descriptions Act 1968 does not require mens rea¹ for an offence to be committed². A seller of goods with a concealed defect of which he is ignorant is, however, not guilty of applying a false trade description unless he expressly sells them as perfect³.

1 As to mens rea generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 8-9. However, the offence under the Trade Descriptions Act 1968 s 14(1) (false statements as to services) requires knowledge or recklessness: see PARA 495 ante.

2 *Clode v Barnes* [1974] 1 All ER 1166, [1974] 1 WLR 544, DC (where one partner was held liable for a false trade description applied by the other partner); *Macnab v Alexanders of Greenock Ltd* 1971 SLT 121; and see *R v Thomson Holidays Ltd* [1974] QB 592, [1974] 1 All ER 823, CA; *Wings Ltd v Ellis* [1985] AC 272, [1984] 3 All ER 577, HL.

3 *Cottee v Douglas Seaton (Used Cars) Ltd* [1972] 3 All ER 750, [1972] 1 WLR 1408, DC. Without such an express statement, the seller is not liable as he has not applied a false trade description at all: *Cottee v Douglas Seaton (Used Cars) Ltd* supra.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/H. ENFORCEMENT/507. Enforcing authority.

H. ENFORCEMENT

507. Enforcing authority.

It is the duty of every local weights and measures authority¹ to enforce within its area the provisions of the Trade Descriptions Act 1968 and of any order made under it²; and, whenever so directed by the Secretary of State, it must make a report to him on the exercise of its functions under the Trade Descriptions Act 1968 in such form and containing such particulars as he may direct³.

A prosecution under the Trade Descriptions Act 1968 may also be brought by a private individual⁴.

1 For the meaning of 'local weights and measures authority' see PARA 398 ante.

2 Trade Descriptions Act 1968 s 26(1) (amended by the Weights and Measures Act 1985 ss 96(1), 98(1), Sch 11 para 18(2), Sch 13 Pt I).

3 Trade Descriptions Act 1968 s 26(2). As to the Secretary of State see PARA 15 ante. All offences under the Trade Descriptions Act 1968 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

4 See the Prosecution of Offences Act 1985 s 6; para 899 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1071.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

507 Enforcing authority

NOTE 3--SI 2003/1376 Schedule amended: see SI 2008/1277 Sch 2 para 101, Sch 3 para 9.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/H. ENFORCEMENT/508. Power to make test purchases.

508. Power to make test purchases.

A local weights and measures authority¹ has power to make, or to authorise any of its officers to make on its behalf, such purchases of goods², and to authorise any of its officers to secure the provision of such services, accommodation or facilities, as may appear expedient for the purpose of determining whether or not the provisions of the Trade Descriptions Act 1968 and any order made under it are being complied with³.

1 For the meaning of 'local weights and measures authority' see PARA 398 ante.

2 As to the meaning of 'goods' see PARA 485 ante.

3 Trade Descriptions Act 1968 s 27. As to the notice to be given where the goods are tested see PARA 510 post.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/H. ENFORCEMENT/509. Power to enter premises and inspect and seize goods and documents.

509. Power to enter premises and inspect and seize goods and documents.

A duly authorised officer of a local weights and measures authority¹ or of a government department may at all reasonable hours and on production, if required, of his credentials exercise the following powers:

- 783 (1) he may, for the purpose of ascertaining whether any offence under the Trade Descriptions Act 1968 has been committed, inspect any goods² and enter any premises³ other than premises used only as a dwelling⁴;
- 784 (2) if he has reasonable cause to suspect that an offence under the Trade Descriptions Act 1968 has been committed, he may, for the purpose of ascertaining whether it has been committed, require any person carrying on a trade or business or employed in connection with a trade or business to produce any books or documents relating to the trade or business, and may take copies of, or of any entry in, any such book or document⁵;
- 785 (3) if he has reasonable cause to believe that an offence under the Trade Descriptions Act 1968 has been committed, he may seize and detain any goods for the purpose of ascertaining, by testing⁶ or otherwise, whether the offence has been committed⁷;
- 786 (4) he may seize and detain any goods or documents⁸ which he has reason to believe may be required as evidence in proceedings for an offence under the Trade Descriptions Act 1968⁹;

787 (5) he may, for the purpose of exercising his powers¹⁰ to seize goods, but only if and to the extent that it is reasonably necessary in order to secure that the statutory provisions¹¹ are duly observed, require any person having authority to do so to break open any container or open any vending machine and, if that person does not comply with the requirement, he may do so himself¹².

An officer entering any premises may take with him such other persons and such equipment as may appear to him necessary¹³; and an officer seizing any goods or documents in the exercise of his powers under these provisions must inform the person from whom they are seized and, in the case of goods seized from a vending machine, the person whose name and address are stated on the machine as being the proprietor's or, if no name and address are so stated, the occupier of the premises on which the machine stands or to which it is affixed¹⁴.

If a justice of the peace, on sworn information in writing:

788 (a) is satisfied that there is reasonable ground to believe either that any goods, books or documents which a duly authorised officer has power to inspect are on any premises and that their inspection is likely to disclose evidence of the commission of an offence under the Trade Descriptions Act 1968, or that any offence under that Act has been, is being or is about to be committed on any premises¹⁵; and

789 (b) is also satisfied either that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant has been given to the occupier or that an application for admission, or the giving of such a notice, would defeat the object of the entry or that the premises are unoccupied or that the occupier is temporarily absent and it might defeat the object of the entry to await his return¹⁶,

the justice may by warrant under his hand, which continues in force for a period of one month, authorise an officer of a local weights and measures authority or of a government department to enter the premises, if need be by force¹⁷. On leaving any premises which he has entered by virtue of such a warrant, an officer must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured against trespassers as he found them¹⁸.

Where, in the exercise of his powers under the above provisions, an officer of a local weights and measures authority or of a government department seizes and detains any goods and their owner suffers loss by reason thereof or by reason that the goods, during the detention, are lost or damaged or deteriorate, then, unless the owner is convicted of an offence under the Trade Descriptions Act 1968 committed in relation to the goods, the authority or department is liable to compensate him for the loss so suffered¹⁹. Any disputed question as to the right to, or the amount of, any compensation payable is to be determined by arbitration²⁰.

If any person who is not a duly authorised officer of a local weights and measures authority or of a government department purports to act as such under the above provisions, he is guilty of an offence²¹.

1 For the meaning of 'local weights and measures authority' see PARA 398 ante.

2 As to the meaning of 'goods' see PARA 485 ante.

3 For these purposes, 'premises' includes any place and any stall, vehicle, ship or aircraft: Trade Descriptions Act 1968 s 39(1). For the meaning of 'ship' see PARA 481 note 2 ante.

4 Ibid s 28(1)(a).

- 5 Ibid s 28(1)(b). This does not require the documents necessarily to be handed over: see *Barge v British Gas Corpn* (1982) 81 LGR 53, DC.
- 6 As to notification of the results of the testing of goods seized see PARA 510 post.
- 7 Trade Descriptions Act 1968 s 28(1)(c).
- 8 Nothing in ibid s 28 is to be taken to compel the production by a solicitor of a document containing a privileged communication made by or to him in that capacity or to authorise the taking of possession of any such document which is in his possession: s 28(7).
- 9 Ibid s 28(1)(d).
- 10 Ie under ibid s 28(1).
- 11 Ie the provisions of the Trade Descriptions Act 1968 and of any order made thereunder.
- 12 Ibid s 28(1)(e). Information which comes to an officer in such circumstances may be specified information for the purposes of the Enterprise Act 2002 s 238 (ie information which comes to a public authority in connection with the exercise of any function it has under or by virtue of specified enactments). See PARA 401 ante.
- 13 Trade Descriptions Act 1968 s 28(4).
- 14 Ibid s 28(2).
- 15 Ibid s 28(3)(a).
- 16 Ibid s 28(3)(b).
- 17 Ibid s 28(3).
- 18 Ibid s 28(4).
- 19 Ibid s 33(1).
- 20 Ibid s 33(2).
- 21 Ibid s 28(6).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/H. ENFORCEMENT/510. Notice of test of goods.

510. Notice of test of goods.

Where any goods¹ seized or purchased by an officer² are submitted to a test, then:

- 790 (1) if the goods were seized, he must inform the person from whom they were seized³ of the result of the test⁴; and
- 791 (2) if the goods were purchased and the test leads to the institution of proceedings for an offence under the Trade Descriptions Act 1968, the officer must inform the person from whom the goods were purchased⁵ of the result of the test⁶;

and, where, as a result of the test, proceedings for an offence under the Trade Descriptions Act 1968 are instituted against any person, the officer must allow him to have the goods tested on his behalf if it is reasonably practicable to do so⁷.

1 As to the meaning of 'goods' see PARA 485 ante.

2 In pursuance of the Trade Descriptions Act 1968: see PARAS 508-509 ante.

3 In the person mentioned in *ibid* s 28(2): see PARA 509 ante.

4 *Ibid* s 30(1)(a).

5 In the case of goods sold through a vending machine, the person to be informed is the person mentioned in *ibid* s 28(2) (see PARA 509 ante): s 30(1)(b).

6 *Ibid* s 30(1)(b).

7 *Ibid* s 30(1).

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471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/H. ENFORCEMENT/511. Obstruction of authorised officers.

511. Obstruction of authorised officers.

Any person who:

- 792 (1) wilfully obstructs¹ an officer of a local weights and measures authority² or of a government department acting in pursuance of the Trade Descriptions Act 1968³;
- 793 (2) wilfully fails to comply with any requirement properly made to him⁴ by such an officer⁵; or
- 794 (3) without reasonable cause fails to give such an officer so acting any other assistance or information which he may reasonably require of that person for the purpose of the performance of his functions under the Trade Descriptions Act 1968⁶,

is guilty of an offence⁷. If any person, in giving any such information, makes any statement which he knows to be false, he is guilty of an offence⁸.

Nothing in the above provisions is to be construed as requiring a person to answer any question or give any information if to do so might incriminate him⁹.

1 'Obstruct' means do any act which makes it more difficult for the officer to carry out his functions: see *Hinchcliffe v Sheldon* [1955] 3 All ER 406, [1955] 1 WLR 1207, DC.

2 For the meaning of 'local weights and measures authority' see PARA 398 ante.

3 Trade Descriptions Act 1968 s 29(1)(a).

4 le under *ibid* s 28 (as amended): see PARA 509 ante.

5 *Ibid* s 29(1)(b). The requirement must be one which the officer is entitled to make: *Barge v British Gas Corp*n (1982) 81 LGR 53, DC.

6 Trade Descriptions Act 1968 s 29(1)(c).

7 *Ibid* s 29(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 29(1) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 498 note 3 ante.

8 Trade Descriptions Act 1968 s 29(2). Section 29(2) applies to information provided in an interview under caution: *R v Page* (1995) 161 JP 340, CA.

9 Trade Descriptions Act 1968 s 29(3).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/H. ENFORCEMENT/512. Evidence by certificate.

512. Evidence by certificate.

The Secretary of State may by regulations provide that certificates issued by such persons as may be specified by the regulations in relation to such matters as may be so specified are to be received in evidence of those matters in any proceedings under the Trade Descriptions Act 1968¹. Such a certificate is not, however, to be received in evidence:

- 795 (1) unless the party against whom it is to be given in evidence has been served with a copy not later than seven days before the hearing²; or
- 796 (2) if that party has, not less than three days before the hearing, served on the other party a notice requiring the attendance of the person issuing the certificate³.

1 Trade Descriptions Act 1968 s 31(1). Such regulations must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 31(5). At the date at which this volume states the law no regulations had been so made. As to the Secretary of State see PARA 15 ante.

2 *Ibid* s 31(2)(a).

3 *Ibid* s 31(2)(b). For these purposes, any document purporting to be a certificate under s 31 is deemed to be such a certificate unless the contrary is shown: s 31(4).

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471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/H. ENFORCEMENT/513. Trade descriptions and civil rights of action.

513. Trade descriptions and civil rights of action.

A breach of the Trade Descriptions Act 1968 does not confer a civil right of action on any person affected by it¹. A contract for the supply of any goods² is, however, not void or unenforceable by reason only of a contravention of any provision of the Trade Descriptions Act 1968³.

Where there are regular and persistent breaches of the Trade Descriptions Act 1968, it may be possible for the Attorney General to bring a relator action for an injunction⁴.

1 See *HP Bulmer Ltd and Showerings Ltd v J Bollinger SA and Champagne Lanson Père et Fils* [1978] RPC 79, CA. As to when a criminal law statute creates a civil offence see *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, [1981] 2 All ER 456, HL; and TORT vol 45(2) (Reissue) PARA 395 et seq. On conviction, a compensation order may be made: see the Powers of Criminal Courts (Sentencing) Act 2000 s 130 (as amended); para 922 et seq post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375. A person suffering damage as a result of the offence may have some other remedy open to him, eg for breach of contract, infringement of registered trade mark or passing off.

2 As to the meaning of 'goods' see PARA 485 ante.

3 Trade Descriptions Act 1968 s 35. But for this provision a seller of goods who had committed a minor offence might well be unable to recover the price: see *Anderson Ltd v Daniel* [1924] 1 KB 138, CA.

4 See *London Armoury Co Ltd v Ever Ready Co (Great Britain) Ltd* [1941] 1 KB 742 at 754, [1941] 1 All ER 364 at 370. As to relator actions generally see PARA 913 post; and CIVIL PROCEDURE vol 11 (2009) PARAS 236-237.

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/I. EU REQUIREMENTS/514. Crystal glass.

I. EU REQUIREMENTS

514. Crystal glass.

A specified description¹ is not to be applied² to glass³ unless the glass is of the prescribed chemical composition and physical properties⁵; and a specified symbol⁶ in relation to descriptions of glass is not to be applied to glass unless any of those descriptions is also lawfully applied to it⁷.

A trade mark, the name of an undertaking or any other inscription containing as a main part, as an adjective or as a root one of the prescribed descriptions⁸ or a description likely to be confused therewith is not to be applied to glass unless the trade mark, name or other inscription is, in very prominent lettering, immediately preceded:

- 797 (1) if the glass is glass to which a prescribed description may lawfully be applied, by any such description;
 798 (2) in any other case, by a statement of the exact nature of the glass⁹.

Nothing in the above provisions applies in relation to glass which is intended for export from the United Kingdom to a country other than a member state¹⁰.

Any person who in the course of a trade or business supplies, offers to supply, exposes for supply or has in his possession for supply in the United Kingdom glass to which there is applied a description, symbol, trade mark, name or other inscription in contravention of the above provisions is guilty of an offence¹¹.

1 I.e a description specified in the Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, reg 4(1), Schedule. The descriptions so specified are: (1) Cristal superieur 30%, Cristallo superiore 30%, Hochbleikristall 30%, Volloodkristal 30%, Full lead crystal 30%, Krystal 30%; (2) Cristal au plomb 24%, Cristallo al piombo 24%, Bleikristall 24%, Loodkristal 24%, Lead crystal 24%, Krystal 24%; (3) Cristallin, Vetro sonoro superiore, Kristallglas, Kristallynglas, Sonoorglas, Crystal glass, crystallin, Krystallin; (4) Verre sonore, Vetro sonoro, Kristallglas, Sonoorglas, Crystal glass, crystallin, Krystallin: Schedule paras 1-4. The percentage figures in heads (1) and (2) supra refer to the lead oxide content of the glass: Schedule para 5. Where a description specified in head (3) or head (4) supra other than 'crystal glass' and 'crystallin' is applied to glass, there must also be applied the description 'crystal glass' or 'crystallin': reg 4(2). Regulation 4(2) does not apply in relation to glass intended for supply in another member state if the description is in the language of that member state: reg 4(2) proviso. For the meaning of 'glass' see note 3 infra.

2 The Trade Descriptions Act 1968 s 4 (see PARA 478 ante) and s 5 (see PARA 487 ante) apply for the purposes of determining whether a description, symbol or trade mark, name or other inscription referred to in the Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, is applied to glass as the Trade Descriptions Act 1968 ss 4, 5 apply for the purpose of determining whether a trade description is applied to goods for the purposes of the Trade Descriptions Act 1968: Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, regs 2(1), 8(1).

3 For these purposes, 'glass' means glassware falling within the relevant heading in the Customs Tariff of the European Community: Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, reg 2(1), (3); Interpretation Act 1978 s 17(2)(b). As to the Customs Tariff of the European Community see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARAS 10-11.

4 I.e the chemical composition and the physical properties mentioned in relation to that description in British Standard 3828 Annex I cols (d)-(g), being composition and properties determined in accordance with the appropriate methods set out in Annex II. 'British Standard 3828' means the British Standard of that number published by the British Standards Institution on 28 February 1973 as amended by Amendment Slip No 1 so published on 29 June 1973: Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, reg 2(1).

5 Ibid reg 4(1). The Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, implement EC Council Directive 69/493 (OJ L326, 29.12.69, p 36): see PARA 393 ante.

6 I.e a symbol described in British Standard 3828 Annex I cols (h), (i).

7 Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, reg 5(1). A single label may bear both the description and the symbol: reg 5(2).

8 I.e one of the descriptions specified in ibid reg 6, Schedule: see note 1 supra.

9 Ibid reg 6.

10 Ibid reg 7.

11 Ibid regs 2(2), 3. The Trade Descriptions Act 1968 s 18 (penalty for offences: see PARA 498 ante), s 19 (as amended) (time limit for prosecution: see PARA 499 ante), s 20 (offences by corporations: see PARA 500 ante), s 23 (offences due to fault of other person: see PARA 503 ante), s 24 (defence of mistake, accident etc: see PARA 504 ante) and s 25 (innocent publication of advertisement: see PARA 505 ante) apply, with necessary modifications, to an offence under the Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, as they apply in relation to offences under the Trade Descriptions Act 1968: Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, regs 2(1), 8(2).

The Trade Descriptions Act 1968 s 26(1), (2) (as amended) (enforcing authorities: see PARA 507 ante), s 27 (test purchases: see PARA 508 ante), s 28 (as amended) (entry of premises and inspection and seizure of goods and documents: see PARA 509 ante), s 29 (obstruction of authorised officers: see PARA 511 ante) and s 30(1) (notice of test and intended prosecution: see PARA 510 ante) apply, with necessary modifications, in relation to the enforcement of the Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, as they apply in relation to the enforcement of the Trade Descriptions Act 1968: Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, regs 2(1), 8(3).

The Trade Descriptions Act 1968 s 33 (see PARA 509 ante) applies in relation to compensation for goods seized and detained under the Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, as it applies in relation to compensation for goods seized and detained under the Trade Descriptions Act 1968: Crystal Glass (Descriptions) Regulations 1973, SI 1973/1952, regs 2(1), 8(4).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/l. EU REQUIREMENTS/515. Textile products.

515. Textile products.

In the case of any supply¹ of, or any offer to supply:

- 799 (1) textile products² by retail, otherwise than where the supply or offer is made to a government department or local authority, or to any other person who is established by a public general Act of Parliament, an indication of the fibre content³ of the textile products must be given by one or more of the following methods, that is to say by marking or labelling the products or, where the products are supplied or offered for supply in packing, by marking or labelling the packing⁴;
- 800 (2) textile products other than one to which the requirements contained in head (1) above apply, an indication of the fibre content of the textile products must be given, where there are accompanying commercial documents, by the inclusion of such an indication in those commercial documents and, in all other cases, either by marking or labelling the products or, where the products are supplied or offered for supply in packing, by marking or labelling the packing⁵.

Where a textile product consists of two or more components which have different fibre contents, the fibre content of each component must be indicated⁶; and, where there are two or more textile products which have the same fibre content and normally form a single unit, the indication of fibre content may be given by a single indication of fibre content⁷.

Where a textile product:

- 801 (a) is a brassiere, corset, corselet or other article of corsetry, the indication of fibre content may be given by a single indication of the fibre content of the whole product or:
- 71 86. (i) in the case of a brassiere, by separate indications of the fibre content of each of, or by a comprehensive indication of the fibre content of all of, the following components, namely the outside and inside fabric of the cups and back;

- 87. (ii) in the case of a corset, by separate indications of the fibre content of each of, or by a comprehensive indication of the fibre content of all of, the following components, namely the front, rear and side stiffening panels;
- 88. (iii) in the case of a corselet, by separate indications of the fibre content of each of, or by a comprehensive indication of the fibre content of all of, the following components, namely the outside and inside fabric of the cups, the front and rear stiffening panels and the side panels; or
- 89. (iv) in the case of any other article of corsetry, by separate indications of the fibre content of each of, or by a comprehensive indication of the fibre content of, all of the components of the article, provided that such an indication is not compulsory in respect of any component which accounts for less than 10 per cent of the weight of the product⁸;

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- 802 (b) includes any etch-printed fabric, the indication of fibre content may be given by separate indications of the fibre content of the base fabric and of the etched parts, in which case, those components must be mentioned by name⁹;
- 803 (c) includes any embroidered fabric, the indication of fibre content may be given by separate indications of the fibre content of the base fabric and of the embroidery yarns, in which case, those components must be mentioned by name¹⁰;
- 804 (d) includes any velvet or plush fabric or any fabric resembling velvet or plush and the backing of that fabric is distinct from and does not have the same fibre content as the use-surface, the indication of fibre content may be given by separate indications of the fibre content of the backing and of the use-surface, in which case, those components must be mentioned by name¹¹;
- 805 (e) is a floor covering or carpet and the backing does not have the same textile fibre content as the use-surface, the indication of fibre content may be given by a single indication of fibre content of the use-surface, which must be mentioned by name¹²;
- 806 (f) is a yarn which has a core and a cover which do not have the same fibre content and is supplied or offered for supply as yarn, the indication of fibre content may be given by separate indications of the fibre content of the core and of the cover¹³.

In relation to specified textiles¹⁴ offered for supply or supplied together, the indication of fibre content may relate to a number of such products if they are of the same type and composition and if that indication is easily accessible to the person to whom the supply is being made¹⁵.

Any person who in the course of a trade or business supplies or offers to supply in the United Kingdom textile products without complying in relation to that supply or offer with the above requirements is guilty of an offence¹⁶.

In any advertisement¹⁷ intended for retail customers describing textile products with sufficient particularity to enable the products to be ordered by reference only to the description in the advertisement, there must be included an indication of the fibre content of the products¹⁸. Any person who in the course of a trade or business publishes in the United Kingdom any advertisement without complying with that requirement is guilty of an offence¹⁹.

An indication of the fibre content of any textile product which satisfies the above requirements is deemed not to be a trade description for the purposes of the Trade Descriptions Act 1968²⁰.

Nothing in the above provisions applies in relation to textile products:

- 807 (A) which are intended for export from the United Kingdom to any destination except a destination in another member state;

- 808 (b) which are imported into the United Kingdom for transit through the United Kingdom under the control of the Commissioners for Her Majesty's Revenue and Customs²¹;
- 809 (c) which are imported into the United Kingdom for the purposes of re-export after processing;
- 810 (d) in respect of a supply to or from outworkers or other persons who are to carry out or who have carried out work on the products on commission²².

1 For these purposes, 'supply' does not include supply by way of hire: Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26, reg 4(1).

2 For these purposes, 'textile products' means: (1) raw, semi-worked, worked, semi-manufactured, manufactured, semi-made-up or made-up products which are exclusively composed of textile fibres, regardless of the mixing or assembly process employed; (2) products containing not less than 80% by weight of textile fibres; (3) furniture, umbrella and sunshade coverings containing not less than 80% by weight of textile fibres; (4) the textile parts of multi-layer floor coverings, of mattresses and of camping goods, and the warm linings of footwear, gloves, mittens and mitts if such parts and linings contain not less than 80% by weight of textile fibres: *ibid* reg 4(1). 'Textile fibre' means: (a) a unit of matter characterised by its flexibility, fineness and high ratio of length to maximum transverse dimension, which render it suitable for textile applications; (b) flexible tubes or strips, including strips cut from wider strips or films, which have an apparent width which does not exceed five millimetres, are produced from the substances used in the manufacture of the fibres referred to by reg 4(1), Sch 2 Pt I entries 17-39 (amended by SI 1988/1350; and SI 2005/1401) and are suitable for textile applications: Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26, reg 4(1). 'Apparent width' means the width of a tube or strip when it is folded, flattened, compressed or twisted or, where the width of a tube is not uniform, the average width: reg 4(1).

The Textile Products (Determination of Composition) Regulations 1976, SI 1976/202 (amended by SI 1988/1349), implementing EC Council Directive 72/276 (OJ L173, 31.7.72, p 1) (amended by EC Council Directive 79/76 (OJ L17, 24.1.79, p 17); EC Commission Directive 81/75 (OJ L57, 4.3.81, p 23); EC Commission Directive 87/184 (OJ L75, 17.3.87, p 21)) (see PARA 393 ante), apply for determining, for the purposes of the Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26 (amended by SI 1988/1350; SI 1994/450; SI 1998/1169; SI 2005/1401), in the course of any official test the composition of any textile product comprising a binary textile fibre mixture or a ternary textile fabric mixture: Textile Products (Determination of Composition) Regulations 1976, SI 1976/202, reg 3(1) (amended by SI 1988/1349).

3 An indication of fibre content must comply with the provisions of the Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26, reg 7, Sch 1 (amended by SI 1994/450): Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26, reg 7.

4 *Ibid* reg 5(2). In the case of undifferentiated goods, not being goods included in Sch 5 item 12 (see note 14 head (12) *infra*) which are supplied in cut lengths, it is sufficient compliance with reg 5(2) if the requirements are complied with while the goods are offered for supply and, in the case of goods included in Sch 5 item 12 which are supplied in cut lengths, the indication of fibre content must be given by labelling the reel on which the goods are supplied or offered for supply: reg 5(2) proviso. For these purposes, 'undifferentiated goods' means textile products of which any part indistinguishable from any other part may be supplied by physically detaching it from the whole in such a quantity as may be specified by the person to whom it is supplied: reg 5(2) proviso.

Nothing in reg 5 (as amended) or reg 6 (see *infra*) applies in relation to any textile product specified in reg 8, Sch 4 unless such a product bears a label or marking giving, or any advertisement relating to such a product includes, any part of the indication of fibre content which would be required to be given or included but for this provision, or any trade mark or name of an undertaking which contains on its own, or as an adjective or as a root either a name specified in reg 8, Sch 2 col 1 (amended by SI 1988/1350; SI 1998/1169) or a name which is likely to be taken for a name so specified: Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26, reg 8. For the meaning of 'advertisement' see note 17 *infra*.

The products so specified in Sch 4 and which are not, except as provided in reg 8, subject to compulsory labelling or marking are: (1) sleeve-supporting arm-bands; (2) watch straps of textile materials; (3) labels and badges; (4) stuffed pan-holders of textile materials; (5) tea cosies; (6) coffee cosies; (7) sleeve protectors; (8) muffs other than in pile fabric; (9) artificial flowers; (10) pin cushions; (11) painted canvas; (12) textile products for base and underlying fabrics and stiffenings; (13) felts; (14) old made-up textile products, where explicitly stated to be such; (15) gaiters; (17) packagings, not new and sold as such; (18) felt hats; (19) purses, pouches, cases, bags and saddlery, of textile materials; (20) travel goods of textile materials; (21) hand-embroidered tapestries, finished or unfinished, and materials for their production, including embroidery yarns, sold separately from the canvas and specially presented for use in such tapestries; (22) slide fasteners; (23) buttons and buckles covered with textile materials; (24) book covers of textile materials; (25) toys; (26) textile parts of

footwear, excepting warm linings; (27) table mats having several components and a surface area of not more than 500 square centimetres; (28) oven gloves and cloths; (29) egg cosies; (30) make-up cases; (31) tobacco pouches of textile fabric; (32) spectacle, cigarette and cigar, lighter and comb cases of textile fabric; (33) protective requisites for sports, with the exception of gloves; (34) toilet cases; (35) shoe-cleaning cases; (36) funeral items; (37) disposable articles, including textile articles designed to be used once only or for a limited time, the normal use of which precludes any restoring for subsequent use for the same or a similar purpose, with the exception of wadding; (38) textile articles subject to the rules in force from time to time of the European Pharmacopoeia and covered by a reference to those rules, non-disposable bandages for medical and orthopaedic textile articles in general; (39) textile articles including cordage, ropes and string, other than articles included in Sch 5 item 12 (see note 14 head (12) *infra*), normally used for use as equipment components in the manufacture and processing of goods or for incorporation in machines, installations, eg for heating, air conditioning or lighting, domestic and other appliances, vehicles and other means of transport, or for their operation, maintenance or equipment, other than tarpaulin covers and textile motor vehicle accessories sold separately from the vehicle; (40) textile articles for protection and safety purposes such as safety belts, parachutes, lifejackets, emergency chutes, fire-fighting devices, bulletproof waistcoats and special protective garments, eg protection against fire, chemical substances or other safety hazards; (41) air-supported structures, eg sports halls, exhibition stands or storage facilities, provided that particulars of the performances and technical specifications of these articles are supplied; (42) sails; (43) animal clothing; and (44) flags and banners: Sch 4. There is no item 16 in the Queen's printer's copy of the Textile Products (Indication of Fibre Content) Regulations 1986, SI 1986/26, Sch 4.

The Textile Products (Indication of Fibre Content) Regulations 1986, SI 1986/26 (as amended: see note 2 *supra*) implement EC Council Directive 96/74 (OJ L32, 3.2.97, p 38) (amended by EC Commission Directive 97/37 (OJ L169, 27.6.97, p 74)) (see PARA 393 *ante*).

5 Textile Products (Indication of Fibre Content) Regulations 1986, SI 1986/26, reg 5(3) (substituted by SI 1994/450). See also note 4 *supra*.

6 Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26, reg 5(4). Regulation 5(4) does not apply in relation to a component which accounts for less than 30% of the weight of the product, unless that component is a main lining: reg 5(4) proviso. See also note 4 *supra*.

7 *Ibid* reg 5(5). See also note 4 *supra*.

8 *Ibid* reg 5(6). See also note 4 *supra*.

9 *Ibid* reg 5(7). See also note 4 *supra*.

10 *Ibid* reg 5(8). Where the embroidered parts do not exceed 10% of the surface area of the product, an indication of the fibre content of the embroidery yarns is not required: reg 5(8) proviso. See also note 4 *supra*.

11 *Ibid* reg 5(9). See also note 4 *supra*.

12 *Ibid* reg 5(10). See also note 4 *supra*.

13 *Ibid* reg 5(11). See also note 4 *supra*.

14 *Ie* textile products specified in *ibid* reg 5(12), Sch 5. The products so specified are: (1) floorcloths; (2) cleaning cloths; (3) edgings and trimmings; (4) passementerie; (5) belts; (6) braces; (7) suspenders and garters; (8) shoe and boot laces; (9) ribbons; (10) elastic; (11) new packagings sold as such; (12) packing string and agricultural twine; string, cordage and ropes, other than articles included in Sch 4 item 39 (see note 4 head (39) *supra*), including cordage and ropes intended for use in mountaineering or watersports; (13) table mats; (14) handkerchiefs; (15) bun nets and hair nets; (16) ties and bow ties for children; (17) bibs, washgloves and face flannels; (18) sewing, mending and embroidery yarns presented for retail sale in small quantities with a net weight of one gram or less; (19) tape for curtains, blinds and shutters: Sch 5.

15 *Ibid* reg 5(12). See also note 4 *supra*.

16 *Ibid* reg 5(1). See also note 4 *supra*. The Trade Descriptions Act 1968 s 18 (penalty for offences: see PARA 498 *ante*), s 19 (as amended) (time limit for prosecution: see PARA 499 *ante*), s 20 (offences by corporations: see PARA 500 *ante*), s 23 (offences due to fault of other person: see PARA 503 *ante*), s 24 (defence of mistake, accident etc: see PARA 504 *ante*) and s 25 (innocent publication of advertisement: see PARA 505 *ante*) apply, with necessary modifications, to an offence under the Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26 (as amended), as they apply in relation to offences under the Trade Descriptions Act 1968: Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26, regs 4(1), 11(1).

The Trade Descriptions Act 1968 s 26(1), (2) (as amended) (enforcing authorities: see PARA 507 *ante*), s 27 (test purchases: see PARA 508 *ante*), s 28 (as amended) (entry of premises and inspection and seizure of goods and documents: see PARA 509 *ante*), s 29 (obstruction of authorised officers: see PARA 511 *ante*) and s 30(1) (notice

of test and intended prosecution: see PARA 510 ante) apply, with necessary modifications, in relation to the enforcement of the Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26 (as amended: see note 2 supra), as they apply in relation to the enforcement of the Trade Descriptions Act 1968: Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26, regs 4(1), 11(2).

The Trade Descriptions Act 1968 s 33 (see PARA 509 ante) applies in relation to compensation for goods seized and detained under the Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26 (as amended), as it applies in relation to compensation for goods seized and detained under the Trade Descriptions Act 1968: Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26, regs 4(1), 11(3).

17 For these purposes, 'advertisement' includes a catalogue, a circular, a price list and other trade literature: *ibid* reg 4(1).

18 *Ibid* reg 6(1). See also note 4 supra.

19 *Ibid* reg 6(2). See also notes 4, 16 supra.

20 *Ibid* reg 10. For the meaning of 'trade description' in the Trade Descriptions Act 1968 see PARA 481 ante.

21 Note that the Inland Revenue and Her Majesty's Customs and Excise have merged to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005.

22 Textile Products (Indications of Fibre Content) Regulations 1986, SI 1986/26, reg 9 (amended by SI 1988/1350); Commissioners for Revenue and Customs Act 2005 s 50(1).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

515 Textile products

NOTE 2--Definition of 'textile fibre' amended: SI 2006/3297. SI 1976/202 replaced: Textile Products (Determination of Composition) Regulations 2008, SI 2008/15.

NOTES 3, 4--SI 1986/26 reg 8, Sch 1 further amended: SI 2008/6, SI 2009/1034.

NOTE 4--EC Council Directive 96/74 replaced: European Parliament and EC Council Directive 2008/121 (OJ L19, 23.1.2009, p 29) (amended by EC Commission Directive 2009/121 (OJ L242, 15.9.2009, p 13)). References in SI 1986/26 to Directive 96/74 are now to the relevant parts of Directive 2008/121: SI 2009/1034. SI 1986/26 Sch 2 revoked: SI 2008/6.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/l. EU REQUIREMENTS/516. Footwear.

516. Footwear.

The following provisions apply to footwear¹ sold or offered for sale to consumers, other than secondhand, worn footwear, protective footwear², certain other prescribed footwear³ and toy footwear⁴. 'Footwear' may range from sandals with uppers consisting simply of adjustable laces or ribbons to thigh boots the uppers of which cover the leg and thigh; among the products included, therefore, are:

811 (1) flat or high-heeled shoes for ordinary indoor or outdoor wear;

- 812 (2) ankle-boots, half-boots, knee-boots and thigh boots;
- 813 (3) sandals of various types, espadrilles⁵, tennis shoes, running and other sports shoes, bathing sandals and other casual footwear;
- 814 (4) special sports footwear which is designed for a sporting activity and has, or has provision for the attachment of, spikes, studs, stops, clips, bars or the like and skating boots, ski boots and cross-country ski footwear, wrestling boots, boxing boots and cycling shoes; also included are composite articles made up of footwear with (ice or roller) skates attached;
- 815 (5) dancing slippers;
- 816 (6) footwear formed from a single piece, particularly by moulding rubber or plastics, but excluding disposable articles of flimsy material (paper, plastic film etc, without applied soles);
- 817 (7) overshoes worn over other footwear, which in some cases are heelless;
- 818 (8) disposable footwear, with applied soles generally designed to be used only once;
- 819 (9) orthopaedic footwear, other than medical devices⁶.

The responsible person, that is to say:

- 820 (a) the manufacturer;
- 821 (b) the manufacturer's authorised agent established in the European Community; or
- 822 (c) where neither the manufacturer nor his authorised agent is established in the European Community, the person who first places the footwear on the Community market,

must ensure that footwear placed on the market complies with the labelling requirements⁷; and the responsible person is responsible for supplying the labelling to be conveyed on the footwear and for the accuracy of the information contained in it⁸. Any person who contravenes those provisions is guilty of an offence⁹.

The labelling which must be conveyed on the footwear must provide information as to the material which constitutes at least 80 per cent of the surface area of the upper, at least 80 per cent of the surface area of the lining and sock and at least 80 per cent of the volume of the outer sole¹⁰. Where, however, no one material accounts for at least 80 per cent of the surface area or volume, as the case may be, information must be given as to the two main materials used in the composition of the footwear¹¹. The labelling must be affixed to at least one article of footwear in each pair and may be affixed by way of printing, sticking, embossing or use of an attached label and it must be visible, securely attached and accessible¹². The responsible person must ensure that any labelling attached to footwear is not likely to mislead consumers as to its composition¹³.

No retailer¹⁴ is to supply¹⁵ footwear unless it is labelled in accordance with the above requirements¹⁶. Any person who contravenes that provision is guilty of an offence¹⁷.

Where an enforcement authority has reasonable grounds for suspecting that the above provisions have been or are being contravened, it may serve a compliance notice¹⁸ on the responsible person or, as the case may be, the retailer¹⁹.

1 For these purposes, 'footwear' means all articles with applied soles designed to protect or cover the foot, including one or more of the main components when marketed separately: Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, reg 2. 'Main components' means the upper, the lining and sock and the outer sole; 'upper' means the outer face of the structural element which is attached to the outer sole; 'outer sole' means the bottom part of the footwear article, which is subject to abrasive wear and attached to the upper; and 'lining and sock' means the lining of the upper and the insole constituting the inside of the footwear article: reg 2.

2 le protective footwear covered by EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (as amended): see PARA 393 ante.

3 le footwear covered by EC Council Directive 76/769 (OJ L262, 27.9.76, p 201) (as amended): see PARA 393 ante.

4 Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, reg 3(1), (3). For these purposes, 'consumer' means any natural person who is acting for purposes which are outside his trade, business or profession: reg 2. The Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, implement European Parliament and EC Council Directive 94/11 (OJ L100, 19.4.94, p 37) (see PARA 393 ante).

5 le shoes with canvas uppers and soles of plaited vegetable material.

6 Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, reg 3(2), Sch 1. The list in Sch 1 is non-exhaustive: reg 3(2). For reasons of homogeneity and clarity and subject to the provisions mentioned in the description of the products covered by EC Council Directive 94/11 (OJ L100, 19.4.94, p 37), products covered by the Combined Nomenclature (CN) Ch 64 may as a general rule be regarded as falling within the scope of EC Council Directive 94/11: Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, Sch 1. As to the Combined Nomenclature see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 10.

7 Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, regs 2, 4(1). An indication of composition of any footwear which satisfies the requirements of the Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, is deemed not to be a trade description for the purposes of the Trade Descriptions Act 1968 (see PARA 471 et seq ante): Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, regs 2, 7.

8 Ibid reg 4(2).

9 Ibid reg 8. A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: reg 8. As to the standard scale see PARA 498 note 3 ante. The Trade Descriptions Act 1968 s 19 (as amended) (time limit for prosecutions: see PARA 499 ante), s 20 (offences by corporations: see PARA 500 ante), s 23 (offences due to fault of other person: see PARA 503 ante), s 24 (defence of mistake, accident etc: see PARA 504 ante) apply in relation to an offence under the Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, as if references in those statutory provisions to offences under the Trade Descriptions Act 1968 were references to offences under the Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489: reg 10(1).

10 Ibid reg 5(1). In the case of the upper, in determining the composition, no account is to be taken of any accessories or reinforcements such as ankle patches, edging, ornamentation buckles, tabs, eyelet stays or similar attachments: reg 5(3). The manufacturer or his authorised agent established in the European Community may provide the information required in accordance with reg 5(1) by way of a pictogram or written indication as set out in reg 5(4), Sch 2: reg 5(4). Subject to the requirements of reg 5, the labelling may contain additional information to that required by reg 5(4): reg 5(5).

11 Ibid reg 5(2).

12 Ibid reg 5(6).

13 Ibid reg 5(7).

14 For these purposes, 'retailer' means any person who supplies footwear: ibid reg 2. As to the meaning of 'supply' see note 15 infra.

15 For these purposes, 'supply' is to be construed in accordance with the Consumer Protection Act 1987 s 46 (see PARA 523 post) and includes offering to supply, agreeing to supply, exposing for supply and possessing for supply; and cognate expressions are to be construed accordingly: Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, reg 2.

16 Ibid reg 6(1). Any retailer who supplies footwear labelled by way of a pictogram from premises to which consumers are admitted must ensure that a notice containing a written indication of the meaning of the pictogram set out in reg 6(2), Sch 2 is displayed in a conspicuous part of those premises: reg 6(2). Any retailer who supplies footwear labelled by way of a pictogram from premises other than those to which consumers are admitted must ensure that consumers are informed of the meaning of any pictogram shown, in accordance with reg 5 (see supra), on the labelling of any footwear he supplies: reg 6(3).

17 Ibid reg 8. See also note 9 supra. A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: reg 8.

18 The compliance notice must: (1) specify the description of the footwear to which the notice relates; (2) state that the enforcement authority suspects that a contravention of a provision of the Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, has taken place and the reasons for that suspicion; (3) specify the provision referred to in head (2) supra; (4) require the person on whom the notice is served (a) to take such action to end the contravention as may be specified by the notice within such period as may be specified in the notice; or (b) to provide evidence within that period to the satisfaction of the enforcement authority that all the provisions of the Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, have been complied with; and (5) warn that person that, if the non-conformity continues, or if satisfactory evidence has not been produced under head (4)(b) supra, within the period specified in the notice, further action may be taken under the Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, in respect of that footwear or any footwear of the same type supplied to that person: reg 9(2), Sch 3 para 1. The notice may include directions as to the measures to be taken by that person to secure compliance with the provisions of the Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, including different ways of securing compliance: Sch 3 para 2.

19 Ibid reg 9(1). The Trade Descriptions Act 1968 s 26(1), (2) (as amended) (enforcing authorities: see PARA 507 ante), s 27 (test purchases: see PARA 508 ante), s 28 (as amended) (entry of premises and inspection and seizure of goods and documents: see PARA 509 ante), s 29 (obstruction of authorised officers: see PARA 511 ante) and s 30(1) (notice of test and intended prosecution: see PARA 510 ante) apply in relation to the enforcement of the Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, as they apply in relation to the enforcement of the Trade Descriptions Act 1968: Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, reg 10(2).

The Trade Descriptions Act 1968 s 33 (compensation for loss etc of goods seized: see PARA 509 ante) applies in relation to compensation for goods seized and detained under the Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, as it applies in relation to compensation for goods seized under the Trade Descriptions Act 1968: Footwear (Indication of Composition) Labelling Regulations 1995, SI 1995/2489, reg 10(3).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(i) Trade Descriptions/l. EU REQUIREMENTS/517. Electro-medical equipment.

517. Electro-medical equipment.

If a person supplies¹ electro-medical equipment²:

- 823 (1) which does not comply with the prescribed technical requirements³ and which is marked with the reversed epsilon⁴, or with a mark so closely resembling it as to be taken to be the reversed epsilon, or to which a declaration⁵ has been applied; or
- 824 (2) which is also a medical device⁶ and which does not satisfy the essential requirements for that device⁷,

he is guilty of an offence⁸.

1 For these purposes, 'supply' has the same meaning as in the Consumer Protection Act 1987 (see PARA 523 post) and includes offering to supply, agreeing to supply, exposing for supply and possessing for supply: Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586, reg 2.

2 For these purposes, 'electro-medical equipment' means electro-medical equipment listed in EC Council Directive 84/539 (OJ L300, 19.11.84, p 179) Annex II which is intended, by its nature, for use in veterinary medicine: Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586, reg 2 (amended by SI 1994/3017).

3 le the technical requirements contained in EC Council Directive 84/539 (OJ L300, 19.11.84, p 179) Annex I.

4 For these purposes, 'the reversed epsilon' means a mark which conforms with the specimen mark contained in ibid Annex III: Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586, reg 2.

5 For these purposes, 'declaration' means a declaration which conforms with the specimen declaration contained in EC Council Directive 84/539 (OJ L300, 19.11.84, p 179) Annex IV: Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586, reg 2.

6 le for the purposes of the Medical Devices Regulations 2002, SI 2002/618 (as amended): see PARA 621 post.

7 le specified in the Medical Devices Regulations 2002, SI 2002/618 (as amended): see PARA 621 post.

8 Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586, reg 3 (substituted by SI 1994/3017). The Trade Descriptions Act 1968 s 18 (as amended) (penalty for offences: see PARA 498 ante), s 19 (time limit for prosecution: see PARA 499 ante), s 20 (offences by corporations: see PARA 500 ante) and s 24 (defence of mistake, accident etc: see PARA 504 ante) apply, with the necessary modifications, in relation to an offence under the Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586 (amended by SI 1994/3017) as they apply in relation to an offence under the Trade Descriptions Act 1968: Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586, reg 4(1). The Trade Descriptions Act 1968 s 26 (as amended) (enforcing authorities: see PARA 507 ante), s 27 (power to make test purchases: see PARA 508 ante), s 28 (power to enter premises and inspect and seize goods or documents: see PARA 509 ante), s 29 (obstruction of authorised officers: see PARA 511 ante) and s 30(1) (notice of test and intended prosecution: see PARA 510 ante) apply, with the necessary modifications, in relation to the enforcement of the Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586 (as amended) as they apply in relation to the enforcement of the Trade Descriptions Act 1968: Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586, reg 4(2). The Trade Descriptions Act 1968 s 33 (see PARA 509 ante) applies in relation to compensation for goods seized and detained under the Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586 (as amended) as it applies in relation to compensation for goods seized and detained under the Trade Descriptions Act 1968: Electro-medical Equipment (EEC Requirements) Regulations 1988, SI 1988/1586, reg 4(3). As to the enforcement of the health and safety legislation see reg 5(1), (2).

UPDATE

471-517 Trade Descriptions

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ii) Product Liability/A. IN GENERAL/518. Statutory regime for product liability.

(ii) Product Liability

A. IN GENERAL

518. Statutory regime for product liability.

The provisions of Part I of the Consumer Protection Act 1987¹ lay down a scheme dealing with civil liability for unsafe goods under which the producer of an unsafe product or, as the case may be, another person in the chain of supply, is held strictly liable in damages with respect to any defect in those goods which causes damage². The primary liability for defective products

lies on the producer³; but there are special provisions for components⁴, persons who market products under their own brand name⁵ and importers⁶. In order to meet cases where he cannot identify the producer, the person injured by the product may in the first instance hold liable his immediate supplier, who may then in turn pass liability up the chain of distribution by identifying his supplier, and so on to the ultimate manufacturer or importer⁷. Liability for damage caused by a defective product does not extend to all damage but only to specified damage⁸.

1 I.e. the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended): see *infra*; and PARA 521 *et seq post*. Part I (as amended) has effect for the purpose of making such provision as is necessary in order to comply with EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) (see PARA 393 *ante*) and is to be construed accordingly: Consumer Protection Act 1987 s 1(1). The provisions of EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) have been amended by European Parliament and EC Council Directive 1999/34 (OJ L141, 4.6.99, p 20), which has been implemented in the United Kingdom by the Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000, SI 2000/2771. The effect of EC Council Directive 1999/34 (OJ L141, 4.6.99, p 20) is to extend the application of the provisions relating to defective products to primary agricultural products, eg meat, cereals, fruit and vegetables, in order to help restore consumer confidence in the safety of such products.

Product standards, safety and liability are reserved matters for the purposes of the Scotland Act 1998 which, by virtue of s 29(2)(b), are outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C8, Pt III para 5. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

2 See the Consumer Protection Act 1987 s 2 (as amended); and PARA 521 *post*.

3 See *ibid* s 2(2)(a); and PARA 521 head (1) *post*.

4 See *ibid* s 1(3); and PARA 521 note 3 *post*.

5 See *ibid* s 2(2)(b); and PARA 521 head (2) *post*.

6 See *ibid* s 2(2)(c); and PARA 521 head (3) *post*.

7 See *ibid* s 2(3); and PARA 521 *post*.

8 See *ibid* s 5; and PARA 525 *post*.

UPDATE

518-527 Product Liability

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ii) Product Liability/A. IN GENERAL/519. Application of provisions relating to product liability to the Crown.

519. Application of provisions relating to product liability to the Crown.

The statutory provisions relating to product liability¹ bind the Crown²; but the Crown is not, as regards the Crown's liability by virtue of those provisions, bound further than the Crown is made liable in tort or in reparation under the Crown Proceedings Act 1947³, as that Act has effect from time to time⁴.

1 I.e. the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended): see PARA 520 *et seq post*.

2 *Ibid* s 9(1).

3 As to the Crown Proceedings Act 1947 see CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 102 et seq.

4 Consumer Protection Act 1987 s 9(2).

UPDATE

518-527 Product Liability

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ii) Product Liability/A. IN GENERAL/520. Power to modify provisions relating to product liability.

520. Power to modify provisions relating to product liability.

Her Majesty may by Order in Council make such modifications¹ of the statutory provisions relating to product liability² and of any other enactment, including an enactment contained in the statutory provisions relating to consumer safety³, misleading price indications⁴, the enforcement provisions⁵ and the miscellaneous and supplemental provisions⁶, as appear to Her Majesty in Council to be⁷ necessary or expedient⁸. Such an Order in Council may not be submitted to Her Majesty in Council unless a draft of the Order has been laid before, and approved by a resolution of, each House of Parliament⁹.

1 For these purposes, except in so far as the context otherwise requires, 'modifications' includes additions, alterations and omissions; and cognate expressions are to be construed accordingly: Consumer Protection Act 1987 s 45(1).

2 *le ibid* Pt I (ss 1-9) (as amended): see PARAS 519 ante, 521 et seq post.

3 *le ibid* Pt II (ss 10-19) (as amended): see PARA 533 et seq post.

4 *le ibid* Pt III (ss 20-26) (as amended): see PARA 702 et seq post.

5 *le ibid* Pt IV (ss 27-35): see PARA 555 et seq post.

6 *le ibid* Pt V (ss 36-50) (a amended): see PARA 564 et seq post.

7 *le in consequence of any modification of EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) (see PARA 393 ante) which is made at any time after 15 May 1987 (ie the date on which the Consumer Protection Act 1987 was passed). EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) has subsequently been amended by European Parliament and EC Council Directive 1999/34 (OJ L141, 4.6.99, p 20), which has been implemented in the United Kingdom by the Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000, SI 2000/2771. The effect of EC Council Directive 1999/34 (OJ L141, 4.6.99, p 20) is to extend the application of the provisions relating to defective products to primary agricultural products, eg meat, cereals, fruit and vegetables, in order to help restore consumer confidence in the safety of such products.*

8 Consumer Protection Act 1987 s 8(1). See the Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000, SI 2000/2771.

9 Consumer Protection Act 1987 s 8(2).

UPDATE

518-527 Product Liability

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ii) Product Liability/B. LIABILITY FOR DEFECTIVE PRODUCTS/521. Liability for defective products.

B. LIABILITY FOR DEFECTIVE PRODUCTS

521. Liability for defective products.

Where any damage¹ is caused wholly or partly by a defect² in a product³, each of the following persons, that is to say:

- 825 (1) the producer⁴ of the product;
- 826 (2) any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product;
- 827 (3) any person who has imported the product into a member state from a place outside the member states in order, in the course of any business⁵ of his, to supply⁶ it to another,

is liable⁷ for the damage⁸.

Where any damage is caused wholly or partly by a defect in a product, any person who supplied the product, whether to the person who suffered the damage, to the producer of any product in which the product in question is comprised or to any other person, is liable for the damage if:

- 828 (a) the person who suffered the damage requests the supplier to identify one or more of the persons, whether still in existence or not, specified in heads (1) to (3) above in relation to the product;
- 829 (b) that request is made within a reasonable period after the damage occurs and at a time when it is not reasonably practicable for the person making the request to identify all those persons; and
- 830 (c) the supplier fails, within a reasonable period after receiving the request, either to comply with the request or to identify the person who supplied the product to him⁹.

Where two or more persons are liable¹⁰ for the same damage, their liability is joint and several¹¹.

The above provisions are without prejudice to any liability arising otherwise than under the statutory provisions¹² relating to product liability¹³.

Liability for defective products is to be treated as liability in tort for the purpose of any enactment conferring jurisdiction on any court with respect to any matter¹⁴.

1 For the meaning of 'damage' see PARA 525 post.

2 For the meaning of 'defect' see PARA 522 post.

3 For these purposes, except in so far as the context otherwise requires, 'product' means any goods or electricity and, subject to the Consumer Protection Act 1987 s 1(3), includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise: s 1(2). A person

who supplies any product in which products are comprised, whether by virtue of being component parts or raw materials or otherwise, is, however, not to be treated by reason only of his supply of that product as supplying any of the products so comprised: s 1(3). 'Goods', except in so far as the context otherwise requires, includes substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle: s 45(1). 'Ship', except in so far as the context otherwise requires, includes any boat and any other description of vessel used in navigation (s 45(1)); and 'aircraft', except in so far as the context otherwise requires, includes gliders, balloons and hovercraft (s 45(1)).

4 For these purposes, except in so far as the context otherwise requires, 'producer', in relation to a product, means: (1) the person who manufactured it; (2) in the case of a substance which has not been manufactured but has been won or abstracted, the person who won or abstracted it; (3) in the case of a product which has not been manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out, eg in relation to agricultural produce, the person who carried out that process: *ibid* s 1(2).

5 For these purposes, except in so far as the context otherwise requires, 'business' includes a trade or profession and the activities of a professional or trade association or of a local authority or other public authority: *ibid* s 45(1).

6 For the meaning of 'supply' see PARA 523 post. See also note 3 *supra*.

7 *Ie* subject to the provisions of the Consumer Protection Act 1987 s 2(3), (5), (6) (see the text and notes 9-13 *infra*) and ss 3-9 (see PARAS 519 *ante*, 521 *et seq post*).

8 *Ibid* s 2(1), (2). As to the power to modify s 2 see PARA 520 *ante*; as to the application of s 2 (as amended) to the Crown see PARA 519 *ante*; and as to the limitation period applicable to proceedings brought under s 2 see PARA 527 post. Nothing in the Consumer Protection Act 1987 makes any person liable by virtue of Pt I (ss 1-9) (as amended) (see PARA 522 *et seq post*) for any damage caused wholly or partly by a defect in a product which was supplied to any person by its producer before 1 March 1988: s 50(7); Consumer Protection Act 1987 (Commencement No 1) Order 1987, SI 1987/1680, arts 2, 4(a).

The Consumer Protection Act 1987 is not to be construed as conferring any other right of action in civil proceedings, apart from the right conferred by virtue of Pt I (as amended), in respect of any loss or damage suffered in consequence of a contravention of a safety provision or of a provision made by or under Pt III (ss 20-26) (as amended) (misleading price descriptions: see PARA 702 *et seq post*): see s 41(2); and PARA 543 post. For the meaning of 'damage' for these purposes see PARA 543 note 4 post. For the meaning of 'safety provision' see PARA 529 note 3 post; and as to references to a contravention of a safety provision see PARA 543 note 8 post.

Any damage for which a person is liable under s 2 is deemed to have been caused, for the purposes of the Fatal Accidents Act 1976 (see NEGLIGENCE vol 78 (2010) PARAS 25-27), by that person's wrongful act, neglect or default: Consumer Protection Act 1987 s 6(1)(a). Where: (1) a person's death is caused wholly or partly by a defect in a product, or a person dies after suffering damage which has been so caused; (2) a request such as is mentioned in s 2(3)(a) (see head (a) in the text) is made to a supplier of the product by that person's personal representatives or, in the case of a person whose death is caused wholly or partly by the defect, by any dependant or relative of that person; and (3) the conditions specified in s 2(3)(b), (c) (see heads (b), (c) in the text) are satisfied in relation to that request, Pt I (as amended) has effect for the purposes of the Law Reform (Miscellaneous Provisions) Act 1934 (see NEGLIGENCE vol 78 (2010) PARA 24) and the Fatal Accidents Act 1976 (see NEGLIGENCE vol 78 (2010) PARA 25 *et seq*) as if the liability of the supplier to that person under the Consumer Protection Act 1987 s 2 did not depend on that person having requested the supplier to identify certain persons or on the said conditions having been satisfied in relation to a request made by that person: s 6(2). For these purposes, 'dependant' has the same meaning as it has in the Fatal Accidents Act 1976 (see NEGLIGENCE vol 78 (2010) PARA 27) (Consumer Protection Act 1987 s 1(2)); and 'relative' has the same meaning as it has in the Damages (Scotland) Act 1976 (Consumer Protection Act 1987 s 1(2)).

The Congenital Disabilities (Civil Liability) Act 1976 s 1 (see NEGLIGENCE vol 78 (2010) PARA 6; TORT vol 45(2) (Reissue) PARA 339) has effect for the purposes of the Consumer Protection Act 1987 Pt I (as amended) as if: (a) a person were answerable to a child in respect of an occurrence caused wholly or partly by a defect in a product if he is or has been liable under s 2 in respect of any effect of the occurrence on a parent of the child, or would be so liable if the occurrence caused a parent of the child to suffer damage; (b) the provisions of Pt I (as amended) relating to liability under s 2 applied in relation to liability by virtue of head (a) *supra* under the Congenital Disabilities (Civil Liability) Act 1976 s 1; and (3) s 1(6) (exclusion of liability: see TORT vol 45(2) (Reissue) PARA 339) were omitted: Consumer Protection Act 1987 s 6(3).

Where any damage is caused partly by a defect in a product and partly by the fault of the person suffering the damage, the Law Reform (Contributory Negligence) Act 1945 (see NEGLIGENCE vol 78 (2010) PARA 75) and the Fatal Accidents Act 1976 s 5 (as amended) (see NEGLIGENCE vol 78 (2010) PARA 75) have effect as if the defect were the fault of every person liable by virtue of the Consumer Protection Act 1987 Pt I (as amended) for the damage caused by the defect: s 6(4). For these purposes, 'fault' has the same meaning as in the Law Reform (Contributory Negligence) Act 1945 (see NEGLIGENCE vol 78 (2010) PARA 75): Consumer Protection Act 1987 s 6(5).

Nothing in Pt I (as amended) prejudices the operation of the Nuclear Installations Act 1965 s 12 (as amended) (right to compensation for certain breaches of duties confined to rights under the 1965 Act: see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1501): Consumer Protection Act 1987 s 6(8).

9 Ibid s 2(3).

10 Ie ibid Pt I (as amended): see PARA 521 et seq post.

11 Ibid s 2(5).

12 See note 10 supra.

13 Consumer Protection Act 1987 s 2(6).

14 Ibid s 6(7).

UPDATE

518-527 Product Liability

For consumer protection from unfair trading see PARA 725A.

521 Liability for defective products

NOTE 8--Consumer Protection Act 1987 s 41(2) amended: SI 2008/1277.

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522. Meaning of 'defect'.

There is a defect in a product¹ if the safety of the product is not such as persons generally are entitled to expect²; and, for these purposes, 'safety', in relation to a product, includes safety with respect to products comprised in that product and safety in the context of risks of damage³ to property, as well as in the context of risks of death or personal injury⁴.

In determining for the above purposes what persons generally are entitled to expect in relation to a product, all the circumstances are to be taken into account, including:

- 831 (1) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;
- 832 (2) what might reasonably be expected to be done with or in relation to the product; and
- 833 (3) the time when the product was supplied⁵ by its producer⁶ to another;

and nothing in the above provisions requires a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question⁷.

1 Ie for the purposes of the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended): see PARAS 518 et seq ante, 524 et seq post. For the meaning of 'product' see PARA 521 note 3 ante.

2 Thus, where goods are unsafe, liability may arise under both the Consumer Protection Act 1987 and the Sale of Goods Act 1979 (see PARA 1 et seq ante); but, where the goods are safe but merely shoddy, redress may in general be sought only under the Sale of Goods Act 1979 or similar legislation.

3 For the meaning of 'damage' see PARA 525 post.

4 Consumer Protection Act 1987 s 3(1). For these purposes, except in so far as the context otherwise requires, 'personal injury' includes any disease and any other impairment of a person's physical or mental condition: s 45(1). As to the power to modify s 3 see PARA 520 ante; as to the application of s 3 to the Crown see PARA 519 ante; and as to the limitation period applicable to proceedings brought under s 3 see PARA 527 post. See *XYZ v Schering Health Care Ltd* [2002] EWHC 1420 (QB), (2002) 70 BMLR 88 (oral contraceptive pills; assessment of scientific studies and evidence relating to increased risk of cardio-vascular injuries).

5 For the meaning of 'supply' see PARA 523 post. As to the supply of a product in which products are comprised see PARA 521 note 3 ante. In determining what persons generally are entitled to expect, where an individual product is an isolated or rare specimen which, unlike the majority of products in its series, does not perform its intended function, the question is whether the public at large accepts that a proportion of the products are likely to be defective; where the defect is due to some error in design or flawed system, the question is whether the product is safe for its foreseeable use: *A v National Blood Authority* [2001] 3 All ER 289.

6 For the meaning of 'producer', in relation to a product, see PARA 521 note 4 ante.

7 Consumer Protection Act 1987 s 3(2). See *Richardson v LRC Products Ltd* (2000) 59 BMLR 185 (contraceptive device).

UPDATE

518-527 Product Liability

For consumer protection from unfair trading see PARA 725A.

522 Meaning of 'defect'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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523. Meaning of 'supply'.

References in the Consumer Protection Act 1987 to supplying goods¹ are to be construed as references to doing any of the following, whether as principal or agent:

- 834 (1) selling, hiring out or lending the goods²;
- 835 (2) entering into a hire-purchase agreement³ to furnish the goods;
- 836 (3) the performance of any contract for work and materials to furnish the goods;
- 837 (4) providing the goods in exchange for any consideration other than money;
- 838 (5) providing the goods in or in connection with the performance of any statutory function; or
- 839 (6) giving the goods as a prize or otherwise making a gift of the goods;

and, in relation to gas⁴ or water, those references are to be construed as including references to providing the service by which the gas or water is made available for use⁵.

For the purposes of any reference in the Consumer Protection Act 1987 to supplying goods, where a person ('the ostensible supplier') supplies goods to another person ('the customer') under a hire-purchase agreement, conditional sale agreement⁶ or credit-sale agreement⁷ or under an agreement for the hiring of the goods, other than a hire-purchase agreement, and the ostensible supplier carries on the business of financing the provision of goods for others by means of such agreements and in the course of that business acquired his interest in the goods supplied to the customer as a means of financing the provision of them for the customer by a further person ('the effective supplier'), the effective supplier and not the ostensible supplier is to be treated as supplying the goods to the customer⁸.

The performance of any contract by the erection of any building or structure on any land or by the carrying out of any other building works is to be treated, for the purposes of the Consumer Protection Act 1987, as a supply of goods, in so far as, but only in so far as, it involves the provision of any goods to any person by means of their incorporation into the building, structure or works⁹; but, except for the purposes of, and in relation to, notices to warn¹⁰ or any provision made by or under the statutory provisions relating to misleading price indications¹¹, references in the Consumer Protection Act 1987 to supplying goods do not include references to supplying goods comprised in land where the supply is effected by the creation or disposal of an interest in the land¹².

Except in the statutory provisions relating to product liability¹³, references in the Consumer Protection Act 1987 to a person's supplying goods are to be confined to references to that person's supplying goods in the course of a business¹⁴ of his, but, for the purposes of this provision, it is immaterial whether the business is a business dealing in the goods¹⁵.

Except for the purposes of, and in relation to, prohibition notices¹⁶ or suspension notices¹⁷, references in the statutory provisions relating to consumer safety¹⁸, misleading price indications¹⁹ and enforcement²⁰ to supplying goods do not include references to supplying goods where the person supplied carries on a business of buying goods of the same description as those goods and repairing or reconditioning them or references to supplying goods by a sale of articles as scrap, that is to say for the value of materials included in the articles rather than for the value of the articles themselves²¹.

Where any goods have at any time been supplied by being hired out or lent to any person, neither a continuation or renewal of the hire or loan, whether on the same or different terms, nor any transaction for the transfer after that time of any interest in the goods to the person to whom they were hired or lent is to be treated for the purposes of the Consumer Protection Act 1987 as a further supply of the goods to that person²².

A ship²³, aircraft²⁴ or motor vehicle²⁵ is not to be treated for the purposes of the Consumer Protection Act 1987 as supplied to any person by reason only that services consisting in the carriage of goods or passengers in that ship, aircraft or vehicle, or in its use for any other purpose, are provided to that person in pursuance of an agreement relating to the use of the ship, aircraft or vehicle for a particular period or for particular voyages, flights or journeys²⁶.

1 For the meaning of 'goods' see PARA 521 note 3 ante.

2 Where a landlord lets property, goods which are left in the premises for the use of the tenant are either being hired out or lent within the meaning of the Consumer Protection Act 1987 s 46(1)(a); they are not fixtures falling within s 46(4) (see the text to notes 10-12 infra): *Drummond-Rees v Dorset County Council* (1996) 162 JP 651, DC (electrical equipment provided by landlord for use in connection with a holiday letting).

3 For these purposes, except in so far as the context otherwise requires, 'hire-purchase agreement' has the same meaning as in the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 95) but as if in the definitions in the Consumer Credit Act 1974 'goods' had the same meaning as in the Consumer Protection Act 1987: s 45(1).

- 4 For these purposes, except in so far as the context otherwise requires, 'gas' has the same meaning as in the Gas Act 1986 Pt I (ss 1-48) (as amended): see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 802): Consumer Protection Act 1987 s 45(1).
- 5 Ibid s 46(1) (amended by the Regulatory Reform (Trading Stamps) Order 2005, SI 2005/871, art 6, Schedule).
- 6 For these purposes, except in so far as the context otherwise requires, 'conditional sale agreement' has the same meaning as in the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 93) but as if in the definitions in the Consumer Credit Act 1974 'goods' had the same meaning as in the Consumer Protection Act 1987: s 45(1).
- 7 For these purposes, except in so far as the context otherwise requires, 'credit-sale agreement' has the same meaning as in the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 93) but as if in the definitions in the Consumer Credit Act 1974 'goods' had the same meaning as in the Consumer Protection Act 1987: s 45(1).
- 8 Ibid s 46(2).
- 9 Ibid s 46(3).
- 10 For the meaning of 'a notice to warn' see PARA 544 post.
- 11 Ie any provision made by or under the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended): see PARA 702 et seq post.
- 12 Ibid s 46(4). See also *Drummond-Rees v Dorset County Council* (1996) 162 JP 651, DC (cited in note 2 supra).
- 13 Ie except in the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended): see PARAS 518 et seq ante, 524 et seq post.
- 14 For the meaning of 'business' see PARA 521 note 5 ante.
- 15 Consumer Protection Act 1987 s 46(5). For the purposes of s 46(5), goods are not to be treated as supplied in the course of a business if they are supplied, in pursuance of an obligation arising under or in connection with the insurance of the goods, to the person with whom they were insured: s 46(6).
- 16 For the meaning of 'a prohibition notice' see PARA 544 post.
- 17 For the meaning of 'a suspension notice' see PARA 549 post.
- 18 Ie references in the Consumer Protection Act 1987 Pt II (ss 10-19) (as amended): see PARA 533 et seq post.
- 19 Ie references in ibid Pt III (ss 20-26) (as amended): see PARA 702 et seq post.
- 20 Ie references in ibid Pt IV (ss 27-35): see PARA 555 et seq post.
- 21 Ibid s 46(7).
- 22 Ibid s 46(8).
- 23 For the meaning of 'ship' see PARA 521 note 3 ante.
- 24 For the meaning of 'aircraft' see PARA 521 note 3 ante.
- 25 For these purposes, except in so far as the context otherwise requires, 'motor vehicle' has the same meaning as in the Road Traffic Act 1988 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 210): Consumer Protection Act 1987 s 45(1) (amended by the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 3 para 35).
- 26 Consumer Protection Act 1987 s 46(9).

UPDATE

518-527 Product Liability

For consumer protection from unfair trading see PARA 725A.

523 Meaning of 'supply'

NOTE 2--A product is supplied where it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed: Case C-127/04 *O'Byrne v Sanofi Pasteur MSD Ltd* [2006] All ER (EC) 674, ECJ (interpreting EC Council Directive 85/374 art 11). See also Case C-358/08 *O'Byrne v Aventis Pasteur SA* (2009) Times, 9 December, ECJ (interpreting Directive 85/374 arts 3, 11 in relation to the substitution of a producer for a supplier as a party to proceedings outside the limitation period).

NOTES 11, 12--Consumer Protection Act 1987 s 46(4) amended: SI 2008/1277.

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524. Defences.

In any civil proceedings¹ against any person ('the person proceeded against') in respect of a defect² in a product³, it is a defence for him to show:

- 840 (1) that the defect is attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation⁴;
- 841 (2) that the person proceeded against did not at any time supply⁵ the product to another⁶;
- 842 (3) that the following conditions are satisfied, that is to say:
 - 73 90. (a) that the only supply of the product to another by the person proceeded against was otherwise than in the course of a business⁷ of that person's; and
 - 91. (b) that the provisions relating to persons generally liable for the damage⁸ do not apply to that person or apply to him by virtue only of things done otherwise than with a view to profit⁹;
 - 74 843 (4) that the defect did not exist in the product at the relevant time¹⁰;
 - 844 (5) that the state of scientific and technical knowledge at the relevant time was not such that a producer¹¹ of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control¹²; or
 - 845 (6) that the defect:
 - 75 92. (a) constituted a defect in a product ('the subsequent product') in which the product in question had been comprised; and
 - 93. (b) was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product¹³.
 - 76

- 1 le by virtue of the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended): see PARAS 518 et seq ante, 525-526 post.
- 2 For the meaning of 'defect' see PARA 522 ante.
- 3 For the meaning of 'product' see PARA 521 note 3 ante.
- 4 Consumer Protection Act 1987 s 4(1)(a). For the meaning of 'Community obligation' see PARA 483 note 1 ante. As to the power to modify s 4 see PARA 520 ante; as to the application of s 4 to the Crown see PARA 519 ante; and as to the limitation period applicable to proceedings brought under s 4 see PARA 527 post.
- 5 For the meaning of 'supply' see PARA 523 ante. As to the supply of a product in which products are comprised see PARA 521 note 3 ante.
- 6 Consumer Protection Act 1987 s 4(1)(b). See also note 4 supra.
- 7 For the meaning of 'business' see PARA 521 note 5 ante.
- 8 le the Consumer Protection Act 1987 s 2(2): see PARA 521 ante.
- 9 Ibid s 4(1)(c). See also note 4 supra. See Case C-203/99 *Veedfald v Århus Amtskommune* [2001] ECR I-3569, [2003] 1 CMLR 1217, ECJ (product manufactured for business purposes but financed from public funds did not fall within exemption from liability).
- 10 Consumer Protection Act 1987 s 4(1)(d). See also note 4 supra. For these purposes, 'the relevant time', in relation to electricity, means the time at which it was generated, being a time before it was transmitted or distributed, and, in relation to any other product, means: (1) if the person proceeded against is a person to whom s 2(2) (see PARA 521 ante) applies in relation to the product, the time when he supplied the product to another; (2) if s 2(2) does not apply to that person in relation to the product, the time when the product was last supplied by a person to whom s 2(2) does apply in relation to the product: s 4(2).
- 11 For the meaning of 'producer', in relation to a product, see PARA 521 note 4 ante.
- 12 Consumer Protection Act 1987 s 4(1)(e). See also note 4 supra. Section 4(1)(e) implements EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) art 7(e). The EC Commission contended that the English provision called for a subjective assessment in that it placed the emphasis on the conduct of a reasonable producer, having regard to the standard precautions in use in the industry in question and, therefore, broadened the defence in EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) art 7(e), which is based on an objective text, ie the state of scientific and technical knowledge rather than the capacity of producers to discover defects, and converted the strict liability imposed by art 1 into liability for negligence. On a proper construction of art 7(e), the producer of a defective product has a defence if he can prove that the objective state of the scientific and technical knowledge, at the time when the product in question was put into circulation was not such as to enable the existence of the defect to be discovered. It was, however, implicit in the wording of art 7(e) that knowledge has to have been accessible at the time when the product in question was put into circulation. On that issue EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) raises difficulties of interpretation which, in the event of litigation, the national courts must resolve. On its proper construction the Consumer Protection Act 1987 s 4(1)(e) places the burden of proof on the producer; it places no restriction on the state of scientific and technical knowledge which is to be taken into account and it does not suggest that the availability of the defence depends on the subjective knowledge of a producer taking reasonable care in the light of the standard precautions taken in the industrial sector in question. Further s 1(1) (cited in PARA 518 note 1 ante) expressly provides that the relevant provisions are to be construed in conformity with EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) and the EC Commission has provided no information to suggest that the English courts would interpret the Consumer Protection Act 1987 s 4(1)(e) inconsistently with EC Council Directive 85/374 (OJ L210, 7.8.85, p 29). It follows that the EC Commission had selectively stressed particular terms used in the English provision without demonstrating that the general legal context of the provision fails effectively to secure full application of EC Council Directive 85/374 (OJ L210, 7.8.85, p 29): Case C-300/95 *EC Commission v United Kingdom* [1997] All ER (EC) 481, [1997] ECR I-2649, ECJ. It is doubtful whether an absence of previous comparable accidents at the time of supply can amount to 'scientific and technical knowledge': *Abouzaid v Mothercare (UK) Ltd* [2000] All ER (D) 2436, CA. EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) art 7(e) does not exempt the producer from liability for a product which has defects which, on rare occasions, will inevitably occur despite the producer taking all reasonable precautions: *A v National Blood Authority* [2001] 3 All ER 289.
- 13 Consumer Protection Act 1987 s 4(1)(f). See also note 4 supra.

UPDATE

518-527 Product Liability

For consumer protection from unfair trading see PARA 725A.

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525. Damage giving rise to liability.

'Damage' means death or personal injury¹ or any loss or damage to any property, including land².

A person is not liable³:

- 846 (1) in respect of any defect⁴ in a product⁵ for the loss of or any damage to the product itself or for the loss of or any damage to the whole or any part of any product which has been supplied⁶ with the product in question comprised in it⁷;
- 847 (2) for any loss of or damage to any property which, at the time it is lost or damaged, is not of a description of property ordinarily intended for private use, occupation or consumption and intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption⁸.

No damages are to be awarded to any person⁹ in respect of any loss of or damage to any property if the amount which would fall to be so awarded to that person, apart from this provision and any liability for interest, does not exceed £275¹⁰.

In determining¹¹ who has suffered any loss of or damage to property and when any such loss or damage occurred, the loss or damage is to be regarded as having occurred at the earliest time at which a person with an interest in the property had knowledge¹² of the material facts about the loss or damage¹³.

1 For the meaning of 'personal injury' see PARA 522 note 4 ante.

2 Consumer Protection Act 1987 s 5(1). As to the power to modify s 5 see PARA 520 ante; as to the application of s 5 to the Crown see PARA 519 ante; and as to the limitation period applicable to proceedings brought under s 5 see PARA 527 post. It is for the national court to define which category of damage a particular case comes within, but it cannot decide to award damages having found a person liable on the ground that the damage does not fall into any of the categories: Case C-203/99 *Veedfald v Århus Amtskommune* [2001] ECR I-3569, [2003] 1 CMLR 1217, ECJ.

3 Ie under the Consumer Protection Act 1987 s 2 (as amended): see PARA 521 ante.

4 For the meaning of 'defect' see PARA 522 ante.

5 For the meaning of 'product' see PARA 521 note 3 ante.

6 For the meaning of 'supply' see PARA 523 ante. As to the supply of a product in which products are comprised see PARA 521 note 3 ante.

7 Consumer Protection Act 1987 s 5(2).

8 Ibid s 5(3).

9 Ie by virtue of ibid Pt I (ss 1-9) (as amended): see PARA 518 et seq ante.

10 Ibid s 5(4).

11 le for the purposes of *ibid* Pt I (as amended).

12 For these purposes, a person's knowledge includes knowledge which he might reasonably have been expected to acquire from facts observable or ascertainable by him or from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek; but a person is not to be taken by virtue of this provision to have knowledge of a fact ascertainable by him only with the help of expert advice unless he has failed to take all reasonable steps to obtain (and, where appropriate, to act on) that advice: *ibid* s 5(7).

13 *Ibid* s 5(5). For these purposes, the material facts about any loss or damage to any property are such facts about the loss or damage as would lead a reasonable person with an interest in the property to consider the loss or damage sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment: s 5(6).

UPDATE

518-527 Product Liability

For consumer protection from unfair trading see PARA 725A.

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526. Prohibition on exclusions from liability.

The liability of a person for defective products¹ to a person who has suffered damage² caused wholly or partly by a defect³ in a product⁴, or to a dependant⁵ or relative⁶ of such a person, may not be limited or excluded by any contract term, by any notice or by any other provision⁷. In the case of goods⁸ of a type ordinarily supplied for private use or consumption, where loss or damage: (1) arises from the goods proving defective while in consumer use⁹; and (2) results from the negligence¹⁰ of a person concerned in the manufacture or distribution of the goods, liability for the loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to a guarantee¹¹ of the goods¹².

1 le by virtue of the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended): see PARA 518 et seq ante.

2 For the meaning of 'damage' see PARA 525 ante.

3 For the meaning of 'defect' see PARA 522 ante.

4 For the meaning of 'product' see PARA 521 note 3 ante.

5 For the meaning of 'dependant' see PARA 521 note 8 ante.

6 For the meaning of 'relative' see PARA 521 note 8 ante.

7 Consumer Protection Act 1987 s 7. As to the power to modify s 7 see PARA 520 ante; as to the application of s 7 to the Crown see PARA 519 ante; and as to the limitation period applicable to proceedings brought under s 7 see PARA 527 post.

8 For the meaning of 'goods' see PARA 450 note 8 ante.

9 Goods are to be regarded as 'in consumer use' when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business: Unfair Contract Terms Act 1977 s 5(2)(a).

10 For the meaning of 'negligence' see PARA 20 note 7 ante.

11 Anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise: Unfair Contract Terms Act 1977 s 5(2)(b).

12 Ibid s 5(1).

UPDATE

518-527 Product Liability

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ii) Product Liability/B. LIABILITY FOR DEFECTIVE PRODUCTS/527. Limitation periods.

527. Limitation periods.

In an action¹ for damages by virtue of any of the provisions relating to product liability²:

848 (1) none of the time limits otherwise provided in the Limitation Act 1980³ applies⁴;

849 (2) an action may not be brought after the expiration of ten years from the relevant time⁵;

850 (3) an action in which the damages claimed by the claimant consist of or include damages in respect of personal injuries⁶ to the claimant or any other person or loss of or damage⁷ to any property may not be brought after the expiration of the period of three years from whichever is the later of:

77

94. (a) the date on which the cause of action accrued; and

95. (b) the date of knowledge of the claimant or, if earlier, of any person in whom his cause of action was previously vested⁸;

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851 (4) if, in a case where the damages claimed by the claimant consist of or include damages in respect of personal injuries to the claimant or any other person, the injured person died before the expiration of the period mentioned in head (3) above, head (3) above has effect as respects the cause of action surviving for the benefit of his estate⁹ as if for the reference to that period there were substituted a reference to the period of three years from whichever is the later of:

79

96. (a) the date of death; and

97. (b) the date of the personal representative's¹⁰ knowledge¹¹.

80

In the case of a claim for personal injuries or death, the court has a discretionary power to exclude the above time limits¹².

1 For these purposes, 'action' includes any proceeding in a court of law: Limitation Act 1980 s 38(1).

2 Ie by virtue of any provision of the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended): see PARA 518 et seq ante.

3 le none of the time limits in the Limitation Act 1980 ss 1-11 (as amended): see LIMITATION PERIODS vol 68 (2008) PARA 915 et seq.

4 Ibid s 11A(1), (2) (added by the Consumer Protection Act 1987 s 6(6), Sch 1 para 1). The Consumer Protection Act 1987 s 1(1) (see PARA 518 note 1 ante) applies for the purpose of construing the Limitation Act 1980 s 11A (as added), so far as s 11A (as added) relates to an action by virtue of any provision of the Consumer Protection Act 1987 Pt I (as amended) as it applies for the purpose of construing Pt I (as amended): Limitation Act 1980 s 11A(8) (added by the Consumer Protection Act 1987 Sch 1 para 1).

5 Limitation Act 1980 s 11A(1), (3) (added by the Consumer Protection Act 1987 Sch 1 para 1). For these purposes, 'the relevant time' has the same meaning as in the Consumer Protection Act 1987 s 4 (see PARA 524 note 10 ante): Limitation Act 1980 s 11A(3) (as so added). Section 11A(3) (as added) operates to extinguish a right of action and does so whether or not that right of action had accrued, or time under ss 12-41 (as amended) had begun to run, at the end of the said period of ten years: s 11A(3) (as so added).

6 For these purposes, 'personal injury' has the same meaning as in the Consumer Protection Act 1987 Pt I (as amended) (see PARA 522 note 4 ante): Limitation Act 1980 s 11A(1), (8) (as added: see note 4 supra).

7 For these purposes, 'damage' has the same meaning as in the Consumer Protection Act 1987 Pt I (as amended) (see PARA 525 ante): Limitation Act 1980 s 11A(1), (8) (as added: see note 4 supra).

8 Ibid s 11A(1), (4) (added by the Consumer Protection Act 1987 Sch 1 para 1).

9 le by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 s 1 (as amended): see NEGLIGENCE vol 78 (2010) PARA 24.

10 For these purposes, 'personal representative' includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will, whether or not he has renounced probate, but not anyone appointed only as a special representative in relation to settled land; and regard is to be had to any knowledge acquired by any such person while a personal representative or previously: Limitation Act 1980 s 11A(1), (6) (added by the Consumer Protection Act 1987 Sch 1 para 1). If there is more than one personal representative and their dates of knowledge are different, the Limitation Act 1980 s 11A(5)(b) (as added) (see head (4)(b) in the text) is to be read as referring to the earlier of those dates: s 11A(1), (7) (added by the Consumer Protection Act 1987 Sch 1 para 1). 'Settled land' has the same meaning as in the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARA 678): Limitation Act 1980 s 38(1). Save in a very limited class of cases, no settlement created on or after 1 January 1997 is a settlement for the purposes of the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and SETTLEMENTS vol 42 (Reissue) PARA 675 et seq.

11 Limitation Act 1980 s 11A(1), (5) (added by the Consumer Protection Act 1987 Sch 1 para 1). For these purposes, references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts: (1) such facts about the damage caused by the defect as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment; and (2) that the damage was wholly or partly attributable to the facts and circumstances alleged to constitute the defect; and (3) the identity of the defendant; but, in determining the date on which a person first had such knowledge, there must be disregarded both the extent, if any, of that person's knowledge on any date of whether particular facts or circumstances would or would not, as a matter of law, constitute a defect and, in a case relating to loss of or damage to property, any knowledge which that person had on a date on which he had no right of action by virtue of the Consumer Protection Act 1987 Pt I (as amended) in respect of the loss or damage: Limitation Act 1980 s 14(1A) (added by the Consumer Protection Act 1987 Sch 1 para 3). A person's knowledge includes knowledge which he might reasonably have been expected to acquire: (a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek; but a person is not so fixed with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain, and, where appropriate, to act on, that advice: Limitation Act 1980 s 14(3).

12 See ibid s 33 (as amended); and LIMITATION PERIODS vol 68 (2008) PARAS 1001-1002. However, the court may not disapply s 11A(3) (as added) (see note 5 supra) or, where the damages claimed by the claimant are confined to damages for loss of or damage to any property, any other provision in its application to an action by virtue of the Consumer Protection Act 1987 Pt I (as amended): see the Limitation Act 1980 s 33(1A) (as added); and LIMITATION PERIODS vol 68 (2008) PARA 1003.

UPDATE

518-527 Product Liability

For consumer protection from unfair trading see PARA 725A.

527 Limitation periods

NOTE 5--See Case C-127/04 *O'Byrne v Sanofi Pasteur MSD Ltd* [2006] All ER (EC) 674, ECJ; Case C-358/08 *O'Byrne v Aventis Pasteur SA* (2009) Times, 9 December, ECJ.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/A. IN GENERAL/528. Statutory regime for consumer safety.

(iii) Consumer Safety

A. IN GENERAL

528. Statutory regime for consumer safety.

The provisions of Part II of the Consumer Protection Act 1987¹:

- 852 (1) lay down a system which imposes criminal liability in respect of unsafe consumer goods;
- 853 (2) introduce the general safety requirement for consumer goods²;
- 854 (3) empower the Secretary of State to make safety regulations to secure that any goods are safe, or not made available to persons in whose hands they would be unsafe, and that appropriate information is provided in respect of goods³;
- 855 (4) provide that breach of the safety regulations is an offence⁴;
- 856 (5) give the Secretary of State power to serve prohibition notices to prevent a person from supplying a particular product which is considered unsafe⁵ and notices to warn requiring a person at his own expense to publish a warning about any goods which the Secretary of State considers are unsafe which that person supplies or has supplied and which are described in the notice⁶;
- 857 (6) give enforcement authorities which have reasonable grounds for suspecting that any safety provision has been contravened power to serve suspension notices prohibiting a person from supplying, offering or exposing for supply those goods for a period not exceeding six months⁷;
- 858 (7) give the court power to order the forfeiture of goods on the ground that there has been a contravention of a safety provision⁸;
- 859 (8) give the Secretary of State power to require any person to supply him with information to help him to make decisions relating to safety regulations, prohibition notices and notices to warn⁹.

Part IV of the Consumer Protection Act 1987¹⁰ gives enforcement authorities powers to enforce the above provisions.

In addition, the General Product Safety Regulations 1994¹¹ impose requirements concerning the safety of products intended for consumers or likely to be used by consumers if such products are to be placed on the market by producers or supplied by distributors.

¹ I.e. the Consumer Protection Act 1987 Pt II (ss 10-19) (as amended): see PARA 533 et seq post. The Consumer Protection Act 1987 and the General Product Safety Regulations 1994, SI 1994/2328 (amended by SI 1994/3142; and SI 1994/3144) (see PARA 565 et seq post) comprise a detailed and carefully crafted code which

provides both for the protection of the public against unsafe products and for the interests of manufacturers and suppliers: *R v Liverpool City Council, ex p Baby Products Association Ltd* [2000] LGR 171, (1999) Times, 1 December, DC (council's trading standards department found that certain baby walkers failed to comply with safety regulations; press release issued by local authority, without power to do so under the code, which announced the unsafety of those named baby-walkers and called for their recall and suspension of their supply, was held to have deprived producers of their rights and safeguards under the code and to be contrary to law; a power conferred in very general terms could not be relied on to defeat the intention of clear and particular statutory provisions).

Product standards, safety and liability are reserved matters for the purposes of the Scotland Act 1998 which, by virtue of s 29(2)(b), are outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C8, Pt III para 5. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

- 2 See the Consumer Protection Act 1987 s 10 (as amended); and PARA 533 post.
- 3 See *ibid* s 11 (as amended); and PARA 539 post. As to the Secretary of State see PARA 15 ante.
- 4 See *ibid* s 12; and PARA 540 post.
- 5 See *ibid* s 13; and PARAS 544-545 post.
- 6 See *ibid* s 13; and PARAS 544, 546 post.
- 7 See *ibid* ss 14, 15; and PARAS 549, 552 post.
- 8 See *ibid* s 16; and PARA 553 post.
- 9 See *ibid* s 18; and PARA 554 post.
- 10 See *ibid* Pt IV (ss 27-35): see PARA 555 et seq post.
- 11 See the General Product Safety Regulations 1994, SI 1994/2328 (amended by SI 1994/3142; and SI 1994/3144): see PARA 565 et seq post.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

528 Statutory regime for consumer safety

NOTE 1--SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803.

TEXT AND NOTE 2--Head (2) omitted: SI 2005/1803.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/A. IN GENERAL/529. Reports etc.

529. Reports etc.

It is the duty of the Secretary of State at least once in every five years to lay before each House of Parliament a report on the exercise during the period to which the report relates of the functions which under the provisions relating to consumer safety¹, or under the enforcement provisions² in their application for the purposes of the safety provisions³, are exercisable by the

Secretary of State, weights and measures authorities and persons on whom functions are conferred by regulations made⁴ by the Secretary of State⁵.

The Secretary of State may from time to time prepare and lay before each House of Parliament such other reports on the exercise of those functions as he considers appropriate⁶.

Every weights and measures authority and every person on whom functions are conferred by regulations made⁷ by the Secretary of State must, whenever the Secretary of State so directs, make a report to the Secretary of State on the exercise of the functions exercisable by that authority or by that person by virtue of any such regulations⁸. Such a report must be in such form and contain such particulars as are specified in the direction of the Secretary of State⁹.

1 Ie under the Consumer Protection Act 1987 Pt II (ss 10-19) (as amended): see PARA 533 et seq post.

2 Ie under ibid Pt IV (ss 27-35): see PARA 555 et seq post.

3 For these purposes, except in so far as the context otherwise requires, 'safety provision' means the general safety requirement in ibid s 10 (as amended) (see PARA 533 post) or any provision of safety regulations, a prohibition notice or a suspension notice: s 45(1). For the meaning of 'safety regulations' see PARA 539 post; for the meaning of 'a prohibition notice' see PARA 544 post; and for the meaning of 'a suspension notice' see PARA 549 post.

4 Ie under ibid s 27(2): see PARA 555 post.

5 Ibid s 42(1). The first report under s 42(1) was to be laid before each House of Parliament not more than five years after the laying of the last report under the Consumer Safety Act 1978 s 8(2) (repealed): Consumer Protection Act 1987 s 42(5). As to the Secretary of State see PARA 15 ante.

6 Ibid s 42(2).

7 See note 4 supra.

8 Consumer Protection Act 1987 s 42(3).

9 Ibid s 42(4).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/A. IN GENERAL/530. Financial provisions.

530. Financial provisions.

There must be provided out of money provided by Parliament:

860 (1) any expenses incurred or compensation payable by a Minister of the Crown or government department in consequence of any provision of the Consumer Protection Act 1987; and

861 (2) any increase attributable to the Consumer Protection Act 1987 in the sums payable out of money so provided under any other Act¹.

Any sums received by a Minister of the Crown or government department by virtue of the Consumer Protection Act 1987 must be paid into the Consolidated Fund².

1 Consumer Protection Act 1987 s 43(1).

2 Ibid s 43(2). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/A. IN GENERAL/531. Service of documents etc.

531. Service of documents etc.

Any document required or authorised by virtue of the Consumer Protection Act 1987 to be served on a person may be so served:

862 (1) by delivering it to him or leaving it at his proper address or by sending it by post to him at that address;

863 (2) if the person is a body corporate, by serving it in accordance with head (1) above on the secretary or clerk of that body; or

864 (3) if the person is a partnership, by serving it in accordance with head (1) above on a partner or on a person having control or management of the partnership business¹.

The Secretary of State may by regulations make provision for the manner in which any information² is to be given to any person under³ any of the enforcement provisions⁴.

1 Consumer Protection Act 1987 s 44(1). For the meaning of 'business' see PARA 521 note 5 ante. For the purposes of s 44(1), and for the purposes of the Interpretation Act 1978 s 7 (service of documents by post: see STATUTES vol 44(1) (Reissue) PARA 1388) in its application to the Consumer Protection Act 1987 s 44(1), the proper address of any person on whom a document is to be served by virtue of the Consumer Protection Act 1987 is his last known address, except that: (1) in the case of service on a body corporate or its secretary or clerk, it is the address of the registered or principal office of the body corporate; (2) in the case of service on a partnership or a partner or person having control or management of a partnership business, it is the principal office of the partnership; and, for these purposes, the principal office of a company registered outside the United Kingdom or of a partnership carrying on business outside the United Kingdom is its principal office within the United Kingdom: s 44(2).

2 For these purposes, except in so far as the context otherwise requires, 'information' includes accounts, estimates and returns: ibid s 45(1).

3 Ie under ibid Pt IV (ss 27-35): see PARA 555 et seq post.

4 Ibid s 44(3). Without prejudice to s 44(3), regulations made by the Secretary of State may prescribe the person, or manner of determining the person, who is to be treated for the purposes of s 28(2) (see PARA 556 post) or s 30 (see PARA 558 post) as the person from whom any goods were purchased or seized where the goods were purchased or seized from a vending machine: s 44(4). As to the Secretary of State see PARA 15 ante.

The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and includes power to make different provision for different cases and to make such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: s 44(5). At the date at which this volume states the law no such regulations had been made and none have effect as if so made.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/A. IN GENERAL/532. Savings for certain privileges.

532. Savings for certain privileges.

Nothing in the Consumer Protection Act 1987 is:

- 865 (1) to be taken as requiring any person to produce any records¹ if he would be entitled to refuse to produce those records in any proceedings in any court on the grounds that they are the subject of legal professional privilege or as authorising any person to take possession of any such records which are in the possession of a person who would be so entitled²;
- 866 (2) to be construed as requiring a person to answer any question or give any information³ if to do so would incriminate that person or that person's spouse⁴.

1 For these purposes, except in so far as the context otherwise requires, 'records' includes any books or documents and any records in non-documentary form: Consumer Protection Act 1987 s 45(1).

2 Ibid s 47(1).

3 For the meaning of 'information' see PARA 531 note 2 ante.

4 Consumer Protection Act 1987 s 47(2) (amended, as from a day to be appointed, by the Civil Partnership Act 2004 s 261(1), Sch 27 para 126, to add the words 'or civil partner' after 'that person's spouse').

These provisions apply in relation to the Fireworks Act 2003: see s 13; and EXPLOSIVES.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

532 Savings for certain privileges

NOTE 4--Day now appointed: SI 2005/3175.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii)

Consumer Safety/B. THE GENERAL SAFETY REQUIREMENT/533. The general safety requirement.

B. THE GENERAL SAFETY REQUIREMENT

533. The general safety requirement.

If a person:

- 867 (1) supplies¹ any consumer goods² which fail to comply with the general safety requirement;
- 868 (2) offers or agrees to supply any such goods; or
- 869 (3) exposes or possesses any such goods for supply,

he is guilty of an offence³.

For these purposes, consumer goods fail to comply with the general safety requirement if they are not reasonably safe⁴ having regard to all the circumstances⁵, including:

- 870 (a) the manner in which, and purposes for which, the goods are being or would be marketed, the get-up of the goods, the use of any mark in relation to the goods and any instructions or warnings which are given or would be given with respect to the keeping, use or consumption of the goods;
- 871 (b) any standards of safety published by any person either for goods of a description which applies to the goods in question or for matters relating to goods of that description; and
- 872 (c) the existence of any means by which it would have been reasonable, taking into account the cost, likelihood and extent of any improvement, for the goods to have been made safer⁶.

For these purposes, consumer goods are not to be regarded as failing to comply with the general safety requirement in respect of:

- 873 (i) anything which is shown to be attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation⁷;
- 874 (ii) any failure to do more in relation to any matter than is required by any safety regulations⁸ imposing requirements with respect to that matter or any provision of any enactment or subordinate legislation⁹ imposing such requirements with respect to that matter as are designated for these purposes by any such regulations¹⁰.

1 For the meaning of 'supply' see PARA 523 ante.

2 For the meaning of 'consumer goods' see PARA 534 post; and for the meaning of 'goods' see PARA 521 note 3 ante.

3 Consumer Protection Act 1987 s 10(1). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both: s 10(6). As to the standard scale see PARA 498 note 3 ante. As to general defences see PARA 536 post; as to the defence of due diligence see PARA 537 post; as to offences by bodies corporate see PARA 538 post; as to the liability of persons other than the principal offender see PARA 538 post; and as to enforcement see PARA 555 et seq post. See also *Hounslow London Borough Council v Beaver Tool Hire Ltd* (7 February 1994, unreported) (petrol can which, after being filled, leaked most of its contents); *Oxfordshire County Council v Omicways Ltd* (3 March 1994, unreported) (toys found to contain a considerable amount of lead); *Fife Regional Council v GSD Ltd* (19 April 1994, unreported) (glass-topped table, the glass of which failed to comply with the

relevant British Standard); *Isle of Wight County Council v Benross Trading Co Ltd* (6 May 1994, unreported) (bath mats found to have a high percentage of their rubber suckers malformed and accordingly the mats offered no resistance to slippage); *Coventry City Council v Ackerman Group plc* [1995] Crim LR 140, DC (retail sale of product for use in microwaves; lack of safety instructions).

The general safety requirement in the Consumer Protection Act 1987 s 10 (as amended) is a safety provision by virtue of s 45(1) (see PARA 529 note 3 ante) and, where contravention of a safety provision is suspected, an enforcement authority may serve a suspension notice: see s 14; and PARA 549 post. Where there has been a contravention of a safety provision, an enforcement authority may apply for a forfeiture order against the goods involved: see s 16; and PARA 553 post.

For the purposes of the General Product Safety Regulations 1994, SI 1994/2328 (as amended) (see PARA 565 et seq post), the provisions of the Consumer Protection Act 1987 s 10 (as amended), to the extent that they impose general safety requirements which must be complied with if products are to be placed on the market, offered or agreed to be placed on the market or exposed or possessed to be placed on the market by producers or supplied, offered or agreed to be supplied or exposed or possessed to be supplied by distributors, are disapplied: see the General Product Safety Regulations 1994, SI 1994/2328, reg 5; and PARA 565 post.

The Consumer Protection Act 1987 and the General Product Safety Regulations 1994, SI 1994/2328 (as amended) comprise a detailed and carefully crafted code which provides both for the protection of the public against unsafe products and for the interests of manufacturers and suppliers: *R v Liverpool City Council, ex p Baby Products Association Ltd* [2000] LGR 171, (1999) Times, 1 December, DC (council's trading standards department found that certain baby walkers failed to comply with safety regulations; press release issued by local authority, without power to do so under the code, which announced the unsafety of those named baby-walkers and called for their recall and suspension of their supply, was held to have deprived producers of their rights and safeguards under the code and to be contrary to law; a power conferred in very general terms could not be relied on to defeat the intention of clear and particular statutory provisions).

4 For the meaning of 'safe' and cognate expressions see PARA 535 post.

5 The words 'having regard to all the circumstances' contemplate not only the goods themselves viewed in isolation but also the use to which they are put: *Whirlpool (UK) Ltd and Magnet Ltd v Gloucestershire County Council* (1993) 159 JP 123, DC.

6 Consumer Protection Act 1987 s 10(2); and see *P & M Supplies (Essex) Ltd v Walsall Metropolitan Borough Council* [1994] Crim LR 580, DC (admissibility of specialist and trade evidence on issue of safety).

7 For the meaning of 'Community obligation' see PARA 483 note 1 ante.

8 For the meaning of 'safety regulations' see PARA 539 post.

9 For these purposes, except in so far as the context otherwise requires, 'subordinate legislation' has the same meaning as in the Interpretation Act 1978 (see STATUTES vol 44(1) (Reissue) PARA 1381): Consumer Protection Act 1987 s 45(1).

10 Ibid s 10(3) (amended by the General Product Safety Regulations 1994, SI 1994/2328, reg 6(1)). As to the Secretary of State's power to make regulations for the purposes of the Consumer Protection Act 1987 s 10(3) (as amended) see PARA 539 post.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

533-534 The general safety requirement, Meaning of 'consumer goods'

Repealed: SI 2005/1803.

534. Meaning of 'consumer goods'.

For the purposes of the general safety requirement¹, 'consumer goods' means any goods² which are ordinarily intended for private use or consumption, not being:

- 875 (1) growing crops or things comprised in land by virtue of being attached to it;
- 876 (2) water, food³, feeding stuff⁴ or fertiliser⁵;
- 877 (3) gas⁶ which is, is to be or has been supplied by a person authorised to supply it by or under the Gas Act 1986⁷;
- 878 (4) aircraft⁸, other than hang-gliders, or motor vehicles⁹;
- 879 (5) controlled drugs¹⁰ or licensed medicinal products¹¹;
- 880 (6) tobacco¹².

1 le for the purposes of the Consumer Protection Act 1987 s 10 (as amended): see PARA 533 ante.

2 For the meaning of 'goods' see PARA 521 note 3 ante. References in the Consumer Protection Act 1987 to any goods to which any safety provision has been or may have been contravened include references to any goods which it is not reasonably practicable to separate from any such goods: s 45(3). For these purposes, except in so far as the context otherwise requires, 'contravention' includes a failure to comply; and cognate expressions are to be construed accordingly: s 45(1). For the meaning of 'safety provision' see PARA 529 note 3 ante; and as to references to a contravention of a safety provision see PARA 543 note 8 post.

3 For these purposes, 'food' does not include anything containing tobacco but, subject to that, has the same meaning as in the Food Safety Act 1990 (see PARA 803 note 5 post; and FOOD vol 18(2) (Reissue) PARA 201): Consumer Protection Act 1987 s 19(1) (amended by the Food Safety Act 1990 s 59(1), Sch 3 para 37). 'Tobacco' includes any tobacco product within the meaning of the Tobacco Products Duty Act 1979 (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 589) and any article or substance containing tobacco and intended for oral or nasal use: Consumer Protection Act 1987 s 19(1).

4 For these purposes, 'feeding stuff' has the same meaning as in the Agriculture Act 1970 Pt IV (ss 66-87) (as amended) (see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 941): Consumer Protection Act 1987 s 19(1).

5 For these purposes, 'fertiliser' has the same meaning as in the Agriculture Act 1970 Pt IV (ss 66-87) (as amended) (see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 941): Consumer Protection Act 1987 s 19(1).

6 For the meaning of 'gas' see PARA 523 note 4 ante.

7 le by or under the Gas Act 1986 s 7A (as added) (licensing of gas suppliers and gas shippers: see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 807) or s 5(1), Sch 2A para 5 (as added) (supply to very large customers an exception to prohibition on unlicensed activities: see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 803, 804). The reference to s 5, Sch 2A para 5 is removed, as from a day to be appointed, by the Utilities Act 2000 s 108, Sch 8.

8 For the meaning of 'aircraft' see PARA 521 note 3 ante.

9 For the meaning of 'motor vehicle' see PARA 523 note 25 ante.

10 For these purposes, 'controlled drug' means a controlled drug within the meaning of the Misuse of Drugs Act 1971 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 238): Consumer Protection Act 1987 s 19(1).

11 For these purposes, 'licensed medicinal product' means: (1) any medicinal product within the meaning of the Medicines Act 1968 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 7) in respect of which a product licence within the meaning of that Act (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 44) is for the time being in force; or (2) any other article or substance in respect of which any such licence is for the time being in force in pursuance of an order under s 104 or s 105 (application of that Act to other articles and substances: see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 9): Consumer Protection Act 1987 s 19(1). Except in so far as the context otherwise requires, 'substance' means any natural or artificial substance, whether in solid, liquid or gaseous form or in the form of a vapour, and includes substances that are comprised in or mixed with other goods: s 45(1).

12 Ibid s 10(7) (amended by the Gas Act 1995 s 16(1), Sch 4 para 15; and, as from a day to be appointed, by the Utilities Act 2000 s 108, Sch 8).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

533-534 The general safety requirement, Meaning of 'consumer goods'

Repealed: SI 2005/1803.

534 Meaning of 'consumer goods'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 11--Also, head (3) a veterinary medicinal product that has a marketing authorisation under the Veterinary Medicines Regulations 2006, SI 2006/2407 (now replaced by the Veterinary Medicines Regulations 2009, SI 2009/2297): Consumer Protection Act 1987 s 19(1) (amended by SI 2006/2407).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/B. THE GENERAL SAFETY REQUIREMENT/535. Meaning of 'safe'.

535. Meaning of 'safe'.

'Safe', in relation to any goods¹, means that there is no risk, or no risk apart from one reduced to a minimum, that any of the following will, whether immediately or after a definite or indefinite period, cause the death of, or any personal injury² to, any person whatsoever, that is to say:

- 881 (1) the goods;
- 882 (2) the keeping, use or consumption of the goods;
- 883 (3) the assembly of any of the goods which are, or are to be, supplied unassembled;
- 884 (4) any emission or leakage from the goods or, as a result of the keeping, use or consumption of the goods, from anything else; or
- 885 (5) reliance on the accuracy of any measurement, calculation or other reading made by or by means of the goods;

and 'safer' and 'unsafe' are to be construed accordingly³.

In the above definition of 'safe', references to the keeping, use or consumption of any goods are references to:

- 886 (a) the keeping, use or consumption of the goods by the persons by whom, and in all or any of the ways or circumstances in which, they might reasonably be expected to be kept, used or consumed; and
- 887 (b) the keeping, use or consumption of the goods either alone or in conjunction with other goods in conjunction with which they might reasonably be expected to be kept, used or consumed⁴.

- 1 For the meaning of 'goods' see PARA 521 note 3 ante.
- 2 For the meaning of 'personal injury' see PARA 522 note 4 ante.
- 3 Consumer Protection Act 1987 s 19(1).
- 4 Ibid s 19(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

535 Meaning of 'safe'

TEXT AND NOTE 3--Reference to 'safer' omitted: 1987 Act s 19(1) (amended by the General Product Safety Regulations 2005, SI 2005/1803).

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536. General defences.

In any proceedings against any person for an offence of supplying, offering or agreeing to supply or exposing or possessing for supply any consumer goods which fail to comply with the general safety requirement¹ it is a defence for that person to show:

- 888 (1) that he reasonably believed that the goods² would not be used or consumed in the United Kingdom; or
- 889 (2) that the following conditions are satisfied, that is to say:
- 81
98. (a) that he supplied the goods, offered or agreed to supply them or, as the case may be, exposed or possessed them for supply in the course of carrying on a retail business³; and
99. (b) that, at the time he supplied the goods or offered or agreed to supply them or exposed or possessed them for supply, he neither knew nor had reasonable grounds for believing that the goods failed to comply with the general safety requirement; or
- 82
- 890 (3) that the terms on which he supplied the goods or agreed or offered to supply them or, in the case of goods which he exposed or possessed for supply, the terms on which he intended to supply them indicated that the goods were not supplied or

to be supplied as new goods and provided for, or contemplated, the acquisition of an interest in the goods by the persons supplied or to be supplied⁴.

1 le an offence under the Consumer Protection Act 1987 s 10 (as amended); see PARA 533 ante. For the meaning of 'supply' see PARA 523 ante; and for the meaning of 'consumer goods' see PARA 534 ante.

2 For the meaning of 'goods' see PARA 521 note 3 ante.

3 For these purposes, goods are supplied in the course of carrying on a retail business if: (1) whether or not they are themselves acquired for a person's private use or consumption, they are supplied in the course of carrying on a business of making a supply of consumer goods available to persons who generally acquire them for private use or consumption; and (2) the descriptions of goods the supply of which is made available in the course of that business do not, to a significant extent, include manufactured or imported goods which have not previously been supplied in the United Kingdom: Consumer Protection Act 1987 s 10(5). For the meaning of 'business' see PARA 521 note 5 ante. See also *Southwark London Borough v Charlesworth* (1983) 147 JP 470, DC.

4 Consumer Protection Act 1987 s 10(4).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/B. THE GENERAL SAFETY REQUIREMENT/537. Defence of due diligence.

537. Defence of due diligence.

In proceedings against any person for an offence of supplying, offering or agreeing to supply or exposing or possessing for supply any consumer goods which fail to comply with the general safety requirement¹ it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence². Where in any proceedings against any person for such an offence the defence of due diligence involves an allegation that the commission of the offence was due to the act or default of another or to reliance on information³ given by another, that person is not, without the leave of the court, entitled to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice in writing giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time he serves it⁴.

A person is not entitled to rely on the defence of due diligence by reason of his reliance on information supplied by another, unless he shows that it was reasonable in all the circumstances for him to have relied on the information, having regard, in particular, to the steps which he took, and those which might reasonably have been taken, for the purpose of verifying the information and to whether he had any reason to disbelieve the information⁵.

1 le an offence under the Consumer Protection Act 1987 s 10 (as amended); see PARA 533 ante. For the meaning of 'supply' see PARA 523 ante; and for the meaning of 'consumer goods' see PARA 534 ante.

2 Ibid s 39(1), (5). As to offences by bodies corporate see PARA 538 post; and as to the liability of persons other than the principal offender see PARA 538 post. Compliance with a British Standard does not entitle the accused automatically to assume that he has exercised all due diligence for these purposes: *Balding v Lew-*

Ways Ltd (1995) 159 JP 541, DC. See also *Riley v Webb* (1987) 151 JP 372, DC; *P & M Supplies (Essex) Ltd v Devon County Council* (1991) 156 JP 328, DC; *Turtington v United Co-operative Ltd* [1993] Crim LR 376, DC; *Suffolk County Council v Rexmore Wholesale Services Ltd* (1994) 159 JP 390, DC; *Sutton London Borough v David Halsall plc* (1994) 159 JP 431, DC; *Coventry City Council v Ackerman Group plc* [1995] Crim LR 140, DC. As to the British Standards Institution see PARA 446 ante.

3 For the meaning of 'information' see PARA 531 note 2 ante.

4 Consumer Protection Act 1987 ss 39(2), (3), 45(1). As to service of documents etc see PARA 531 ante.

5 Ibid s 39(4).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/B. THE GENERAL SAFETY REQUIREMENT/538. Liability of persons other than the principal offender; offences by bodies corporate.

538. Liability of persons other than the principal offender; offences by bodies corporate.

Where the commission by any person of an offence of supplying, offering or agreeing to supply or exposing or possessing for supply any consumer goods which fail to comply with the general safety requirement¹ is due to the act or default committed by some other person in the course of any business² of his, the other person is guilty of the offence and may be proceeded against and punished, whether or not proceedings are taken against the first-mentioned person³.

Where a body corporate is guilty of an offence under the Consumer Protection Act 1987⁴ in respect of any act or default which is shown to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager⁵, secretary, or other similar officer of the body corporate, or of any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly⁶.

1 Is an offence under the Consumer Protection Act 1987 s 10 (as amended); see PARA 533 ante. For the meaning of 'supply' see PARA 523 ante; and for the meaning of 'consumer goods' see PARA 534 ante.

2 For the meaning of 'business' see PARA 521 note 5 ante.

3 Consumer Protection Act 1987 s 40(1).

4 Is including where it is so guilty by virtue of ibid s 40(1); see supra.

5 For the meaning of 'manager' see PARA 500 note 3 ante.

6 Consumer Protection Act 1987 s 40(2). Where the affairs of a body corporate are managed by its members s 40(2) applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 40(3).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/C. SAFETY REGULATIONS/539. Safety regulations.

C. SAFETY REGULATIONS

539. Safety regulations.

The Secretary of State may by regulations¹ ('safety regulations') make such provision as he considers appropriate for the purposes of the statutory provisions² and for the purposes of securing:

- 891 (1) that goods³ are safe⁴;
- 892 (2) that goods which are unsafe, or would be unsafe in the hands of persons of a particular description, are not made available to persons generally or, as the case may be, to persons of that description; and
- 893 (3) the appropriate information⁵ is, and inappropriate information is not, provided in relation to such goods⁶.

Safety regulations may contain⁷ provision:

- 894 (a) with respect to the composition or contents, design, construction, finish or packing of goods, with respect to standards for such goods and with respect to other matters relating to such goods;
- 895 (b) with respect to the giving, refusal, alteration or cancellation of approvals of such goods, of descriptions of such goods or of standards for such goods;
- 896 (c) with respect to the conditions that may be attached to any approval given under the regulations;
- 897 (d) for requiring such fees as may be determined by or under the regulations to be paid on the giving or alteration of any approval under the regulations and on the making of an application for such an approval or alteration;
- 898 (e) with respect to appeals against refusals, alterations and cancellations of approvals given under the regulations and against the conditions contained in such approvals;
- 899 (f) for requiring goods to be approved under the regulations or to conform to the requirements of the regulations or to descriptions or standards specified in or approved by or under the regulations;
- 900 (g) with respect to the testing or inspection of goods, including provision for determining the standards to be applied in carrying out any test or inspection;
- 901 (h) with respect to the ways of dealing with goods of which some or all do not satisfy a test required by or under the regulations or a standard connected with a procedure so required;
- 902 (i) for requiring a mark, warning or instruction or any other information relating to goods to be put on or to accompany the goods or to be used or provided in some other manner in relation to the goods, and for securing that inappropriate information is not given in relation to goods either by means of misleading marks or otherwise;

- 903 (j) for prohibiting persons from supplying⁸, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply, goods and component parts and raw materials for such goods;
- 904 (k) for requiring information to be given to any such person as may be determined by or under the regulations for the purpose of enabling that person to exercise any functions conferred on him by the regulations⁹.

Safety regulations may also contain¹⁰ provision:

- 905 (i) for requiring persons on whom enforcement functions are conferred¹¹ to have regard, in exercising their functions so far as relating to any provision of safety regulations, to matters specified in a direction issued by the Secretary of State with respect to that provision;
- 906 (ii) for securing that a person is not guilty of an offence against the safety regulations¹² unless it is shown that the goods in question do not conform to a particular standard;
- 907 (iii) for securing that proceedings for such an offence are not brought in England and Wales except by or with the consent of the Secretary of State or the Director of Public Prosecutions¹³;
- 908 (iv) for enabling a magistrates' court in England and Wales to try an information in respect of such an offence if the information was laid within 12 months from the time when the offence was committed;
- 909 (v) for determining the persons by whom, and the manner in which, anything required to be done by or under the regulations is to be done¹⁴.

Safety regulations must not provide for any contravention¹⁵ of the regulations to be an offence¹⁶.

Where the Secretary of State proposes to make safety regulations, it is his duty, before he makes them:

- 910 (A) to consult such organisations as appear to him to be representative of interests substantially affected by the proposal;
- 911 (B) to consult such other persons as he considers appropriate; and
- 912 (C) in the case of proposed regulations relating to goods suitable for use at work, to consult the Health and Safety Commission¹⁷ in relation to the application of the proposed regulations to Great Britain;

but the above provisions do not apply in the case of regulations which provide for the regulations to cease to have effect at the end of a period of not more than 12 months beginning with the day on which they come into force and which contain a statement that it appears to the Secretary of State that the need to protect the public requires that the regulations should be made without delay¹⁸.

1 The power to make safety regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and includes power: (1) to make different provision for different cases; and (2) to make such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: Consumer Protection Act 1987 s 11(6). As to the Secretary of State see PARA 15 ante. In exercise of the power so conferred the Secretary of State has made the following regulations: the Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324 (amended by SI 1989/2358; SI 1993/207); the Ceramic Ware (Safety) Regulations 1988, SI 1988/1647; the Babies' Dummies (Safety) (Revocation) Regulations 1989, SI 1989/141; the Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149; the Food Imitations (Safety) Regulations 1989, SI 1989/1291; the All-Terrain Motor Vehicles (Safety) Regulations 1989, SI 1989/2288; the Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693 (amended by SI 1992/711); the Oil Lamps (Safety) (Revocation) Regulations 1992, SI 1992/23; the Cigarettes

(Maximum Tar Yield) (Safety) Regulations 1992, SI 1992/2783; the Tobacco for Oral Use (Safety) Regulations 1992, SI 1992/3134; the Imitation Dummies (Safety) Regulations 1993, SI 1993/2923; the Plugs and Sockets etc (Safety) Regulations 1994, SI 1994/1768; the Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844 (amended by SI 1996/2635; SI 1999/2084; SI 2000/2897; SI 2002/1770; SI 2002/3010; SI 2004/1031; and SI 2004/1417); the Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117 (amended by SI 1996/3227; SI 1997/815; SI 2003/1316; and SI 2003/2762); the Electrical Equipment (Safety) Regulations 1994, SI 1994/3260 (amended by the Employment Rights (Disputes Resolution) Act 1998 s 1(2)); the Toys (Safety) Regulations 1995, SI 1995/204 (amended by SI 2004/1769); the Fireworks (Safety) (Revocation) Regulations 1995, SI 1995/415; the N-nitrosamines and N-nitrosatable Substances in Elastomer or Rubber Teats and Dummies (Safety) Regulations 1995, SI 1995/1012; the Gas Appliances (Safety) Regulations 1995, SI 1995/1629; the Stands for Carry-cots (Safety) (Revocation) Regulations 1996, SI 1996/2756; the Fireworks (Safety) Regulations 1997, SI 1997/2294 (amended by SI 2004/1372); the Wheeled Child Conveyances (Safety) Regulations 1997, SI 1997/2866; the Pencils and Graphic Instruments (Safety) Regulations 1998, SI 1998/2406; the Cigarette Lighter Refill (Safety) Regulations 1999, SI 1999/1844; the Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978 (amended by SI 2003/3314); the Dangerous Substances and Preparations (Nickel) (Safety) Regulations 2000, SI 2000/1668; the Medical Devices Regulations 2002, SI 2002/618 (see PARAS 621-622 post); the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041 (see PARAS 640-649 post); the Pedal Bicycles (Safety) Regulations 2003, SI 2003/1101; the Creosote (Prohibition on Use and Marketing) (No 2) Regulations 2003, SI 2003/1511 (amended by SI 2003/2650); the Unlicensed Medicinal Products for Human Use (Transmissible Spongiform Encephalopathies) (Safety) Regulations 2003, SI 2003/1680 (amended by SI 2004/3224); the Controls on Certain Azo Dyes and 'Blue Colourant' Regulations 2003, SI 2003/3310 (amended by SI 2004/2913); the Fireworks Regulations 2004, SI 2004/1836 (amended by SI 2004/3262); and the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (amended by SI 2004/2361; and SI 2004/2988) (see PARAS 587-593 post).

Regulations made under the Consumer Protection Act 1961 (repealed) which were in force on 1 October 1987, including, for the avoidance of doubt, the regulations referred to in s 6(2) (repealed), have effect as if they had been made under the Consumer Protection Act 1987 s 11 (as amended); and references in those regulations to the Consumer Protection Act 1961 or to any provisions of that Act are to be construed as references to the Consumer Protection Act 1987 or to the corresponding provisions of the Consumer Protection Act 1987: Consumer Protection Act 1987 (Commencement No 1) Order 1987, SI 1987/1680, arts 2, 6. In addition, regulations made under the Consumer Safety Act 1978 s 1 (repealed) have effect, by virtue of the Interpretation Act 1978 s 17(2)(b), as if made under the Consumer Protection Act 1987 s 11 (as amended). Accordingly, the following regulations have effect as if so made:

- 1 (1) the Cooking Utensils (Safety) Regulations 1972, SI 1972/1957 (amended by SI 1987/1680); the Children's Clothing (Hood Cords) Regulations 1976, SI 1976/2 (amended by SI 1987/1680); the Oil Heaters (Safety) Regulations 1977, SI 1977/167; and the Nightwear (Safety) Regulations 1985, SI 1985/2043 (amended by SI 1987/286) (all made under the Consumer Protection Act 1961 (repealed));
- 2 (2) the Filament Lamps for Vehicles (Safety) Regulations 1982, SI 1982/444; the Gas Catalytic Heaters (Safety) Regulations 1984, SI 1984/1802 (amended by SI 1987/1979); the Asbestos Products (Safety) Regulations 1985, SI 1985/2042 (amended by SI 1987/1979); the Nightwear (Safety) Regulations 1985, SI 1985/2043 (amended by SI 1987/286); and the Bunk Beds (Entrapment Hazards) (Safety) Regulations 1987, SI 1987/1337 (all made under the Consumer Safety Act 1978 s 1 (repealed)).

As to safety regulations see PARA 575 et seq post.

The Consumer Protection Act 1987 s 18 (see PARA 554 post) applies in relation to fireworks regulations as in relation to regulations under s 11: Fireworks Act 2003 s 2(7) (see EXPLOSIVES).

2 le for the purposes of the Consumer Protection Act 1987 s 10(3) (as amended): see PARA 533 ante.

3 Ibid s 11 (as amended) applies to any goods other than: (1) growing crops and things comprised in land by virtue of being attached to it; (2) water, food, feeding stuff and fertiliser; (3) gas which is, is to be or has been supplied by a person authorised to supply it by or under the Gas Act 1986 s 7A (as added) (licensing of gas suppliers and gas shippers: see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 807) or s 5(1), Sch 2A para 5 (supply to very large customers an exception to prohibition on unlicensed activities); (4) controlled drugs or licensed medicinal products: s 11(7) (amended by the Gas Act 1995 s 16(1), Sch 4 para 15; and prospectively amended by the Utilities Act 2000 s 108, Sch 8 as from a day to be appointed). For the meaning of 'goods' see PARA 521 note 3 ante; for the meaning of 'food' see PARA 534 note 3 ante; for the meaning of 'feeding stuff' see PARA 534 note 4 ante; for the meaning of 'fertiliser' see PARA 534 note 5 ante; for the meaning of 'gas' see PARA 523 note 4 ante; for the meaning of 'controlled drug' see PARA 534 note 10 ante; and for the meaning of 'licensed medicinal product' see PARA 534 note 11 ante.

Goods to which the Consumer Protection Act 1987 s 11 (as amended) applies are relevant goods for the purposes of s 13 (see PARA 544 post) and may, therefore, be the subject of a prohibition notice or a notice to warn under s 13: see s 13(6); and PARA 544 post.

- 4 For the meaning of 'safe' and cognate expressions see PARA 535 ante.
- 5 For the meaning of 'information' see PARA 531 note 2 ante.
- 6 Consumer Protection Act 1987 s 11(1). As to the Secretary of State's power to obtain information for the purpose of deciding whether to make, vary, serve or revoke safety regulations see PARA 554 post; as to his duty to report to Parliament on the discharge of his functions relating to consumer safety see PARA 529 ante; as to offences against the safety regulations see PARA 540 post; and as to enforcement see PARA 555 et seq post. As to the restrictions on disclosure of information obtained through compliance with a requirement imposed by safety regulations see PARA 401 ante.

Any provision of safety regulations is a safety provision by virtue of s 45(1) (see PARA 529 note 3 ante) and, where contravention of a safety provision is suspected, an enforcement authority may serve a suspension notice: see s 14; and PARA 549 post. Where there has been a contravention of a safety provision, an enforcement authority may apply for a forfeiture order against the goods involved: see s 16; and PARA 553 post.
- 7 Ie without prejudice to the generality of ibid s 11(1): see the text to notes 1-6 supra.
- 8 For the meaning of 'supply' see PARA 523 ante. For these purposes, 'supply' is confined to supply in the United Kingdom: *United States Tobacco International Inc v Secretary of State for Health* (1990) 155 JP 144, DC.
- 9 Consumer Protection Act 1987 s 11(2).
- 10 See note 7 supra.
- 11 Ie conferred by or under the Consumer Protection Act 1987 s 27: see PARA 555 post.
- 12 As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq; and as to consents by the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1071.
- 13 Ie an offence under the Consumer Protection Act 1987 s 12: see PARA 540 post.
- 14 Ibid s 11(3)(a)-(c), (e), (g).
- 15 For the meaning of 'contravention' see PARA 534 note 2 ante.
- 16 Consumer Protection Act 1987 s 11(4). Contraventions of the regulations are a statutory offence under s 12: see PARA 540 post.
- 17 As to the Health and Safety Commission see HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 367 NOTE 10.
- 18 Consumer Protection Act 1987 s 11(5).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

539 Safety regulations

NOTE 1--SI 2003/1511, SI 2003/3310 revoked: SI 2008/2852. SI 2003/1680 further amended: SI 2005/2750, SI 2005/2754. SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367). SI 2000/1668 replaced: Dangerous Substances and Preparations (Nickel) (Safety) Regulations 2005, SI 2005/1815. SI 1988/1647 replaced: Ceramic Articles in Contact with Food (England) Regulations 2006, SI 2006/1179 (amended by SI 2007/2790); Ceramic Articles in Contact with Food (Wales) Regulations 2006, SI 2006/1704 (amended by SI 2007/3252). SI 1989/2288 amended: SI 2008/1597.

TEXT AND NOTE 3--Words 'for the purposes of the statutory provisions and' omitted: Consumer Protection Act 1987 s 11(1) (amended by SI 2008/960).

TEXT AND NOTE 17--Reference to the Health and Safety Commission is now to the Health and Safety Executive (see HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 361 et seq): Consumer Protection Act 1987 s 11(5) (amended by SI 2008/960).

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540. Offences against the safety regulations.

Where safety regulations¹ prohibit a person from supplying² or offering or agreeing to supply any goods³ or from exposing or possessing any goods for supply, then, if that person contravenes⁴ the prohibition, he is guilty of an offence⁵.

Where safety regulations require a person who makes or processes any goods in the course of carrying on a business⁶:

- 913 (1) to carry out a particular test or to use a particular procedure in connection with the making or processing of the goods with a view to ascertaining whether the goods satisfy any requirements of such regulations; or
- 914 (2) to deal or not to deal in a particular way with a quantity of the goods of which the whole or part does not satisfy such a test or does not satisfy standards connected with such a procedure,

then, if that person does not comply with the requirement, he is guilty of an offence⁷.

If a person contravenes a provision of safety regulations which prohibits or requires the provision, by means of a mark or otherwise, of information⁸ of a particular kind in relation to goods, he is guilty of an offence⁹.

Where safety regulations require any person to give information to another for the purpose of enabling that other to exercise any function, that person is guilty of an offence if:

- 915 (a) he fails without reasonable cause to comply with the requirement; or
- 916 (b) in giving the information which is required of him, he makes any statement which he knows is false in a material particular or he recklessly makes any statement which is false in a material particular¹⁰.

1 For the meaning of 'safety regulations' see PARA 539 ante.

2 For the meaning of 'supply' see PARA 523 ante.

3 For the meaning of 'goods' see PARA 521 note 3 ante.

4 For the meaning of 'contravention' see PARA 534 note 2 ante.

5 Consumer Protection Act 1987 s 12(1). A person guilty of an offence under s 12 is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or to both: s 12(5). As to the standard scale see PARA 498 note 3 ante. As to the defence of due diligence to an offence under s 12(1) and s 12(2), (3) (see infra) see PARA 541 post; as to offences by bodies corporate see PARA 542 post; as to offences by persons other than the principal offender see PARA 542 post; as to civil liability in consequence of a contravention of safety regulations see PARA 543 post; and as to enforcement see PARA 555

et seq post. Where there has been a contravention of a safety provision, an enforcement authority may apply for a forfeiture order against the goods involved: see PARA 553 post.

- 6 For the meaning of 'business' see PARA 521 note 5 ante.
- 7 Consumer Protection Act 1987 s 12(2). See note 5 supra.
- 8 For the meaning of 'information' see PARA 531 note 2 ante.
- 9 Consumer Protection Act 1987 s 12(3). See note 5 supra.
- 10 Ibid s 12(4). See note 5 supra.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/C. SAFETY REGULATIONS/541. Defence of due diligence.

541. Defence of due diligence.

In proceedings against any person for certain offences against the safety regulations¹ it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence². Where in any proceedings against any person for such an offence the defence of due diligence involves an allegation that the commission of the offence was due to the act or default of another or to reliance on information³ given by another, that person is not, without the leave of the court, entitled to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice in writing giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time he serves it⁴.

A person is not entitled to rely on the defence of due diligence by reason of his reliance on information supplied by another, unless he shows that it was reasonable in all the circumstances for him to have relied on the information, having regard, in particular, to the steps which he took, and those which might reasonably have been taken, for the purpose of verifying the information and to whether he had any reason to disbelieve the information⁵.

- 1 ie an offence under the Consumer Protection Act 1987 s 12(1), (2) or (3): see PARA 540 ante.
- 2 Ibid s 39(1), (5). As to offences by bodies corporate see PARA 542 post; and as to the liability of persons other than the principal offender see PARA 542 post. See also the cases cited in PARA 537 note 2 ante.
- 3 For the meaning of 'information' see PARA 531 note 2 ante.
- 4 Consumer Protection Act 1987 ss 39(2), (3), 45(1). As to service of documents etc see PARA 531 ante.
- 5 Ibid s 39(4).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/C. SAFETY REGULATIONS/542. Liability of persons other than the principal offender; offences by bodies corporate.

542. Liability of persons other than the principal offender; offences by bodies corporate.

Where the commission by any person of certain offences against the safety regulations¹ is due to the act or default committed by some other person in the course of any business² of his, the other person is guilty of the offence and may be proceeded against and punished, whether or not proceedings are taken against the first-mentioned person³.

Where a body corporate is guilty of an offence under the Consumer Protection Act 1987⁴ in respect of any act or default which is shown to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager⁵, secretary, or other similar officer of the body corporate, or of any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly⁶.

1 Ie an offence under the Consumer Protection Act 1987 s 12(1), (2) or (3): see PARA 540 ante.

2 For the meaning of 'business' see PARA 521 note 5 ante.

3 Consumer Protection Act 1987 s 40(1).

4 Ie including where it is so guilty by virtue of ibid s 40(1): see the text to notes 1-3 supra.

5 For the meaning of 'manager' see PARA 500 note 3 ante.

6 Consumer Protection Act 1987 s 40(2). Where the affairs of a body corporate are managed by its members, s 40(2) applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 40(3).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/C. SAFETY REGULATIONS/543. Civil proceedings.

543. Civil proceedings.

An obligation imposed by safety regulations¹ is a duty owed to any person who may be affected by a contravention² of the obligation and, subject to any provision to the contrary in the

regulations and to the defences and other incidents applying to actions for breach of statutory duty³, a contravention of any such obligation is actionable accordingly⁴. Liability so incurred⁵ may not be limited or excluded by any contract term, by any notice or⁶ by any other provision⁷.

Subject to any provision to the contrary in the agreement itself, an agreement is not void or unenforceable by reason only of a contravention of a safety provision⁸.

1 For the meaning of 'safety regulations' see PARA 539 ante.

2 For the meaning of 'contravention' see PARA 534 note 2 ante.

3 As to the sanctions and remedies for breach of statutory duty see STATUTES vol 44(1) (Reissue) PARA 1353 et seq; and as to actions for damages for breach of statutory duty see TORT vol 45(2) (Reissue) PARA 395 et seq.

4 Consumer Protection Act 1987 s 41(1). Nothing in s 41(1) prejudices the operation of the Nuclear Installations Act 1965 s 12 (rights to compensation for certain breaches of duties confined to rights under that Act: see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1501): Consumer Protection Act 1987 s 41(5). The Consumer Protection Act 1987 is not to be construed as conferring any other right of action in civil proceedings, apart from the right conferred by virtue of Pt I (ss 1-9) (as amended) (see PARA 518 et seq ante), in respect of any loss or damage suffered in consequence of a contravention of a safety provision or of a provision made by or under Pt III (ss 20-26) (as amended) (misleading price indications: see PARA 702 et seq post): s 41(2). For these purposes, 'damage' includes personal injury and death: s 41(6). For the meaning of 'safety provision' see PARA 529 note 3 ante; and as to references to a contravention of a safety provision see note 8 infra.

5 Ie by virtue of ibid s 41(1): see the text to notes 1-4 supra.

6 Ie subject to the power contained in ibid s 41(1) to limit or exclude it in safety regulations.

7 Ibid s 41(4).

8 Ibid s 41(3). For these purposes, except in so far as the context otherwise requires, references to a contravention of a safety provision, in relation to any goods, include references to anything which would constitute such a contravention if the goods were supplied to any person: s 45(2).

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

543 Civil proceedings

NOTE 4--Words 'or of ... Pt III (ss 20-26)' omitted: Consumer Protection Act 1987 s 41(2) (amended by SI 2008/1277).

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D. PROHIBITION NOTICES; NOTICES TO WARN

544. Prohibition notices; notices to warn.

The Secretary of State may:

- 917 (1) serve on any person a notice in writing ('a prohibition notice')¹ prohibiting that person, except with the consent of the Secretary of State, from supplying², or from offering to supply, agreeing to supply, exposing for supply or possessing for supply, any relevant goods³ which the Secretary of State considers are unsafe⁴ and which are described in the notice⁵;
- 918 (2) serve on any person a notice ('a notice to warn')⁶ requiring that person at his own expense to publish, in a form and manner and on occasions specified in the notice, a warning about any relevant goods which the Secretary of State considers are unsafe, which that person supplies or has supplied and which are described in the notice⁷.

A consent given by the Secretary of State for the purposes of a prohibition notice may impose such conditions on the doing of anything for which the consent is required as the Secretary of State considers appropriate⁸.

A person who contravenes⁹ a prohibition notice or a notice to warn is guilty of an offence¹⁰.

1 As to prohibition notices see PARA 545 post.

2 For the meaning of 'supply' see PARA 523 ante.

3 For these purposes, 'relevant goods' means: (1) in relation to a prohibition notice, any goods to which the Consumer Protection Act 1987 s 11 (as amended) (see PARA 539 note 3 ante) applies; and (2) in relation to a notice to warn, any goods to which s 11 (as amended) applies or any growing crops or things comprised in land by virtue of being attached to it: s 13(6). For the meaning of 'goods' see PARA 521 note 3 ante.

4 For the meaning of 'safe' and cognate expressions see PARA 535 ante.

5 Consumer Protection Act 1987 ss 13(1)(a), 45(1). As to service of documents etc see PARA 531 ante. Section 13(2), Sch 2 (see PARAS 545-546 post) have effect with respect to prohibition notices and notices to warn; and the Secretary of State may by regulations make provision specifying the manner in which information is to be given to any person under Sch 2: s 13(2). The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and includes power: (1) to make different provision for different cases; and (2) to make such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: s 13(5). At the date at which this volume states the law no such regulations had been made. For the meaning of 'information' see PARA 531 note 2 ante. As to the Secretary of State's power to obtain information for the purpose of deciding whether to make, vary or serve notices under s 13(1) see PARA 554 post; and as to enforcement see PARA 555 et seq post.

6 As to notices to warn see PARA 546 post.

7 Consumer Protection Act 1987 ss 13(1)(b), 45(1). See also note 5 supra.

8 Ibid s 13(3).

9 For the meaning of 'contravention' see PARA 534 note 2 ante.

10 Consumer Protection Act 1987 s 13(4). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both: s 13(4). As to the standard scale see PARA 498 note 3 ante. As to the defence of due diligence see PARA 547 post; as to offences by bodies corporate see PARA 548 post; as to the liability of persons other than the principal offender see PARA 548 post; and as to the modification of s 13(4) for the purposes of the enforcement of the General Product Safety Regulations 1994, SI 1994/2328 (as amended) see reg 11(d); and PARA 574 note 4 post.

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

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545. Prohibition notices.

A prohibition notice¹ in respect of any goods² must:

- 919 (1) state that the Secretary of State considers that the goods are unsafe³;
- 920 (2) set out the reasons why the Secretary of State considers that the goods are unsafe;
- 921 (3) specify the day on which the notice is to come into force; and
- 922 (4) state that the trader⁴ may at any time make representations in writing to the Secretary of State for the purpose of establishing that the goods are safe⁵.

If representations in writing about a prohibition notice are made by the trader to the Secretary of State, it is the duty of the Secretary of State to consider whether to revoke the notice and:

- 923 (a) if he decides to revoke it, to do so;
- 924 (b) in any other case, to appoint a person to consider those representations, any further representations made, whether in writing or orally, by the trader about the notice and the statements of any witnesses duly⁶ examined⁷.

Where the Secretary of State has appointed a person to consider representations about a prohibition notice, he must serve a notification⁸ on the trader which states that the trader may make oral representations to the appointed person⁹ for the purpose of establishing that the goods to which the notice relates are safe and specifies the place and time at which the oral representations may be made¹⁰. A person on whom a notification has been so served or his representative may, at the place and time specified in the notification, make oral representations to the appointed person for the purpose of establishing that the goods in question are safe and call and examine witnesses in connection with the representations¹¹.

Where representations in writing about a prohibition notice are made by the trader to the Secretary of State at any time after a person has been appointed to consider representations about that notice, then, whether or not the appointed person has made a report to the Secretary of State, the following provisions¹² apply instead of¹³ the above provisions¹⁴. The Secretary of State must, before the end of the period of one month beginning with the day on which he receives the representations, serve a notification on the trader which states:

- 925 (i) that the Secretary of State has decided to revoke the notice, has decided to vary it or, as the case may be, has decided neither to revoke nor to vary it; or
- 926 (ii) that, a person having been appointed to consider representations about the notice, the trader may, at a place and time specified in the notification, make oral representations to the appointed person for the purpose of establishing that the goods to which the notice relates are safe¹⁵.

A person on whom a notification has been served for the purposes of head (ii) above or his representative may, at the place and time specified in the notification make oral representations to the appointed person for the purpose of establishing that the goods in question are safe and call and examine witnesses in connection with the representations¹⁶.

Where a person is appointed to consider representations about a prohibition notice, it is his duty to consider:

- 927 (A) any written representations made by the trader about the notice, other than those in respect of which a notification is served under head (i) above;
- 928 (B) any oral representations duly made¹⁷; and
- 929 (C) any statements made by witnesses in connection with the oral representations;

and, after considering any such matters, to make a report, including recommendations, to the Secretary of State about the matters considered by him and the notice¹⁸. It is the duty of the Secretary of State to consider any report so made to him and, after considering the report, to inform the trader of his decision with respect to the prohibition notice to which the report relates¹⁹.

The Secretary of State may revoke or vary a prohibition notice by serving on the trader a notification stating that the notice is revoked or, as the case may be, is varied as specified in the notification²⁰. The Secretary of State must not vary a prohibition notice so as to make the effect of the notice more restrictive for the trader²¹.

1 For the meaning of 'a prohibition notice' see PARA 544 ante.

2 For the meaning of 'goods' see PARA 521 note 3 ante.

3 For the meaning of 'safe' and cognate expressions see PARA 535 ante.

4 For these purposes, 'trader', in relation to a prohibition notice, means the person on whom the notice is or was served: Consumer Protection Act 1987 s 13(2), Sch 2 para 11.

5 Ibid Sch 2 para 1. As to the Secretary of State's power to make regulations prescribing the manner in which information is to be given to any person under Sch 2 see s 13(2) and PARA 544 note 5 ante; and as to the restrictions on disclosure of information included in written or oral representations made for the purposes of Sch 2 Pt I (paras 1-5) see PARA 401 ante.

6 I.e. examined under ibid Sch 2 Pt I (paras 1-5): see infra.

7 Ibid Sch 2 para 2(1).

8 For these purposes, 'notification' means a notification in writing: ibid Sch 2 para 11.

9 For these purposes, 'the appointed person', in relation to a prohibition notice, means the person for the time being appointed under ibid Sch 2 Pt I (paras 1-5) to consider representations about the notice: Sch 2 para 11. The Secretary of State may appoint a person, instead of the appointed person, to consider any representations or statements, if the person originally appointed, or last appointed under this provision, to consider those representations or statements has died or appears to the Secretary of State to be otherwise unable to act: Sch 2 para 10(2).

10 Ibid Sch 2 para 2(2). As to service of documents etc see PARA 531 ante. The time specified in a notification served under Sch 2 para 2(2) must not be before the end of the period of 21 days beginning with the day on which the notification is served, unless the trader otherwise agrees: Sch 2 para 2(3).

11 Ibid Sch 2 para 2(4). Where a notification served on any person under Sch 2 Pt I (paras 1-5) has appointed a time for the making of oral representations or the examination of witnesses, the Secretary of State may, by giving that person such notification as he considers appropriate, change that time to a later time or appoint further times at which further representations may be made or the examination of witnesses may be continued; and Sch 2 para 2(4) and Sch 2 para 3(4) (see the text to note 16 infra) have effect accordingly: Sch 2 para 10(1).

12 I.e. ibid Sch 2 para 3(2)-(4): see the text to notes 15-16 infra.

13 I.e. instead of ibid Sch 2 para 2: see the text and notes 7-11 supra.

14 Ibid Sch 2 para 3(1).

15 Ibid Sch 2 para 3(2). The time specified in a notification served for the purposes of Sch 2 para 3(2)(b) (see head (ii) in the text) must not be before the end of the period of 21 days beginning with the day on which the notification is served, unless the trader otherwise agrees or the time is the time already specified for the purposes of Sch 2 para 2(2)(b) (see head (b) in the text): Sch 2 para 3(3).

16 Ibid Sch 2 para 3(4). See also note 11 supra.

17 Ie under ibid Sch 2 paras 2(4) or 3(4): see the text to notes 11, 16 supra.

18 Ibid Sch 2 para 4(1).

19 Ibid Sch 2 para 4(2).

20 Ibid Sch 2 para 5(1). Without prejudice to the power conferred by s 13(2) (see PARA 544 ante), the service of a notification under Sch 2 para 5(1) is sufficient to satisfy the requirement of Sch 2 para 4(2) (see the text to note 19 supra) that the trader be informed of the Secretary of State's decision: Sch 2 para 5(3).

21 Ibid Sch 2 para 5(2).

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

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546. Notices to warn.

If the Secretary of State proposes to serve a notice to warn¹ on any person in respect of any goods², the Secretary of State must serve on that person a notification³ which:

- 930 (1) contains a draft of the proposed notice;
- 931 (2) states that the Secretary of State proposes to serve a notice in the form of the draft on that person;
- 932 (3) states that the Secretary of State considers that the goods described in the draft are unsafe⁴;
- 933 (4) sets out the reasons why the Secretary of State considers that those goods are unsafe; and
- 934 (5) states that that person may make representations to the Secretary of State for the purpose of establishing that the goods are safe if, before the end of the period of 14 days beginning with the day on which the notification is served, he informs the Secretary of State of his intention to make representations and whether the representations will be made only in writing or both in writing and orally⁵.

Where the Secretary of State has served a notification containing a draft of a proposed notice to warn on any person, he must not serve a notice to warn on that person in respect of the goods to which the proposed notice relates unless:

- 935 (a) the period of 14 days beginning with the day on which the notification was served expires without the Secretary of State being informed as mentioned in head (5) above;
- 936 (b) the period of 28 days beginning with that day expires without any written representations being made by that person to the Secretary of State about the proposed notice; or
- 937 (c) the Secretary of State has considered a report about the proposed notice by a duly appointed⁶ person⁷.

Where a person on whom a notification containing a draft of a proposed notice to warn has been served informs the Secretary of State as mentioned in head (5) above before the end of the period of 14 days beginning with the day on which the notification was served and makes written representations to the Secretary of State about the proposed notice before the end of the period of 28 days beginning with that day, the Secretary of State must appoint a person to consider those representations, any further representations made by that person about the draft notice and the statements of any witnesses duly⁸ examined⁹.

Where the Secretary of State has appointed a person to consider representations about a proposed notice to warn and the person whose representations are to be considered has informed the Secretary of State for the purposes of head (5) above that the representations he intends to make will include oral representations, the Secretary of State must inform the person intending to make the representations of the place and time at which oral representations may be made to the appointed person¹⁰. A person who has been so informed of a place and time or his representative may, at that place and time, make oral representations to the appointed person for the purpose of establishing that the goods to which the proposed notice relates are safe and call and examine witnesses in connection with the representations¹¹.

Where a person is appointed to consider representations about a proposed notice to warn, it is his duty to consider:

- 938 (i) any written representations made by the person on whom it is proposed to serve the notice; and
- 939 (ii) in a case where a place and time have been appointed¹² for oral representations to be made by that person or his representative, representations so made and any statements made by witnesses in connection with those representations;

and, after considering those matters, to make a report, including recommendations, to the Secretary of State about the matters considered by him and the proposal to serve the notice¹³. It is the duty of the Secretary of State to consider any report so made to him and, after considering the report, to inform the person on whom it was proposed that a notice should be served of his decision with respect to the proposal¹⁴.

If, at any time after serving a notification on a person¹⁵, the Secretary of State decides not to serve on that person either the proposed notice to warn or that notice with modifications, the Secretary of State must inform that person of the decision; and nothing done for the purposes of any of the above provisions before that person was so informed:

- 940 (A) entitles the Secretary of State subsequently to serve the proposed notice or that notice with modifications; or
- 941 (B) requires the Secretary of State, or any person appointed to consider representations about the proposed notice, subsequently to do anything in respect of, or in consequence of, any such representations¹⁶.

The Secretary of State may revoke a notice to warn by serving on the person on whom the notice was served a notification stating that the notice is revoked¹⁷.

1 For the meaning of 'a notice to warn' see PARA 544 ante.

2 For the meaning of 'goods' see PARA 521 note 3 ante.

3 For the meaning of 'notification' see PARA 545 note 8 ante.

4 For the meaning of 'safe' and cognate expressions see PARA 535 ante.

5 Consumer Protection Act 1987 s 13(2), Sch 2 para 6(1). As to service of documents etc see PARA 531 ante; as to the Secretary of State's power to make regulations prescribing the manner in which information is to be given to any person under Sch 2 see s 13(2) and PARA 544 note 5 ante; and as to the restrictions on disclosure of information included in written or oral representations made for the purposes of Sch 2 Pt II (paras 6-9) see PARA 401 ante.

6 *Ie* under *ibid* Sch 2 para 7(1): see the text to notes 8-9 *infra*.

7 *Ibid* Sch 2 para 6(2).

8 *Ie* under *ibid* Sch 2 Pt II (paras 6-9): see *infra*.

9 *Ibid* Sch 2 para 7(1).

10 *Ibid* Sch 2 para 7(2). Where a person on whom a notification containing a draft of a proposed notice to warn has been served is informed of a time for the purposes of Sch 2 para 7(2), that time must not be: (1) before the end of the period of 28 days beginning with the day on which the notification was served; or (2) before the end of the period of seven days beginning with the day on which that person is informed of the time: Sch 2 para 7(3).

11 *Ibid* Sch 2 para 7(4). For these purposes, 'the appointed person', in relation to a proposal to serve a notice to warn, means the person for the time being appointed under Sch 2 Pt II (paras 6-9) to consider representations about the proposed notice: Sch 2 para 11. The Secretary of State may appoint a person, instead of the appointed person, to consider any representations or statements, if the person originally appointed, or last appointed under this provision, to consider those representations or statements has died or appears to the Secretary of State to be otherwise unable to act: Sch 2 para 10(2).

Where a notification served on any person under Sch 2 Pt II (paras 6-9) has appointed a time for the making of oral representations or the examination of witnesses, he may, by giving that person such notification as the Secretary of State considers appropriate, change that time to a later time or appoint further times at which further representations may be made or the examination of witnesses may be continued; and Sch 2 para 7(4) has effect accordingly: Sch 2 para 10(1).

12 *Ie* under *ibid* Sch 2 para 7(2): see *supra*.

13 *Ibid* Sch 2 para 8(1).

14 *Ibid* Sch 2 para 8(2).

15 *Ie* under *ibid* Sch 2 para 6: see the text and notes 1-7 *supra*.

16 *Ibid* Sch 2 para 8(3). Where a notification containing a draft of a proposed notice to warn is served on a person in respect of any goods, a notice to warn served on him in consequence of a decision made under Sch 2 para 7(2) (see the text to note 10 *supra*) must either be in the form of the draft or must be less onerous than the draft: Sch 2 para 8(4).

17 *Ibid* Sch 2 para 9.

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For consumer protection from unfair trading see PARA 725A.

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547. Defence of due diligence.

In proceedings against any person for an offence of contravening a prohibition notice or a notice to warn¹ it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence². Where in any proceedings against any person for such an offence the defence of due diligence involves an allegation that the commission of the offence was due to the act or default of another or to reliance on information³ given by another, that person is not, without the leave of the court, entitled to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice in writing giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time he serves it⁴.

A person is not entitled to rely on the defence of due diligence by reason of his reliance on information supplied by another, unless he shows that it was reasonable in all the circumstances for him to have relied on the information, having regard, in particular, to the steps which he took, and those which might reasonably have been taken, for the purpose of verifying the information and to whether he had any reason to disbelieve the information⁵.

1 Ie an offence under the Consumer Protection Act 1987 s 13(4): see PARA 544 ante. For the meaning of 'a prohibition notice' and 'a notice to warn' see PARA 544 ante.

2 Ibid s 39(1), (5). As to offences by bodies corporate see PARA 548 post; and as to the liability of persons other than the principal offender see PARA 548 post. See also the cases cited in PARA 537 note 2 ante.

3 For the meaning of 'information' see PARA 531 note 2 ante.

4 Consumer Protection Act 1987 ss 39(2), (3), 45(1). As to service of documents etc see PARA 531 ante.

5 Ibid s 39(4).

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For consumer protection from unfair trading see PARA 725A.

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548. Liability of persons other than the principal offender; offences by bodies corporate.

Where the commission by any person of an offence of contravening a prohibition notice or a notice to warn¹ is due to the act or default committed by some other person in the course of any business² of his, the other person is guilty of the offence and may be proceeded against and punished, whether or not proceedings are taken against the first-mentioned person³.

Where a body corporate is guilty of an offence under the Consumer Protection Act 1987⁴ in respect of any act or default which is shown to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager⁵, secretary, or other similar officer of the body corporate, or of any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly⁶.

1 le an offence under the Consumer Protection Act 1987 s 13(4): see PARA 544 ante. For the meanings of 'a prohibition notice' and 'a notice to warn' see PARA 544 ante.

2 For the meaning of 'business' see PARA 521 note 5 ante.

3 Consumer Protection Act 1987 s 40(1).

4 le including where it is so guilty by virtue of *ibid* s 40(1): see the text to notes 1-3 supra.

5 For the meaning of 'manager' see PARA 500 note 3 ante.

6 Consumer Protection Act 1987 s 40(2). Where the affairs of a body corporate are managed by its members, s 40(2) applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 40(3).

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For consumer protection from unfair trading see PARA 725A.

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E. SUSPENSION NOTICES

549. Suspension notices.

Where an enforcement authority¹ has reasonable grounds for suspecting any safety provision² has been contravened³ in relation to any goods⁴, the authority may serve a notice in writing ('a suspension notice') prohibiting the person on whom it is served, for such period ending not more than six months after the date of the notice as is specified therein, from doing any of the following things without the consent of the authority, that is to say, supplying⁵ the goods, offering to supply them, agreeing to supply them or exposing them for supply⁶. A consent given by an enforcement authority for these purposes may impose such conditions on the doing of anything for which the consent is required as the authority considers appropriate⁷.

A suspension notice served by an enforcement authority in respect of any goods must:

- 942 (1) describe the goods in a manner sufficient to identify them;

943 (2) set out the grounds on which the authority suspects that a safety provision has been contravened in relation to the goods; and

944 (3) state that, and the manner in which, the person on whom the notice is served may appeal⁸ against the notice⁹.

A suspension notice served by an enforcement authority for the purpose of prohibiting a person for any period from doing the things mentioned above¹⁰ in relation to any goods may also require that person to keep the authority informed of the whereabouts throughout that period of any of those goods in which he has an interest¹¹.

Where a suspension notice has been served on any person in respect of any goods, no further such notice may be served on that person in respect of the same goods unless:

945 (a) proceedings against that person for an offence in respect of a contravention in relation to the goods of a safety provision, not being an offence under these provisions; or

946 (b) proceedings for the forfeiture of the goods¹²,

are pending at the end of the period specified in the first-mentioned notice¹³.

Any person who contravenes a suspension notice is guilty of an offence¹⁴.

Where an enforcement authority serves a suspension notice in respect of any goods, the authority is liable to pay compensation to any person having an interest in the goods in respect of any loss or damage caused by reason of the service of the notice if there has been no contravention in relation to the goods of any safety provisions and the exercise of the power is not attributable to any neglect or default by that person¹⁵.

Any disputed question as to the right to or the amount of any compensation payable under the above provisions is to be determined by arbitration¹⁶.

1 For these purposes, except in so far as the context otherwise requires, 'enforcement authority' means the Secretary of State, any other Minister of the Crown in charge of a government department, any such department and any authority, council or other person on whom functions under the Consumer Protection Act 1987 are conferred by or under s 27 (see PARA 555 post): s 45(1).

2 For the meaning of 'safety provision' see PARA 529 note 3 ante.

3 For the meaning of 'contravention' see PARA 534 note 2 ante; and as to references to a contravention of a safety provision see PARA 543 note 8 ante.

4 For the meaning of 'goods' see PARA 521 note 3 ante.

5 For the meaning of 'supply' see PARA 523 ante.

6 Consumer Protection Act 1987 ss 14(1), 45(1). As to service of documents etc see PARA 531 ante; as to appeals against suspension notices see PARA 552 post; and as to enforcement see PARA 555 et seq post. A suspension notice served under the Consumer Protection Act 1987 is not limited to the area of the enforcement authority serving it: *Brighton and Hove City Council v Woolworths plc* [2002] EWHC 2565 (Admin), [2002] All ER (D) 156 (Nov).

7 Consumer Protection Act 1987 s 14(5).

8 *Ie* under *ibid* s 15: see PARA 552 post.

9 *Ibid* s 14(2).

10 *Ie* in *ibid* s 14(1): see the text to notes 1-6 *supra*.

11 *Ibid* s 14(3).

12 le under ibid s 16: see PARA 553 post.

13 Ibid s 14(4).

14 Ibid s 14(6). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both: s 14(6). As to the standard scale see PARA 498 note 3 ante. As to the defence of due diligence see PARA 550 post; as to offences by bodies corporate see PARA 551 post; as to offences by persons other than the principal offender see PARA 551 post; and as to the modification of s 14(6) for the purposes of the enforcement of the General Product Safety Regulations 1994, SI 1994/2328 (as amended) see reg 11(d); and PARA 574 note 4 post.

15 Consumer Protection Act 1987 s 14(7).

16 Ibid s 14(8).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/E. SUSPENSION NOTICES/550. Defence of due diligence.

550. Defence of due diligence.

In proceedings against any person for an offence of contravening a suspension notice¹ it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence². Where in any proceedings against any person for such an offence the defence of due diligence involves an allegation that the commission of the offence was due to the act or default of another or to reliance on information³ given by another, that person is not, without the leave of the court, entitled to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice in writing giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time he serves it⁴.

A person is not entitled to rely on the defence of due diligence by reason of his reliance on information supplied by another, unless he shows that it was reasonable in all the circumstances for him to have relied on the information, having regard, in particular, to the steps which he took, and those which might reasonably have been taken, for the purpose of verifying the information and to whether he had any reason to disbelieve the information⁵.

1 le an offence under the Consumer Protection Act 1987 s 14(6): see PARA 549 ante. For the meaning of 'a suspension notice' see PARA 549 ante.

2 Ibid s 39(1), (5). As to offences by bodies corporate and as to the liability of persons other than the principal offender see PARA 551 post. See also the cases cited in PARA 531 note 2 ante.

3 For the meaning of 'information' see PARA 531 note 2 ante.

4 Consumer Protection Act 1987 ss 39(2), (3), 45(1). As to service of documents etc see PARA 531 ante.

5 Ibid s 39(4).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/E. SUSPENSION NOTICES/551. Liability of persons other than the principal offender; offences by bodies corporate.

551. Liability of persons other than the principal offender; offences by bodies corporate.

Where the commission by any person of an offence of contravening a suspension notice¹ is due to the act or default committed by some other person in the course of any business² of his, the other person is guilty of the offence and may be proceeded against and punished, whether or not proceedings are taken against the first-mentioned person³.

Where a body corporate is guilty of an offence under the Consumer Protection Act 1987⁴ in respect of any act or default which is shown to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager⁵, secretary, or other similar officer of the body corporate, or of any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly⁶.

1 Is an offence under the Consumer Protection Act 1987 s 14(6): see PARA 549 ante. For the meaning of 'a suspension notice' see PARA 549 ante.

2 For the meaning of 'business' see PARA 521 note 5 ante.

3 Consumer Protection Act 1987 s 40(1).

4 Is including where it is so guilty by virtue of *ibid* s 40(1): see the text to notes 1-3 supra.

5 For the meaning of 'manager' see PARA 500 note 3 ante.

6 Consumer Protection Act 1987 s 40(2). Where the affairs of a body corporate are managed by its members, s 40(2) applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 40(3).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/E. SUSPENSION NOTICES/552. Appeals against suspension notices.

552. Appeals against suspension notices.

Any person having an interest in any goods¹ in respect of which a suspension notice² is for the time being in force may apply for an order setting aside the notice³. Such an application may be made:

- 947 (1) to any magistrates' court in which proceedings have been brought in England and Wales for an offence in respect of a contravention⁴ in relation to the goods of any safety provision⁵ or for the forfeiture⁶ of the goods;
- 948 (2) where no such proceedings have been so brought, by way of complaint to a magistrates' court⁷.

On such an application, the court must make an order setting aside the suspension notice only if the court is satisfied that there has been no contravention in relation to the goods of any safety provision⁸.

Any person aggrieved by an order made under the above provisions by a magistrates' court in England and Wales, or by a decision of such a court not to make such an order, may appeal against that order or decision to the Crown Court; and an order so made may contain such provision as appears to the court to be appropriate for delaying the coming into force of the order pending the making and determination of any appeal⁹.

1 For the meaning of 'goods' see PARA 521 note 3 ante.

2 For the meaning of 'a suspension notice' see PARA 549 ante.

3 Consumer Protection Act 1987 s 15(1). Where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only exceptionally that judicial review will be granted. In determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and to ask itself what, in the context of the statutory provisions, is the real issue to be determined and whether the statutory appeal procedure is suitable to determine it. Given that the statutory emphasis of the Consumer Protection Act 1987 is on consumer safety, that that Act is aimed at withholding goods from the public if there is reasonable suspicion that the goods are unsafe and that the suspension notice prohibiting supply is to remain in force until the goods are cleared of danger even if the process by which the enforcement authority reaches its decision is flawed, and given that an appeal to a magistrates' court under s 15 is at least as expeditious, if not more so, than judicial review and is more suited to the resolution of issues of fact and that, if the goods are shown not to contravene the safety provisions, not only will the notice be set aside but the enforcement authority will be required to pay compensation to any person having an interest in the goods, even if the enforcement authority has reasonable grounds for its suspicion, an appeal under s 15 is geared exactly to deciding the real issue to be determined, ie whether the goods contravene a safety provision: *R v Birmingham City Council, ex p Ferrero Ltd* [1993] 1 All ER 530, CA (the fact that the recipient of the suspension notice could not have expressed its complaint about reasonableness to the local authority's decision on an appeal under the Consumer Protection Act 1987 s 15 was held not to be sufficient reason for granting judicial review; instead the recipient of the notice should have been left to pursue its appeal under s 15). A local authority is under no duty to consult a trader either before or after the service of a suspension notice since such a duty cannot be implied at common law because to do so would frustrate the statutory purpose of achieving consumer safety and enabling the immediate withdrawal from sale of unsafe or dangerous goods, the statutory scheme with its provisions for appeal and compensation being sufficient to achieve justice: *R v Birmingham City Council, ex p Ferrero Ltd* supra per curiam.

4 For the meaning of 'contravention' see PARA 534 note 2 ante.

5 For the meaning of 'safety provision' see PARA 529 note 3 ante.

6 Ie under the Consumer Protection Act 1987 s 16: see PARA 553 post.

7 Ibid s 15(2)(a), (b). Where an application has been so made, an enforcement authority may apply for a forfeiture order in relation to the goods concerned: see PARA 553 post.

8 Ibid s 15(3). As to references to a contravention of a safety provision see PARA 543 note 8 ante.

9 Ibid s 15(5). For these purposes, 'appeal' includes any application under the Magistrates' Courts Act 1980 s 111 (case stated: see MAGISTRATES vol 29(2) (Reissue) PARA 885): Consumer Protection Act 1987 s 15(5).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/F. FORFEITURE OF GOODS/553. Forfeiture.

F. FORFEITURE OF GOODS

553. Forfeiture.

An enforcement authority¹ in England and Wales may apply for an order for the forfeiture of any goods² on the grounds that there has been a contravention³ in relation to the goods of a safety provision⁴.

Such an application may be made:

- 949 (1) where proceedings have been brought in a magistrates' court for an offence in respect of a contravention in relation to some or all of the goods of any safety provision, to that court;
- 950 (2) where an application with respect to some or all of the goods has been made to a magistrates' court⁵, to that court; and
- 951 (3) where no application for the forfeiture of the goods has been made under head (1) or head (2) above, by way of complaint to a magistrates' court⁶.

On such an application, the court must make an order for the forfeiture of any goods only if it is satisfied that there has been a contravention in relation to the goods of a safety provision⁷.

For the avoidance of doubt, it is declared that a court may infer that there has been a contravention in relation to any goods of a safety provision if it is satisfied that any such provision has been contravened in relation to goods which are representative of those goods, whether by reason of being of the same design or part of the same consignment or batch or otherwise⁸.

Any person aggrieved by an order made under the above provisions by a magistrates' court, or by a decision of such a court not to make such an order, may appeal against that order or decision to the Crown Court; and an order so made may contain such provision as appears to the court to be appropriate for delaying the coming into force of the order pending the making and determination of any appeal⁹.

Where any goods are so forfeited, they must be destroyed in accordance with such directions as the court may give¹⁰. On making an order for the forfeiture of goods, however, a magistrates' court may, if it considers it appropriate to do so, direct that the goods to which the order relates are, instead of being destroyed, to be released, to such person as the court may specify, on condition that that person does not supply those goods to any person otherwise than as specified¹¹ and complies with any order to pay costs or expenses, including any order for the recovery of the expenses of enforcement¹², which has been made against that person in the proceedings for the order for forfeiture¹³.

- 1 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.
- 2 For the meaning of 'goods' see PARA 521 note 3 ante.
- 3 For the meaning of 'contravention' see PARA 534 note 2 ante.
- 4 Consumer Protection Act 1987 s 16(1). For the meaning of 'safety provision' see PARA 529 note 3 ante; and as to references to a contravention of a safety provision see PARA 543 note 8 ante.
- 5 le under *ibid* s 15 (see PARA 552 ante) or s 33 (see PARA 561 post).
- 6 *Ibid* s 16(2). As to the power to serve a further suspension notice where proceedings for forfeiture under s 16 are pending at the expiry of the original notice see s 14(4); and PARA 549 ante. Where proceedings for forfeiture under s 16 result from a test purchase, the enforcement authority must allow an interested party to have the goods tested: see s 28(2); and PARA 556 post. As to powers of seizure and detention where there are grounds for suspecting that the goods may be liable to forfeiture see s 29(6) (see PARA 557 post) and s 30(6) (see PARA 558 post); and as to recovery of expenses by an enforcement authority in connection with forfeiture under s 16 see PARA 563 post.
- 7 *Ibid* s 16(3).
- 8 *Ibid* s 16(4).
- 9 *Ibid* s 16(5). For these purposes, 'appeal' includes any application under the Magistrates' Courts Act 1980 s 111 (case stated: see MAGISTRATES vol 29(2) (Reissue) PARA 885): Consumer Protection Act 1987 s 16(5).
- 10 *Ibid* s 16(6).
- 11 le as mentioned in *ibid* s 46(7)(a) or (b): see PARA 523 ante.
- 12 le any order under *ibid* s 35: see PARA 563 post.
- 13 *Ibid* s 16(7).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

553 Forfeiture

NOTE 6--Consumer Protection Act 1987 s 28(2) amended: SI 2008/1277.

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G. SECRETARY OF STATE'S POWER TO OBTAIN INFORMATION

554. Power to obtain information.

If the Secretary of State considers that, for the purpose of deciding whether to make, vary or revoke any safety regulations¹ or to serve, vary or revoke a prohibition notice² or to serve or revoke a notice to warn³, he requires information⁴ which another person is likely to be able to

furnish, the Secretary of State may serve on the other person a notice in writing requiring that person:

- 952 (1) to furnish to the Secretary of State, within a period specified in the notice, such information as is so specified;
- 953 (2) to produce such records⁵ as are specified in the notice at a time and place so specified and to permit a person appointed by the Secretary of State for the purpose to take copies of the records at that time and place⁶.

If a person:

- 954 (a) fails without reasonable cause to comply with a notice served on him under the above provisions; or
- 955 (b) in purporting to comply with a requirement which, by virtue of head (1) above, is contained in such a notice, furnishes information which he knows is false in a material particular or recklessly furnishes information which is false in a material particular,

he is guilty of an offence⁷.

1 For the meaning of 'safety regulations' see PARA 539 ante.

2 For the meaning of 'a prohibition notice' see PARA 544 ante.

3 For the meaning of 'a notice to warn' see PARA 544 ante.

4 For the meaning of 'information' see PARA 531 note 2 ante.

5 For the meaning of 'records' see PARA 532 note 1 ante.

6 Consumer Protection Act 1987 ss 18(1), (2), 45(1). As to the restrictions on disclosure of information obtained through the exercise of powers under s 18 see PARA 401 ante. Section 18 applies in relation to fireworks regulations as in relation to regulations under s 11 (see PARA 539 ante): Fireworks Act 2003 s 2(7) (see EXPLOSIVES).

7 Consumer Protection Act 1987 s 18(3). A person guilty of such an offence is liable, in the case of an offence under head (a) in the text, on summary conviction to a fine not exceeding level 5 on the standard scale and, in the case of an offence under head (b) in the text, on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: s 18(4). As to the standard scale see PARA 498 note 3 ante. As to the statutory maximum see PARA 401 note 31 ante.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/H. POWERS OF ENFORCEMENT/555. Enforcement.

H. POWERS OF ENFORCEMENT

555. Enforcement.

It is the duty of every weights and measures authority¹ in Great Britain to enforce within its area the safety provisions².

The Secretary of State may by regulations:

- 956 (1) wholly or partly transfer any duty so imposed by the safety provisions on a weights and measures authority to such other person who has agreed to the transfer as is specified in the regulations;
- 957 (2) relieve such an authority of any such duty so far as it is exercisable in relation to such goods³ as may be described in the regulations⁴.

1 For the meaning of 'local weights and measures authority' see PARA 398 ante.

2 Consumer Protection Act 1987 s 27(1)(a). As to the application of s 27 in relation to misleading price indications see PARA 710 post. For the meaning of 'safety provision' see PARA 529 note 3 ante. See *Brighton and Hove City Council v Woolworths plc* [2002] EWHC 2565 (Admin), (2002) 167 JP 21 (breaches of suspension notice did not occur within authority's area; no power to prosecute).

Nothing in the Consumer Protection Act 1987 s 27 authorises any weights and measures authority, or any person on whom functions are conferred by regulations under s 27(2) (see note 4 infra), to bring proceedings in Scotland for an offence: s 27(4).

3 For the meaning of 'goods' see PARA 521 note 3 ante.

4 Consumer Protection Act 1987 s 27(2). The power to make regulations under s 27 is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and includes power: (1) to make different provision for different cases; and (2) to make such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: s 27(3). Persons on whom functions are conferred by s 27 must report to the Secretary of State when so directed: see PARA 529 ante. As to the Secretary of State's duty to submit reports on the exercise of functions conferred on him by s 27 see PARA 529 ante. In exercise of the power so conferred the Secretary of State has made the Medical Devices Regulations 2002, SI 2002/618 (amended by SI 2003/1697) (see PARAS 621-622 post); the Unlicensed Medicinal Products for Human Use (Transmissible Spongiform Encephalopathies) (Safety) Regulations 2003, SI 2003/1680 (amended by SI 2004/3224); the Medical Devices (Amendment) Regulations 2003, SI 2003/1697; and the Fireworks Regulations 2004, SI 2004/1836 (amended by SI 2004/3262).

As to the provisions which may be made by safety regulations relating to persons on whom functions are conferred by or under the Consumer Protection Act 1987 s 27 see s 11(3) and PARA 539 ante; as to the power of the Commissioners for Her Majesty's Revenue and Customs in certain circumstances to disclose information in order to facilitate the exercise of functions in relation to enforcement see PARA 564 post; and as to the restrictions on disclosure of information obtained as a result of the exercise of enforcement powers see PARA 401 ante.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

555 Enforcement

NOTE 2--Consumer Protection Act 1987 s 27(1)(a) amended: SI 2008/1277.

NOTE 4--SI 2002/618 further amended: SI 2007/400, SI 2008/530, SI 2008/2936 (with effect from 21 March 2010). SI 2003/1680 further amended: SI 2005/2750, SI 2005/2754.

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556. Test purchases.

An enforcement authority¹ has power, for the purpose of ascertaining whether any safety provision² has been contravened³ in relation to any goods⁴, to make, or to authorise an officer⁵ of the authority to make, any purchase of any goods⁶.

Where any goods so purchased by or on behalf of an enforcement authority are submitted to a test and the test leads to the bringing of proceedings for an offence in respect of a contravention in relation to the goods of any safety provision or for the forfeiture of goods⁷ or the serving of a suspension notice⁸ in respect of any goods, and the authority is requested to do so and it is practicable for the authority to comply with the request, the authority must allow the person from whom the goods were purchased⁹ or any person who is a party to the proceedings or has an interest in any goods to which the notice relates to have the goods tested¹⁰.

The Secretary of State may by regulations provide that any test of goods so purchased by or on behalf of an enforcement authority:

958 (1) is to be carried out at the expense of the authority in a manner and by a person prescribed by or determined under the regulations; or

959 (2) is to be carried out either as mentioned in head (1) above or by the authority in a manner prescribed by the regulations¹¹.

Nothing in the above provisions authorises the acquisition by or on behalf of an enforcement authority of any interest in land¹².

1 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

2 For the meaning of 'safety provision' see PARA 529 note 3 ante.

3 For the meaning of 'contravention' see PARA 534 note 2 ante.

4 For the meaning of 'goods' see PARA 521 note 3 ante.

5 For these purposes, except in so far as the context otherwise requires, 'officer', in relation to an enforcement authority, means a person authorised in writing to assist the authority in carrying out its functions under or for the purposes of the enforcement of any of the safety provisions or of any of the provisions made by or under the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended) (misleading price indications: see PARA 702 et seq post): s 45(1).

6 Ibid s 28(1)(a). As to the application of s 28 in relation to misleading price indications see PARA 711 post; as to the Secretary of State's duty to submit reports on the exercise of functions conferred on him by s 28 see PARA 529 ante; as to the power of the Commissioners for Her Majesty's Revenue and Customs in certain circumstances to disclose information in order to facilitate the exercise of functions in relation to enforcement see PARA 564 post; and as to the restrictions on disclosure of information obtained as a result of the exercise of enforcement powers see PARA 401 ante.

7 Ie under ibid s 16: see PARA 553 ante.

8 For the meaning of 'a suspension notice' see PARA 549 ante.

9 As to the Secretary of State's power to prescribe by regulations the person who is to be treated as the person from whom goods were purchased where the goods were obtained from a vending machine see the Consumer Protection Act 1987 s 44(4); and PARA 531 ante.

10 Ibid s 28(2).

11 Ibid s 28(3). The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and includes power: (1) to make different provision for different cases; and (2) to make such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: s 28(4). In exercise of the power so conferred the Secretary of State has made the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (amended by SI 2004/2361; and SI 2004/2988): see PARA 587 et seq post.

12 Consumer Protection Act 1987 s 28(5).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

556 Test purchases

NOTES 6, 10--Consumer Protection Act 1987 s 28(1)(a), (2) amended: SI 2008/1277.

NOTE 11--SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367).

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557. Powers of search etc.

A duly authorised officer¹ of an enforcement authority² may at any reasonable hour and on production, if required, of his credentials exercise any of the powers conferred by the following provisions³.

The officer may, for the purpose of ascertaining whether there has been any contravention⁴ of any safety provision⁵, inspect any goods⁶ and enter any premises⁷ other than premises occupied only as a person's residence⁸. An officer so entering any premises may take with him such other persons and such equipment as may appear to him necessary⁹. The officer may, for the purpose of ascertaining whether there has been any contravention of any safety provision, examine any procedure, including any arrangements for carrying out a test, connected with the production of any goods¹⁰.

If the officer has reasonable grounds for suspecting that any goods are manufactured or imported goods which have not been supplied in the United Kingdom since they were manufactured or imported, he may:

- 960 (1) for the purpose of ascertaining whether there has been any contravention of any safety provision in relation to the goods, require any person carrying on a business¹¹, or employed in connection with a business, to produce any records¹² relating to the business;
- 961 (2) for the purpose of ascertaining, by testing or otherwise, whether there has been any such contravention, seize and detain the goods;
- 962 (3) take copies of, or of any entry in, any records produced by virtue of head (1) above¹³.

If the officer has reasonable grounds for suspecting that there has been a contravention in relation to any goods of any safety provision, he may:

- 963 (a) for the purpose of ascertaining whether there has been any such contravention, require any person carrying on a business, or employed in connection with a business, to produce any records relating to the business;
- 964 (b) for the purpose of ascertaining, by testing or otherwise, whether there has been any such contravention, seize and detain the goods;
- 965 (c) take copies of, or of any entry in, any records produced by virtue of head (a) above¹⁴.

The officer may seize and detain:

- 966 (i) any goods or records which he has reasonable grounds for believing may be required as evidence in proceedings for an offence in respect of a contravention of any safety provision;
- 967 (ii) any goods which he has reasonable grounds for suspecting may be liable¹⁵ to be forfeited¹⁶.

If, and to the extent that, it is reasonably necessary to do so to prevent a contravention of any safety provision, the officer may, for the purpose of exercising his power under the above provisions¹⁷ to seize any goods or records:

- 968 (A) require any person having authority to do so to open any container or to open any vending machine; and
- 969 (B) himself open or break open any such container or machine where a requirement made under head (A) above in relation to the container or machine has not been complied with¹⁸.

1 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.

2 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

3 Consumer Protection Act 1987 s 29(1). As to the application of s 29 in relation to misleading price indications see PARA 712 post; and as to obstruction of an authorised officer see PARA 560 post.

4 For the meaning of 'contravention' see PARA 534 note 2 ante.

5 For the meaning of 'safety provision' see PARA 529 note 3 ante.

6 For the meaning of 'goods' see PARA 521 note 3 ante.

7 For these purposes, except in so far as the context otherwise requires, 'premises' includes any place and any ship, aircraft or vehicle: Consumer Protection Act 1987 s 45(1). For the meaning of 'ship' see PARA 521 note 3 ante; and for the meaning of 'aircraft' see PARA 521 note 3 ante.

8 Ibid s 29(2).

9 Ibid s 30(3).

10 Ibid s 29(3).

11 For the meaning of 'business' see PARA 521 note 5 ante.

12 For the meaning of 'records' see PARA 532 note 1 ante.

13 Consumer Protection Act 1987 s 29(4); and see *Dudley Metropolitan Borough Council v Debenhams plc* (1994) 159 JP 18, DC (search of premises held to be in breach of the Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises; computer evidence inadmissible). As to the procedure on seizure of goods and records see PARA 558 post; as to appeals against the detention of goods see PARA 561 post; as to the right to compensation for seizure and detention if there has been no contravention of any safety provision see PARA 562 post; and as to disclosure of information see PARAS 401 ante, 564 post.

14 Consumer Protection Act 1987 s 29(5).

15 *Ie* under *ibid* s 16: see PARA 553 ante.

16 *Ibid* s 29(6).

17 *Ie* under *ibid* s 29(4), (5) or (6): see the text to notes 11-16 *supra*.

18 *Ibid* s 29(7).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

557 Powers of search etc

NOTES 8, 14, 16, 18--Consumer Protection Act 1987 s 27(2), (5)-(7) amended: SI 2008/1277.

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558. Procedure on seizure of goods or records.

An officer¹ seizing any goods² or records³ must inform the person from whom they are seized and, in the case of imported goods seized on any premises under the control of the Commissioners for Her Majesty's Revenue and Customs⁴, the importer of those goods⁵ that the goods or records have been so seized⁶.

If a justice of the peace:

970 (1) is satisfied by any written information on oath that there are reasonable grounds for believing either that any goods or records which any officer has power to inspect⁷ are on any premises⁸ and that their inspection is likely to disclose evidence that there has been a contravention⁹ of any safety provision¹⁰ or that such a contravention has taken place, is taking place or is about to take place on any premises; and

971 (2) is also satisfied by any such information either that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant has been given to the occupier or that an application for admission, or the giving of such a notice, would defeat the object of the entry or that the premises are unoccupied or that the occupier is temporarily absent and it might defeat the object of the entry to await his return,

the justice may by warrant under his hand, which continues in force for a period of one month, authorise any officer of an enforcement authority to enter the premises, if need be by force¹¹.

An officer entering any premises¹² may take with him such other persons and such equipment as may appear to him necessary¹³. On leaving any premises which a person is authorised to enter by such a warrant, that person must, if the premises are unoccupied or the occupier is temporarily absent, leave the premises as effectively secured against trespassers as he found them¹⁴.

If any person who is not an officer of an enforcement authority purports to act as such¹⁵, he is guilty of an offence¹⁶.

Where any goods seized by an officer¹⁷ are submitted to a test, the officer must inform the person from whom they are seized and, in the case of imported goods seized on any premises under the control of the Commissioners for Her Majesty's Revenue and Customs, the importer of those goods, of the result of the test and, if:

- 972 (a) proceedings are brought for an offence in respect of a contravention in relation to the goods of any safety provision or for forfeiture of the goods¹⁸, or a suspension notice¹⁹ is served in respect of any goods; and
- 973 (b) the officer is requested to do so and it is practicable to comply with the request,

the officer must allow any person who is a party to the proceedings or, as the case may be, has an interest in the goods to which the notice relates to have the goods tested²⁰.

The Secretary of State may by regulations provide that any test of goods seized²¹ by an officer of an enforcement authority must:

- 974 (i) be carried out at the expense of the authority in a manner and by a person prescribed by or determined under the regulations; or
- 975 (ii) be carried out either as mentioned in head (i) above or by the authority in a manner prescribed by the regulations²².

1 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante; and for the meaning of 'enforcement authority' see PARA 549 note 1 ante.

2 For the meaning of 'goods' see PARA 521 note 3 ante.

3 Ie under the Consumer Protection Act 1987 s 29: see PARA 557 ante. For the meaning of 'records' see PARA 532 note 1 ante.

4 Note that the Inland Revenue and Her Majesty's Customs and Excise have merged to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005.

5 Ie within the meaning of the Customs and Excise Management Act 1979. For the meaning of 'importer' see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 964; and for the meaning of 'goods' see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 413.

6 Consumer Protection Act 1987 s 30(1); Commissioners for Revenue and Customs Act 2005 s 50. As to the application of the Consumer Protection Act 1987 s 30 in relation to misleading price indications see PARA 713 post; as to obstruction of an authorised officer see PARA 560 post; as to appeals against the detention of goods see PARA 561 post; as to the Secretary of State's power to prescribe by regulations the person who is to be treated as the person from whom goods were seized where the goods were seized from a vending machine see s 44(4) and PARA 531 ante; as to the Secretary of State's duty to submit reports on the exercise of functions conferred on him by s 30 see PARA 529 ante; and as to disclosure of information see PARAS 401 ante, 564 post.

7 See note 3 supra.

- 8 For the meaning of 'premises' see PARA 557 note 7 ante.
- 9 For the meaning of 'contravention' see PARA 534 note 2 ante.
- 10 For the meaning of 'safety provision' see PARA 529 note 3 ante.
- 11 Consumer Protection Act 1987 s 30(2).
- 12 Ie by virtue of *ibid* s 29 (see PARA 557 ante) or a warrant under s 30(2) (see the text to notes 7-11 supra).
- 13 *Ibid* s 30(3).
- 14 *Ibid* s 30(4).
- 15 Ie under *ibid* s 29 or s 30.
- 16 *Ibid* s 30(5). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 30(5). As to the standard scale see PARA 498 note 3 ante.
- 17 See note 3 supra.
- 18 Ie under the Consumer Protection Act 1987 s 16: see PARA 553 ante.
- 19 For the meaning of 'a suspension notice' see PARA 549 ante.
- 20 Consumer Protection Act 1987 s 30(6); Commissioners for Revenue and Customs Act 2005 s 50.
- 21 See note 3 supra.
- 22 Consumer Protection Act 1987 s 30(7). The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and includes power to make different provision for different cases and to make such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: s 30(8). In exercise of the power so conferred the Secretary of State has made the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (amended by SI 2004/2361; and SI 2004/2988): see PARA 587 et seq post.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

558 Procedure on seizure of goods or records

NOTES 11, 20--Consumer Protection Act 1987 s 30(2), (6) amended: SI 2008/1277.

NOTE 22--SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367).

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559. Power of customs officer to detain goods.

A customs officer¹ may, for the purpose of facilitating the exercise by an enforcement authority² or officer³ of such an authority of any functions conferred on the authority or officer by or under

the provisions relating to consumer safety⁴, or by or under the enforcement provisions⁵ in their application for the purposes of the safety provisions⁶, seize any imported goods⁷ and detain them for not more than two working days⁸. Anything so seized and detained must be dealt with during the period of its detention in such manner as the Commissioners for Her Majesty's Revenue and Customs⁹ may direct¹⁰.

1 For these purposes, and for the purposes of the Consumer Protection Act 1987 s 32 (see PARA 560 post), 'customs officer' means any officer within the meaning of the Customs and Excise Management Act 1979 (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 417); Consumer Protection Act 1987 s 31(4).

2 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

3 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.

4 le by or under the Consumer Protection Act 1987 Pt II (ss 10-19) (as amended): see PARA 533 et seq ante.

5 le by or under ibid Pt IV (ss 27-35): see PARA 555 et seq ante and PARA 560 et seq post.

6 For the meaning of 'safety provision' see PARA 529 note 3 ante.

7 For the meaning of 'goods' see PARA 521 note 3 ante.

8 Consumer Protection Act 1987 s 31(1). For these purposes, the reference to two working days is a reference to a period of 48 hours calculated from the time when the goods in question are seized but disregarding so much of any period as falls on a Saturday or Sunday or on Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321) in the part of the United Kingdom where the goods are seized: Consumer Protection Act 1987 s 31(3). As to obstruction of a customs officer see PARA 560 post; and as to appeals against the detention of goods see PARA 561 post.

9 Note that the Inland Revenue and Her Majesty's Customs and Excise have merged to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005.

10 Consumer Protection Act 1987 s 31(2); Commissioners for Revenue and Customs Act 2005 s 50. As to the Commissioners' power to authorise disclosure of information obtained for the purpose of exercising their functions in relation to imported goods see PARA 564 post; and as to the confidentiality of information obtained as a consequence of the exercise of enforcement powers see PARA 401 ante.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/H. POWERS OF ENFORCEMENT/560. Obstruction of authorised officer.

560. Obstruction of authorised officer.

Any person who:

- 976 (1) intentionally obstructs any officer¹ of an enforcement authority² who is acting in pursuance of any of the enforcement provisions³ or any customs officer⁴ who is so acting;
- 977 (2) intentionally fails to comply with any requirement made of him by any officer of an enforcement authority under any of the enforcement provisions⁵; or

978 (3) without reasonable cause fails to give any officer of an enforcement authority who is so acting any other assistance or information⁶ which the officer may reasonably require of him for the purposes of the exercise of the officer's functions under any of the enforcement provisions⁷,

is guilty of an offence⁸.

If a person, in giving any information which is required of him by virtue of head (3) above, makes any statement which he knows is false in a material particular or recklessly makes a statement which is false in a material particular, he is guilty of an offence⁹.

1 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.

2 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

3 ie under any provision of the Consumer Protection Act 1987 Pt IV (ss 27-35): see PARA 555 et seq ante.

4 For the meaning of 'customs officer' see PARA 559 note 1 ante.

5 See note 3 supra.

6 For the meaning of 'information' see PARA 531 note 2 ante.

7 See note 3 supra.

8 Consumer Protection Act 1987 s 32(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 32(1). As to the standard scale see PARA 498 note 3 ante. As to the application of s 32 in relation to misleading price indications see PARA 714 post. See also *R v Greater Manchester Justices, ex p Aldi GmbH & Co KG* (1994) 159 JP 717, DC (instructions of superior held not to constitute a defence to the requirement to answer questions).

9 Consumer Protection Act 1987 s 32(2). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: s 32(3). As to the statutory maximum see PARA 401 note 31 ante.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/H. POWERS OF ENFORCEMENT/561. Appeals against detention of goods.

561. Appeals against detention of goods.

Any person having an interest in any goods¹ which are for the time being detained² by an enforcement authority³ or by an officer⁴ of such an authority may apply for an order requiring the goods to be released to him or to another person⁵. Such an application may be made:

979 (1) to any magistrates' court in which proceedings have been brought for an offence in respect of a contravention⁶ in relation to the goods of any safety provision⁷ or for the forfeiture of the goods⁸;

980 (2) where no such proceedings have been so brought, by way of complaint to a magistrates' court⁹.

On such an application, an order requiring goods to be released is to be made only if the court is satisfied:

981 (a) that proceedings for an offence in respect of a contravention in relation to the goods of any safety provision or for the forfeiture of the goods¹⁰ have not been brought or, having been brought, have been concluded without the goods being forfeited; and

982 (b) where no such proceedings have been brought, that more than six months have elapsed since the goods were seized¹¹.

Any person aggrieved by such an order, or by a decision of a magistrates' court not to make such an order, may appeal against that order or decision to the Crown Court; and an order so made may contain such provision as appears to the court to be appropriate for delaying the coming into force of the order pending the making and determination of any appeal¹².

1 For the meaning of 'goods' see PARA 521 note 3 ante.

2 Ie under any provision of the Consumer Protection Act 1987 Pt IV (ss 27-35): see PARA 555 et seq ante.

3 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

4 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.

5 Consumer Protection Act 1987 s 33(1). As to the application of s 33 in relation to misleading price indications see PARA 715 post.

6 For the meaning of 'contravention' see PARA 534 note 2 ante.

7 For the meaning of 'safety provision' see PARA 529 note 3 ante.

8 Ie under the Consumer Protection Act 1987 s 16: see PARA 553 ante.

9 Ibid s 33(2)(a), (b).

10 See note 8 supra.

11 Consumer Protection Act 1987 s 33(3).

12 Ibid s 33(4). For these purposes, 'appeal' includes any application under the Magistrates' Courts Act 1980 s 111 (case stated: see MAGISTRATES vol 29(2) (Reissue) PARA 885): Consumer Protection Act 1987 s 33(4).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

561 Appeals against detention of goods

NOTES 9, 11--Consumer Protection Act 1987 s 33(2), (3) amended: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/H. POWERS OF ENFORCEMENT/562. Compensation for seizure and detention.

562. Compensation for seizure and detention.

Where an officer¹ of an enforcement authority² exercises any power³ to seize and detain goods⁴, the enforcement authority is liable to pay compensation to any person having an interest in the goods in respect of any loss or damage caused by reason of the exercise of the power if there has been no contravention⁵ in relation to the goods of any safety provision⁶ and the exercise of the power is not attributable to any neglect or default by that person⁷.

Any disputed question as to the right to or the amount of any compensation so payable is to be determined by arbitration⁸.

1 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.

2 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

3 Ie under the Consumer Protection Act 1987 s 29: see PARA 557 ante.

4 For the meaning of 'goods' see PARA 521 note 3 ante.

5 For the meaning of 'contravention' see PARA 534 note 2 ante.

6 For the meaning of 'safety provision' see PARA 529 note 3 ante.

7 Consumer Protection Act 1987 s 34(1). As to the application of s 34 in relation to misleading price indications see PARA 716 post.

8 Ibid s 34(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

562 Compensation for seizure and detention

NOTE 7--Consumer Protection Act 1987 s 34(1) amended: SI 2008/1277.

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563. Recovery of expenses of enforcement.

Where a court convicts a person of an offence in respect of a contravention¹ in relation to any goods² of any safety provision³ or makes an order for the forfeiture of any goods⁴, the court may, in addition to any other order it may make as to costs or expenses, order the person convicted or, as the case may be, any person having an interest in the goods to reimburse an enforcement authority⁵ for any expenditure which has been or may be incurred by that

authority in connection with any seizure or detention of the goods by or on behalf of the authority or in connection with any compliance by the authority with directions given by the court for the purposes of any order for the forfeiture of the goods⁶.

1 For the meaning of 'contravention' see PARA 534 note 2 ante.

2 For the meaning of 'goods' see PARA 521 note 3 ante.

3 For the meaning of 'safety provision' see PARA 529 note 3 ante.

4 le under the Consumer Protection Act 1987 s 16: see PARA 553 ante.

5 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

6 Consumer Protection Act 1987 s 35(1), (2). As to the application of s 35 in relation to misleading price indications see PARA 717 post.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

563 Recovery of expenses of enforcement

NOTE 6--Consumer Protection Act 1987 s 35(1) amended: SI 2008/1277.

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I. DISCLOSURE OF INFORMATION

564. Power of Commissioners for Her Majesty's Revenue and Customs to disclose information.

If they think it appropriate to do so for the purpose of facilitating the exercise by any enforcement authority¹ or any officer² of an enforcement authority of any functions conferred on the enforcement authority or, as the case may be, officer of an enforcement authority by or under the statutory provisions relating to consumer safety³, or by or under the enforcement provisions⁴ in their application for the purposes of the safety provisions⁵, the Commissioners for Her Majesty's Revenue and Customs⁶ may authorise the disclosure to the enforcement authority or, as the case may be, officer of the enforcement authority of any information⁷ obtained for the purposes of the exercise by the Commissioners of their functions in relation to imported goods⁸.

A disclosure of information must be so made in such manner as may be directed by the Commissioners and may be made through such persons acting on behalf of the enforcement authority or, as the case may be, officer of the enforcement authority as may be so directed⁹.

Information may be so disclosed whether or not the disclosure of the information has been requested by or on behalf of the enforcement authority or, as the case may be, officer of the enforcement authority¹⁰.

- 1 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.
- 2 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.
- 3 In the Consumer Protection Act 1987 Pt II (ss 10-19) (as amended): see PARA 533 et seq ante.
- 4 In under ibid Pt IV (ss 27-35): see PARA 555 et seq ante.
- 5 For the meaning of 'safety provision' see PARA 529 note 3 ante.
- 6 Note that the Inland Revenue and Her Majesty's Customs and Excise have merged to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005.
- 7 For the meaning of 'information' see PARA 531 note 2 ante.
- 8 Consumer Protection Act 1987 s 37(1), (2); Commissioners for Revenue and Customs Act 2005 s 50. The recipient of such information is subject to restrictions on disclosure: see PARA 401 ante.
- 9 Consumer Protection Act 1987 s 37(2), (3).
- 10 Ibid s 37(2), (4).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/J. GENERAL PRODUCT SAFETY/565. Application of provisions.

J. GENERAL PRODUCT SAFETY

565. Application of provisions.

The general product safety provisions¹ do not apply to:

- 983 (1) secondhand products² which are antiques;
- 984 (2) products supplied for repair or reconditioning before use, provided that the supplier clearly informs the person to whom he supplies the product to that effect; or
- 985 (3) any product where there are specific provisions in rules of Community³ law governing all aspects of the safety of the product⁴.

The general product safety provisions⁵ apply to a product where the product is the subject of provisions of Community law⁶, in so far as those provisions do not make specific provision governing an aspect of the safety of the product⁷.

The general safety provision in the Consumer Protection Act 1987⁸, to the extent that it imposes general safety requirements which must be complied with if products are to be placed on the market, offered or agreed to be placed on the market or exposed or possessed to be placed on the market by producers⁹ or supplied, offered or agreed to be supplied or exposed or possessed to be supplied by distributors¹⁰, are disapplied¹¹.

1 le the General Product Safety Regulations 1994, SI 1994/2328 (amended by SI 1994/3142; SI 1994/3144): see *infra*; and PARA 566 et seq post. The General Product Safety Regulations 1994, SI 1994/2328 (as amended) implement European Parliament and Council Directive 2001/95 on general product safety (OJ L11, 15.1.2002, p 4) (which revokes and replaces EC Council Directive 92/59 (OJ L228, 11.8.92, p 24)) (see PARA 393 ante).

The Consumer Protection Act 1987 (see PARA 518 et seq ante) and the General Product Safety Regulations 1994, SI 1994/2328 (as amended) comprise a detailed and carefully crafted code which provides both for the protection of the public against unsafe products and for the interests of manufacturers and suppliers: *R v Liverpool City Council, ex p Baby Products Association Ltd* [2000] LGR 171, (1999) Times, 1 December, DC (council's trading standards department found that certain baby walkers failed to comply with safety regulations; press release issued by local authority, without power to do so under the code, which announced the unsafety of those named baby-walkers and called for their recall and suspension of their supply, was held to have deprived producers of their rights and safeguards under the code and to be contrary to law; a power conferred in very general terms could not be relied on to defeat the intention of clear and particular statutory provisions).

2 For these purposes, 'product' means any product intended for consumers or likely to be used by consumers, supplied whether for consideration or not in the course of a commercial activity and whether new, used or reconditioned; but a product which is used exclusively in the context of a commercial activity, even if it is used for or by a consumer is not to be regarded as a product for these purposes, provided always and for the avoidance of doubt this exception does not extend to the supply of such a product to a consumer: General Product Safety Regulations 1994, SI 1994/2328, reg 2(1). 'Consumer' means a consumer acting otherwise than in the course of a commercial activity; and 'commercial activity' includes a business and a trade: reg 2(1).

3 For these purposes, references to 'the Community' are references to the European Economic Area established by the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)) (the 'EEA Agreement'): General Product Safety Regulations 1994, SI 1994/2328, reg 2(2). As to the European Economic Area and the EEA Agreement see PARA 386 note 1 ante.

4 General Product Safety Regulations 1994, SI 1994/2328, reg 3. Nothing in the General Product Safety Regulations 1994, SI 1994/2328 (as amended) applies to a medicinal product for human use to which the Medicines for Human Use (Marketing Authorisations etc) Regulations 1994, SI 1994/3144 (as amended) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 20 et seq) apply: General Product Safety Regulations 1994, SI 1994/2328, reg 1(2) (added by SI 1994/3144).

5 See note 1 *supra*.

6 le other than EC Council Directive 92/59 (OJ L228, 11.8.92, p 24): see PARA 393 ante.

7 General Product Safety Regulations 1994, SI 1994/2328, regs 2(1), 4.

8 le the Consumer Protection Act 1987 s 10 (as amended): see PARA 533 ante.

9 For these purposes, 'producer' means: (1) the manufacturer of the product, when he is established in the Community, and includes any person presenting himself as the manufacturer by affixing to the product his name, trade mark or other distinctive mark, or the person who reconditions the product; (2) when the manufacturer is not established in the Community, if the manufacturer does not have a representative established in the Community, the importer of the product and, in all other cases, the manufacturer's representative; and (3) other professionals in the supply chain, in so far as their activities may affect the safety properties of a product placed on the market: General Product Safety Regulations 1994, SI 1994/2328, reg 2(1).

10 For these purposes, 'distributor' means any professional in the supply chain whose activity does not affect the safety properties of a product: *ibid* reg 2(1).

11 *Ibid* reg 5.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

565-574 General Product Safety

SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4).

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566. General safety requirement.

No producer¹ is to place a product² on the market unless the product is a safe product ('the general safety requirement')³. For these purposes, 'safe product' means any product which under normal or reasonably foreseeable conditions of use, including duration, does not present any risk or only the minimum risks compatible with the product's use, considered as acceptable and consistent with a high level of protection for the safety and health of persons, taking into account, in particular:

- 986 (1) the characteristics of the product, including its composition, packaging, instructions for assembly and maintenance;
- 987 (2) the effect on other products, where it is reasonably foreseeable that it will be used with other products;
- 988 (3) the presentation of the product, the labelling, any instructions for its use and disposal and any other indication or information provided by the producer; and
- 989 (4) the categories of consumers⁴ at serious risk when using the product, in particular, children;

and the fact that higher levels of safety may be obtained or other products presenting a lesser degree of risk may be available does not of itself cause the product to be considered other than a safe product⁵.

Any person who contravenes the general safety requirement is guilty of an offence⁶.

1 For the meaning of 'producer' see PARA 565 note 9 ante.

2 For the meaning of 'product' see PARA 565 note 2 ante.

3 General Product Safety Regulations 1994, SI 1994/2328, reg 7.

4 For the meaning of 'consumer' see PARA 565 note 2 ante.

5 General Product Safety Regulations 1994, SI 1994/2328, reg 2(1).

6 Ibid reg 12. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale, or to both: reg 17. As to the standard scale see PARA 498 note 3 ante. As to the defence of due diligence see PARA 571 post; as to offences by bodies corporate see PARA 573 post; and as to the liability of persons other than the principal offender see PARA 572 post. Notwithstanding anything in the Magistrates' Courts Act 1980 s 127 (general provisions as to limitation of time: see MAGISTRATES vol 29(2) (Reissue) PARA 589), a magistrates' court may try an information for an offence under the General Product Safety Regulations 1994, SI 1994/2328, reg 12 if the information is laid within 12 months from the date of the offence: reg 16(1).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

565-574 General Product Safety

SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4).

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567. Requirement as to information.

Within the limits of his activity, a producer¹ must:

- 990 (1) provide consumers² with the relevant information to enable them to assess the risks inherent in a product³ throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks; and
- 991 (2) adopt measures commensurate with the characteristics of the products which he supplies, to enable him to be informed of the risks which these products might present and to take appropriate action, including, if necessary, withdrawing the product in question from the market to avoid those risks⁴.

The measures referred to in head (2) above may include, whenever appropriate:

- 992 (a) marking of the products or product batches in such a way that they can be identified;
- 993 (b) sample testing of marketed products;
- 994 (c) investigating complaints; and
- 995 (d) keeping distributors⁵ informed of such monitoring⁶.

1 For the meaning of 'producer' see PARA 565 note 9 ante.

2 For the meaning of 'consumer' see PARA 565 note 2 ante.

3 For the meaning of 'product' see PARA 565 note 2 ante.

4 General Product Safety Regulations 1994, SI 1994/2328, reg 8(1).

5 For the meaning of 'distributor' see PARA 565 note 10 ante.

6 General Product Safety Regulations 1994, SI 1994/2328, reg 8(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

565-574 General Product Safety

SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4).

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568. Requirements of distributors.

A distributor¹ must act with due care in order to help ensure compliance with the general safety requirement² and, in particular, without limiting the generality of the above:

996 (1) a distributor is not to supply to any person products³ which he knows, or should have presumed, on the basis of the information in his possession and as a professional, are dangerous products⁴; and

997 (2) within the limits of his activities, a distributor must participate in monitoring the safety of products placed on the market, in particular by passing on information on the product risks and co-operating in the action taken to avoid those risks⁵.

Any person who contravenes the provisions of head (1) above is guilty of an offence⁶.

1 For the meaning of 'distributor' see PARA 565 note 10 ante.

2 Ie the requirements of the General Product Safety Regulations 1994, SI 1994/2328, reg 7: see PARA 566 ante.

3 For the meaning of 'product' see PARA 565 note 2 ante.

4 For these purposes, 'dangerous product' means any product other than a safe product: General Product Safety Regulations 1994, SI 1994/2328, reg 2(1). For the meaning of 'safe product' see PARA 566 ante.

5 Ibid reg 9.

6 Ibid reg 12. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale, or to both: reg 17. As to the standard scale see PARA 498 note 3 ante. As to the defence of due diligence see PARA 571 post; as to offences by bodies corporate see PARA 573 post; and as to the liability of persons other than the principal offender see PARA 572 post. Notwithstanding anything in the Magistrates' Courts Act 1980 s 127 (general provisions as to limitation of time: see MAGISTRATES vol 29(2) (Reissue) PARA 589), a magistrates' court may try an information for an offence under the General Product Safety Regulations 1994, SI 1994/2328, reg 12 if the information is laid within 12 months from the date of the offence: reg 16(1).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

565-574 General Product Safety

SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4).

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569. Presumption of conformity and product assessment.

Where, in relation to any product¹, such product conforms to the specific rules of the law of the United Kingdom laying down the health and safety requirements which the product must satisfy in order to be marketed, there is a presumption that, until the contrary is proved, the product is a safe product².

Where no such specific rules exist, the conformity of a product to the general safety requirement³ is to be assessed taking into account:

- 998 (1) voluntary national standards of the United Kingdom giving effect to a European standard;
- 999 (2) Community⁴ technical specifications; or
- 1000 (3) if there are no such voluntary national standards of the United Kingdom or Community technical specifications, standards drawn up in the United Kingdom or the codes of good practice in respect of health and safety in the product sector concerned or the state of the art and technology,

and the safety which consumers⁵ may reasonably expect⁶.

1 For the meaning of 'product' see PARA 565 note 2 ante.

2 General Product Safety Regulations 1994, SI 1994/2328, reg 10(1). For the meaning of 'safe product' see PARA 566 ante.

3 As to the general safety requirement see PARA 566 ante.

4 For the meaning of 'the Community' for these purposes see PARA 565 note 3 ante.

5 For the meaning of 'consumer' see PARA 565 note 2 ante.

6 General Product Safety Regulations 1994, SI 1994/2328, reg 10(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

565-574 General Product Safety

SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4).

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570. Offence of offering etc dangerous products.

No producer¹ or distributor² is to:

- 1001 (1) offer or agree to place on the market any dangerous product³ or expose or possess any such product for placing on the market; or
- 1002 (2) offer or agree to supply any dangerous product or expose or possess any such product for supply;

and any person who contravenes the above provisions is guilty of an offence⁴.

1 For the meaning of 'producer' see PARA 565 note 9 ante.

2 For the meaning of 'distributor' see PARA 565 note 10 ante.

3 For the meaning of 'dangerous product' see PARA 568 note 4 ante.

4 General Product Safety Regulations 1994, SI 1994/2328, reg 13. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale, or to both: reg 17. As to the standard scale see PARA 498 note 3 ante. As to the defence of due diligence see PARA 571 post; as to offences by bodies corporate see PARA 573 post; and as to the liability of persons other than the principal offender see PARA 572 post. Notwithstanding anything in the Magistrates' Courts Act 1980 s 127 (general provisions as to limitation of time: see MAGISTRATES vol 29(2) (Reissue) PARA 589), a magistrates' court may try an information for an offence under the General Product Safety Regulations 1994, SI 1994/2328, reg 13 if the information is laid within 12 months from the date of the offence: reg 16(1).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

565-574 General Product Safety

SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4).

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571. Defence of due diligence.

In proceedings against any person for an offence¹ it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence².

Where in any proceedings against any person for such an offence the defence of due diligence involves an allegation that the commission of the offence was due to the act or default of

another or to reliance on information given by another, that person is not entitled, without the leave of the court, to rely on the defence unless, not less than seven days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time he serves it³.

A person is not entitled to rely on the defence of due diligence by reason of his reliance on information supplied to him by another, unless he shows that it was reasonable in all the circumstances for him to have relied on the information, having regard, in particular, to the steps which he took, and those which might reasonably have been taken, for the purpose of verifying the information and to whether he had any reason to disbelieve the information⁴.

1 Is an offence under the General Product Safety Regulations 1994, SI 1994/2328 (as amended): see PARA 565 et seq ante.

2 Ibid reg 14(1). A person is not entitled to rely on the defence provided by reg 14(1) or by the Consumer Protection Act 1987 s 39(1) (see PARA 541 ante) if he has contravened the General Product Safety Regulations 1994, SI 1994/2328, reg 9(b) (see PARA 568 head (2) ante): reg 14(5).

3 Ibid reg 14(2), (3).

4 Ibid reg 14(4).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

565-574 General Product Safety

SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4).

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572. Liability of person other than principal offender.

Where the commission by any person of an offence¹ is due to the act or default committed by some other person in the course of a commercial activity² of his, the other person is guilty of an offence and may be proceeded against and punished accordingly, whether or not proceedings are taken against the first-mentioned person³.

1 Is an offence to which the General Product Safety Regulations 1994, SI 1994/2328, reg 14 applies: see PARA 571 ante.

2 For the meaning of 'commercial activity' see PARA 565 note 2 ante.

3 General Product Safety Regulations 1994, SI 1994/2328, reg 15(1). Where a person is proceeded against by virtue of reg 15(1), the 12-month time limit in reg 16(1) (see PARAS 566 note 6, 568 note 6, 570 note 4 ante) applies: *R v Thames Magistrates' Court, ex p Academy International plc* (1999) 164 JP 77, DC. More than one person may be convicted of an offence in relation to the supply of the same item: *Padgett Bros (A-Z) Ltd v Coventry City Council* (1998) 162 JP 673, DC (there is no requirement that the relevant act should be solely due to the act or default of the importer, but merely that it is due in part to that).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

565-574 General Product Safety

SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4).

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573. Offences by bodies corporate.

Where a body corporate is guilty of an offence¹ in respect of any act or default which is shown to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager², secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly³.

1 ie including where it is so guilty by virtue of the General Product Safety Regulations 1994, SI 1994/2328, reg 15(1): see PARA 572 ante.

2 For the meaning of 'manager' see PARA 500 note 3 ante.

3 General Product Safety Regulations 1994, SI 1994/2328, reg 15(2). Where the affairs of a body corporate are managed by its members, reg 15(2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: reg 15(3).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

565-574 General Product Safety

SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4).

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574. Enforcement.

For the purposes of providing for the enforcement of the general safety provisions¹, the statutory provisions relating to prohibition notices and notices to warn² apply, to the extent that they do not already do so, to products³ as they apply to relevant goods⁴.

Every enforcement authority⁵ must give immediate notice to the Secretary of State of any action, other than action taken in respect of any secondhand product, taken by it to prohibit or restrict the supply of any product or forfeit or do any other thing in respect of any product⁶.

1 le the General Product Safety Regulations 1994, SI 1994/2328 (as amended): see PARA 565 et seq ante.

2 le the Consumer Protection Act 1987 s 13: see PARA 544 ante.

3 For the meaning of 'product' see PARA 565 note 2 ante.

4 General Product Safety Regulations 1994, SI 1994/2328, reg 11(a). The requirements of the General Product Safety Regulations 1994, SI 1994/2328 (as amended) constitute safety provisions for the purposes of the Consumer Protection Act 1987 s 14 (suspension notices: see PARA 549 ante), s 15 (appeals against suspension notices: see PARA 552 ante), s 16 (forfeiture: see PARA 553 ante) and s 18 (power to obtain information: see PARA 554 ante): General Product Safety Regulations 1994, SI 1994/2328, reg 11(b).

A weights and measures authority in Great Britain has the same duty to enforce the General Product Safety Regulations 1994, SI 1994/2328 (as amended) as it has in relation to the Consumer Protection Act 1987 Pt II (ss 10-19) (as amended) (see PARA 533 et seq ante); and Pt IV (ss 27-35) (see PARA 555 et seq ante), s 37 (see PARA 564 ante) and s 42(3), (4) (see PARA 529 ante) apply accordingly: General Product Safety Regulations 1994, SI 1994/2328, reg 11(c)(i). Nothing in reg 11 (as amended) authorises any enforcement authority to bring proceedings in Scotland for an offence: reg 11(e).

Without prejudice to the provisions of reg 11(a), (b), (c)(i) (see supra), in so far as the General Product Safety Regulations 1994, SI 1994/2328 (as amended) apply: (1) to products licensed in accordance with the provisions of the Medicines Act 1968 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 43 et seq) or authorised in accordance with the provisions of the Marketing Authorisations for Veterinary Medicinal Products Regulations 1994, SI 1994/3142 or which are the subject of a marketing authorisation within the meaning of the Medicines for Human Use (Marketing Authorisation etc) Regulations 1994, SI 1994/3144 (as amended) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 20 et seq), it is the duty of the enforcement authority as defined in the Medicines Act 1968 s 132(1) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 168) to enforce or to secure the enforcement of the General Product Safety Regulations 1994, SI 1994/2328 (as amended) and the Medicines Act 1968 ss 108-115, 119 and Sch 3 (as amended) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 168 et seq) apply accordingly as if the General Product Safety Regulations 1994, SI 1994/2328 (as amended) were regulations made under the Medicines Act 1968; (2) in relation to food within the meaning of the Food Safety Act 1990 s 1 (as amended) (see PARA 803 note 5 post; and FOOD vol 18(2) (Reissue) PARA 201), it is the duty of each food authority as defined in s 5 (as amended) (see FOOD vol 18(2) (Reissue) PARA 251) to enforce or to secure the enforcement of the General Product Safety Regulations 1994, SI 1994/2328 (as amended) within its area in Great Britain and the Food Safety Act 1990 ss 9, 29, 30 and 32 (as amended) (see FOOD vol 18(2) (Reissue) PARAS 261, 262, 267, 284) apply accordingly as if the General Product Safety Regulations 1994, SI 1994/2328 (as amended) were food safety requirements made under the Food Safety Act 1990 and s 10 (see FOOD vol 18(2) (Reissue) PARA 285) applies as if the General Product Safety Regulations 1994, SI 1994/2328 (as amended) were regulations made under the Food Safety Act 1990 Pt II (ss 7-26) (see FOOD): General Product Safety Regulations 1994, SI 1994/2328, regs 2(1), 11(c)(ii) (amended by SI 1994/3142; SI 1994/3144).

In the Consumer Protection Act 1987 s 13(4) (see PARA 544 ante) and s 14(6) (see PARA 549 ante) for the words 'six months' there are to be substituted the words 'three months': General Product Safety Regulations 1994, SI 1994/2328, reg 11(d).

5 For these purposes, 'enforcement authority' means the Secretary of State, any other Minister of the Crown in charge of a government department, any such department and any authority, council and other person on whom functions under the General Product Safety Regulations 1994, SI 1994/2328 (as amended) are imposed by or under reg 11 (as amended) (see supra): reg 2(1).

6 Ibid reg 18(1), (2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

565-574 General Product Safety

SI 1994/2328 replaced: General Product Safety Regulations 2005, SI 2005/1803 (implementing EC Council Directive 2001/95 (OJ L11, 15.1.2002, p 4).

574 Enforcement

NOTE 4--SI 1994/2987 revoked: SI 2005/2745.

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K. SAFETY OF PARTICULAR PRODUCTS

(A) AEROSOL DISPENSERS

575. In general.

An aerosol dispenser¹ is, subject to certain exceptions, to be marked with the reversed epsilon² if:

- 1003 (1) it complies with the general requirements relating to construction set out in the relevant EC provisions;
- 1004 (2) it complies with the special requirements set out in the relevant EC provisions in the case of metal, glass and plastic dispensers respectively, meets the prescribed tests and has been duly inspected; and
- 1005 (3) it is marked in visible, legible and indelible characters, in the English language, unless there is reason to believe that the dispenser will not be used in the United Kingdom, with the prescribed information and the net contents by weight and by volume expressed in metric units;

provided that, if the capacity of the dispenser does not exceed 150 millilitres and the dispenser is too small to be marked with the information mentioned in heads (1) to (3) above, the information must be marked on a label attached to the dispenser³.

An aerosol dispenser may, however, be marked with the reversed epsilon if:

- 1006 (a) the person responsible for marketing it is in possession of test results or other data showing that, although it has flammable contents, those contents do not

- present any risk of ignition under normal or reasonably foreseeable conditions of use;
- 1007 (b) the dispenser or a label attached to it is marked with a statement in clear, legible and indelible characters of the quantity of flammable material contained in it; and
- 1008 (c) the person responsible for marketing the dispenser retains a copy of the test results or other data referred to in head (a) above and provides a copy to a competent authority on request⁴.

A person who:

- 1009 (i) marks an aerosol dispenser or unfilled container with a mark so closely resembling the reversed epsilon as to be likely to deceive is guilty of an offence⁵;
- 1010 (ii) sells or has in his possession for sale an aerosol dispenser not previously sold in the United Kingdom which is marked with the reversed epsilon but which does not comply with all the requirements in heads (1) to (3) above is guilty of an offence⁶;
- 1011 (iii) sells or has in his possession for sale an aerosol dispenser imported by him into the United Kingdom which is marked with a mark so closely resembling the reversed epsilon as to be likely to deceive is guilty of an offence⁷.

1 For these purposes, 'aerosol dispenser' means any container which is not re-usable, made of metal, glass or plastic and containing a gas compressed, liquefied or dissolved under pressure, with or without a liquid, paste or powder, and fitted with a release device allowing the contents to be ejected as solid or liquid particles in suspension in a gas, as a foam, paste or powder or in a liquid state: Aerosol Dispensers (EEC Requirements) Regulations 1977, SI 1977/1140, reg 2(1).

2 For these purposes, 'the reversed epsilon' means the symbol '3': *ibid* reg 2(1).

3 See *ibid* reg 3(1). However, so far as they apply to aerosol dispensers containing products to which EC Council Directive 80/322 (OJ L51, 25.2.80, p 1) (ranges of nominal quantities and nominal capacities permitted for certain prepacked goods) applies, the Aerosol Dispensers (EEC Requirements) Regulations 1977, SI 1977/1140 (as amended) have effect as if in reg 3(1)(c) the words 'by weight' were omitted: Aerosol Dispensers (EEC Requirements) (Amendment) Regulations 1981, SI 1981/1549, reg 2.

The Weights and Measures Act 1985 (see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 16 et seq) does not, in so far as it relates to the marking of quantity on containers, apply to aerosol dispensers which are marked with the reversed epsilon: Aerosol Dispensers (EEC Requirements) Regulations 1977, SI 1977/1140, reg 2(3).

Where, in relation to any aerosol dispenser marked with the reversed epsilon, there appears a name and address or trade mark which is the name and address or trade mark of the person responsible for marketing the aerosol dispenser, that information is deemed not to be a trade description for the purposes of the Trade Descriptions Act 1968 (see PARA 471 et seq ante): Aerosol Dispensers (EEC Requirements) Regulations 1977, SI 1977/1140, reg 12(2).

4 See *ibid* reg 3(3) (added by SI 1996/2412).

5 See the Aerosol Dispensers (EEC Requirements) Regulations 1977, SI 1977/1140, reg 5(2). As to the entry of premises by an officer of an enforcement authority for the purpose of determining whether an offence has been committed, the inspection and testing of aerosol dispensers see regs 5, 6; as to the institution of proceedings see reg 10; and as to penalties for offences see reg 11 (amended by SI 1985/1279).

6 See the Aerosol Dispensers (EEC Requirements) Regulations 1977, SI 1977/1140, reg 4(1).

7 See *ibid* reg 4(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

575 In general

TEXT AND NOTES--Omitted. SI 1977/1140 replaced: see now Aerosol Dispensers Regulations 2009, SI 2009/2824.

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(B) ASBESTOS PRODUCTS

576. In general.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply:

- 1012 (1) crocidolite asbestos minerals or amosite asbestos minerals or any product containing any such minerals¹;
- 1013 (2) any of the following asbestos minerals, namely, chrysotile, fibrous anthophyllite, fibrous actinolite or fibrous tremolite or any product containing any such minerals unless the minerals or the product are duly² labelled³;
- 1014 (3) any of the following products:
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- 100. (a) toys;
- 101. (b) materials and preparations intended to be applied by spraying, except where their intended use is for undersealing a motor vehicle, the material or preparation in question is a bituminous compound and any of the asbestos minerals mentioned in head (2) above contained in the compound do not amount in total to more than 10 per cent by weight of the compound;
- 102. (c) products in powder form intended for private use or consumption where their supply is, or would be, by retail;
- 103. (d) products for use in connection with smoking including tobacco pipes and cigarette and cigar holders;
- 104. (e) paint and varnishes,
- 84
- 1015 which contain any of the asbestos minerals mentioned in head (2) above⁴.

The above provisions do not apply in any case in which the asbestos minerals or products in question are supplied for research and development or analysis, or an offer or agreement is made to supply them for such a purpose, or they are exposed or possessed for supply for such a purpose⁵.

¹ Asbestos Products (Safety) Regulations 1985, SI 1985/2042, reg 2(1). Regulation 2(1) does not, however, apply to:

³ (1) any torque converter which contains crocidolite asbestos minerals but no amosite asbestos minerals, is labelled in accordance with reg 2(2), Schedule and is intended for the repair of a motor vehicle (reg 2(2));

- 4 (2) any intermediate brake band which contains crocidolite but no amosite asbestos minerals, is labelled in accordance with reg 2(3), Schedule, is intended for the repair of a motor vehicle and was manufactured before 1 January 1986 (reg 2(3) (substituted by SI 1987/1979)).

The Asbestos Products (Safety) Regulations 1985, SI 1985/2042 (as amended) implement EC Council Directive 76/769 (OJ L262, 27.9.76, p 201) (as amended) (see PARA 393 ante).

2 le labelled in accordance with the Asbestos Products (Safety) Regulations 1985, SI 1985/2042, reg 3(1), Schedule.

3 Ibid reg 3(1) (amended by SI 1987/1979). Where, however, a product contains a component containing asbestos, it is sufficient compliance with the Asbestos Products (Safety) Regulations 1985, SI 1985/2042, reg 3 (as amended) if such component is labelled in accordance with reg 3(2), Schedule; and, where the size of such a component makes it impossible for a label to be affixed to the component, neither the component nor the product need be labelled: reg 3(2). Regulation 3(1) (as amended) is also subject to the Gas Catalytic Heaters (Safety) Regulations 1984, SI 1984/1892, reg 3 (as substituted) (see PARA 577 post): Asbestos Products (Safety) Regulations 1985, SI 1985/2042, reg 3(1) (as so amended).

4 Ibid reg 4 (substituted by SI 1987/1979).

5 Asbestos Products (Safety) Regulations 1985, SI 1985/2042, reg 1(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

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577. Gas catalytic heaters.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any gas catalytic heater¹ containing any asbestos or any catalytic unit² or insulation device suitable for incorporation in a gas catalytic heater if the unit or device contains any asbestos³.

1 For these purposes, 'gas catalytic heater' means an appliance suitable for use in any dwelling and designed for the heating of space by means of the catalytic oxidation of petroleum gas, being an appliance: (1) in which the source of the petroleum gas is in liquid form; and (2) which incorporates a catalytic unit: Gas Catalytic Heaters (Safety) Regulations 1984, SI 1984/1802, reg 2. 'Petroleum gas' means a hydrocarbon mixture consisting predominantly of butane, butylene, propane or propylene or of any mixture thereof: reg 2. For the meaning of 'catalytic unit' see note 2 infra.

2 For these purposes, 'catalytic unit' means a unit: (1) which contains a catalytic pad; (2) into which petroleum gas is injected; and (3) through which such gas is distributed and oxidised: ibid reg 2.

3 Ibid reg 3 (substituted by SI 1987/1979).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

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(C) BATTERIES AND ACCUMULATORS

578. Batteries and accumulators containing dangerous substances.

No person is to market a prohibited battery or prohibited accumulator¹, that is to say batteries and accumulators (whether incorporated into appliances or otherwise) containing more than 0.0005 per cent of mercury by weight, other than button cells and batteries composed of button cells with a mercury content of no more than 2 per cent by weight².

Any person who without reasonable excuse³ contravenes or fails to comply with the above provisions is guilty of an offence⁴.

A separate collection mark and the relevant heavy metal content mark must be printed on a battery or accumulator or, as the case may be, on the packaging for that battery or accumulator:

1016 (1) in relation to a battery or accumulator manufactured in Great Britain for sale in the European Community, by the manufacturer thereof; or

1017 (2) in a case where the manufacturer thereof is not established in Great Britain, the battery or accumulator is to be marketed in Great Britain and a separate collection mark and the relevant heavy metal content mark have not already been printed thereon or, as the case may be, on the packaging thereof, by the manufacturer's authorised representative established in Great Britain or by the person in Great Britain responsible for placing that battery or accumulator on the market⁵.

In relation to an appliance, other than an excluded appliance⁶, into which a battery or accumulator is or, as the case may be, is to be incorporated, the manufacturer of that appliance must ensure that the battery or accumulator which is or, as the case may be, is to be incorporated therein can be readily removed, when spent⁷, by the consumer⁸. An excluded appliance must be accompanied by instructions which inform the user of the appliance of the content of environmentally hazardous batteries or accumulators contained in the appliance and show how the batteries or accumulators can be removed safely⁹.

1 The Batteries and Accumulators (Containing Dangerous Substances) Regulations 1994, SI 1994/232 (as amended), apply on and after 18 December 2000 to: (1) batteries and accumulators put on the market as from 1 January 1999 containing more than 0.0005% of mercury by weight; (2) batteries and accumulators put on the market as from 18 September 1992 and containing (a) more than 25mg of mercury per cell, except alkaline manganese batteries; (b) more than 0.025% of cadmium by weight; (c) more than 0.4% of lead by weight; and (3) alkaline manganese batteries containing more than 0.025% of mercury by weight placed on the market as from 18 September 1992: reg 2A (added by SI 2000/3097).

2 Batteries and Accumulators (Containing Dangerous Substances) Regulations 1994, SI 1994/232, reg 3 (substituted by SI 2000/3097). The Batteries and Accumulators (Containing Dangerous Substances) Regulations 1994, SI 1994/232 (as amended) implement EC Council Directive 91/157 (OJ L78, 26.3.91, p 38) (see PARA 393 ante).

3 For these purposes, in relation to a failure to comply with the Batteries and Accumulators (Containing Dangerous Substances) Regulations 1994, SI 1994/232, reg 3 (as substituted), it is a 'reasonable excuse',

without prejudice to the generality of that expression, if that person believes, with reasonable cause, that the prohibited battery will not be used in the European Community: regs 2(2), 7(2).

4 Ibid reg 7(1) (substituted by SI 2000/3097). A person guilty of such an offence is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale: Batteries and Accumulators (Containing Dangerous Substances) Regulations 1994, SI 1994/232, reg 7(1) (as so substituted). As to the standard scale see PARA 498 note 3 ante. As to offences due to the act or default of other persons see the Batteries and Accumulators (Containing Dangerous Substances) Regulations 1994, SI 1994/232, reg 7(3); and as to offences by corporations see reg 8(1)-(3).

5 See ibid reg 4(1), (2) (amended by SI 2001/2551). As to the Secretary of State's powers of enforcement if he is notified that a battery or accumulator has not been marked in accordance with the Batteries and Accumulators (Containing Dangerous Substances) Regulations 1994, SI 1994/232, reg 4 (as amended) see reg 6(1), (3), (4); and as to offences in connection with contravention of reg 6 see regs 7(1), (3), 8 (reg 7(1) as substituted: see note 4 supra).

6 For these purposes, 'excluded appliance' means an appliance within the following list of categories of appliance: (1) appliances whose batteries are soldered, welded or otherwise permanently attached to terminals to ensure continuity of power supply in demanding industrial usage and to preserve the memory and data functions of information technology and business equipment, where use of the batteries or accumulators is technically necessary; (2) reference cells in scientific and professional equipment, and batteries and accumulators placed in medical devices designed to maintain vital functions and in heart pacemakers, where uninterrupted functioning is essential and the batteries and accumulators can be removed only by qualified personnel; (3) portable appliances, where replacement of the batteries by unqualified personnel could present safety hazards to the user or could affect the operation of the appliance, and professional equipment intended for use in highly sensitive surroundings, eg in the presence of volatile substances: ibid reg 2(2), Sch 1.

7 For these purposes, 'spent', in relation to a battery or accumulator, means a battery or accumulator which is not re-usable and is intended for recovery or disposal: ibid reg 2(2).

8 Ibid reg 5(1). As to the Secretary of State's powers of enforcement where he is notified that an appliance or excluded appliance does not meet the requirements of reg 5 which apply to it see reg 6(2)-(4); and as to offences in connection with contravention of reg 6 see regs 7(1), (3), 8(1)-(3) (reg 7(1) as substituted: see note 4 supra).

9 Ibid reg 5(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

578 Batteries and accumulators containing dangerous substances

TEXT AND NOTES--SI 1994/232 (as amended) replaced by the Batteries and Accumulators (Placing on the Market) Regulations 2008, SI 2008/2164.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(D) Children's Items/579. Toys.

(D) CHILDREN'S ITEMS

579. Toys.

Any product or material designed or clearly intended for use in play by children of less than 14 years of age (a 'toy') but excluding:

- 1018 (1) Christmas decorations;
- 1019 (2) detailed scale models for adult collectors;
- 1020 (3) equipment intended to be used collectively in playgrounds;
- 1021 (4) sports equipment;
- 1022 (5) aquatic equipment intended to be used in deep water;
- 1023 (6) folk dolls and decorative dolls and other similar articles for adult collectors;
- 1024 (7) 'professional' toys installed in public places (shopping centres, stations etc);
- 1025 (8) puzzles with more than 500 pieces or without picture, intended for specialists;
- 1026 (9) air guns and air pistols;
- 1027 (10) fireworks, including percussion caps;
- 1028 (11) slings and catapults;
- 1029 (12) sets of darts with metallic points;
- 1030 (13) electric ovens, irons or other functional products operated at a nominal voltage exceeding 24 volts;
- 1031 (14) products containing heating elements intended for use under the supervision of an adult in a teaching context;
- 1032 (15) vehicles with combustion engines;
- 1033 (16) toy steam engines;
- 1034 (17) bicycles designed for sport or for travel on the public highway;
- 1035 (18) video toys that can be connected to a video screen, operated at a nominal voltage exceeding 24 volts;
- 1036 (19) babies' dummies;
- 1037 (20) faithful reproductions of real firearms;
- 1038 (21) fashion jewellery for children,

must satisfy the essential safety requirements¹. The essential safety requirements relate to:

- 1039 (a) general principles²;
- 1040 (b) physical and mechanical properties³;
- 1041 (c) flammability⁴;
- 1042 (d) chemical properties⁵;
- 1043 (e) electrical properties⁶;
- 1044 (f) hygiene⁷; and
- 1045 (g) radioactivity⁸.

Any toy supplied for the first time in the Community⁹ on or after 1 January 1995:

- 1046 (i) which bears the CE marking is presumed, which presumption is rebuttable, to comply with¹⁰ all the statutory requirements¹¹;
- 1047 (ii) which conforms with the relevant national standards applicable to it where those standards relate to all matters covered by the essential safety requirements applicable to the toy are presumed, which presumption is rebuttable, to satisfy the essential safety requirements¹²;
- 1048 (iii) which has not been manufactured, or which has been manufactured only partly, in conformity with the relevant national standards applicable to it or for which no such standards exist or where the relevant national standards applicable to it relate only to some of the matters covered by the essential safety requirements applicable to the toy is presumed, which presumption is rebuttable, to satisfy the essential safety requirements if an EC type-examination is in force in respect of a model of the toy¹³.

Toys must be accompanied by the appropriate warnings and indications of precautions to be taken¹⁴ during use¹⁵.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any toy in respect of which the essential safety requirements are not satisfied, save that a person other than a manufacturer or his authorised representative established in the Community (or, where neither the manufacturer nor his authorised representative are established in the Community, the importer into the Community) may supply any toy, provided that the toy would not jeopardise the safety or health of users or third parties when used as intended or in a foreseeable way, bearing in mind the normal behaviour of children¹⁶.

1 See the Toys (Safety) Regulations 1995, SI 1995/204, regs 3(1), 4, Sch 3. 'Essential safety requirements' means the requirements in EC Council Directive 88/378 (OJ L187, 16.7.88, p 1) Annex II, which is set out in the Toys (Safety) Regulations 1995, SI 1995/204, reg 3(1), Sch 2: reg 3(1). The Toys (Safety) Regulations 1995, SI 1995/204, implement EC Council Directive 88/378 (OJ L187, 16.7.88, p 1) (amended by EC Council Directive 92/32 (OJ L154, 5.6.92, p 1); EC Council Directive 93/68 (OJ L220, 30.8.93, p 1); EC Council Directive 93/68 (OJ L22, 30.1.93, p 124)) (see PARA 393 ante).

2 See EC Council Directive 88/378 (OJ L187, 16.7.88, p 1) Annex II Pt I.

3 See *ibid* Annex II Pt II para 1.

4 See *ibid* Annex II Pt II para 2.

5 See *ibid* Annex II Pt II para 3.

6 See *ibid* Annex II Pt II para 4.

7 See *ibid* Annex II Pt II para 5.

8 See *ibid* Annex II Pt II para 6. No person may knowingly or recklessly add any radioactive substance in the production of personal ornaments or toys, or knowingly or recklessly import or export any personal ornament or toy to which any radioactive substance has been added in its production: Justification of Practices Involving Ionising Radiation Regulations 2004, SI 2004/1769, reg 20(1). As to enforcement see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 647.

9 For these purposes, 'the Community' means the European Community and other member states; and 'member state' means a state which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)) (the 'EEA Agreement'): Toys (Safety) Regulations 1995, SI 1995/204, reg 3(1). As to the European Economic Area and the EEA Agreement see PARA 386 note 1 ante.

10 *Ie* comply with all the provisions of the Toys (Safety) Regulations 1995, SI 1995/204.

11 *Ibid* reg 5(1). As to the approval of bodies to carry out (inter alia) examinations and tests of toys see reg 8; and as to EC type-examination certificates see reg 9.

12 *Ibid* reg 6.

13 *Ibid* reg 7.

14 *Ie* the warnings and indications of precautions to be taken during use contained in EC Council Directive 88/378 (OJ L187, 16.7.88, p 1) Annex IV, which is set out in the Toys (Safety) Regulations 1995, SI 1995/204, reg 10(8), Sch 4.

15 *Ibid* reg 10(8). As to CE marking and other information on or accompanying toys generally see reg 10(1)-(7), (9)-(12), Sch 5; as to the requirement to keep available and give information about toys which bear the CE marking see reg 11; and as to the requirement to give information about toys which do not bear the CE marking see reg 12.

16 *Ibid* regs 3(1), 13. As to the commencement of proceedings see reg 15; and as to the duties of enforcement authorities see reg 14.

The Toys (Safety) Regulations 1995, SI 1995/204, are to be treated for all purposes as if they were safety regulations within the meaning of the Consumer Protection Act 1987 (see PARA 539 ante): Toys (Safety) Regulations 1995, SI 1995/204, reg 16(1). A manufacturer, authorised representative or first supplier who contravenes reg 11(3) (requirement to have toys tested) is, however, guilty of an offence punishable on summary conviction with imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale: reg 16(2). As to the standard scale see PARA 498 note 3 ante.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

579 Toys

TEXT AND NOTES 1-8, 14--Directive 88/378 replaced with effect in part from 20 July 2011 and in part from 20 July 2013: European Parliament and EC Council Directive 2009/48 (OJ L170, 30.6.2009, p 1).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(D) Children's Items/580. Childcare articles and toys intended to be placed in the mouth by children of less than three years of age.

580. Childcare articles and toys intended to be placed in the mouth by children of less than three years of age.

It is recommended that member states should adopt the measures required to ensure a high level of child health protection in regard to phthalate-containing soft PVC childcare articles¹ and toys² intended to be placed in the mouth of children of less than three years of age, and notably the substances di-iso-nonyl phthalate (DINP), di (2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), di-iso-decyl phthalate (DIDP), di-n-octyl phthalate (DNOP) and butylbenzyl phthalate (BBP). Particular attention should be paid to the substances DINP and DEHP³.

1 For these purposes, 'childcare article' means any product designed to facilitate sleep, relaxation, the feeding of children, or sucking on the part of children: EC Commission Recommendation 98/485 (OJ L217, 5.8.98, p 35) art 2(2).

2 For these purposes, 'toy' means any product designed or clearly intended for use in play by children: *ibid* art 2(1).

3 *Ibid* art 1(1). As to the vetting procedure see art 1(2); and as to the supply of information to the EC Commission and the exchange of information with other member states see art 1(3), (4).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(D) Children's Items/581. Teats and dummies.

581. Teats and dummies.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply a teat¹ or dummy² which is intended to be, or is, brought into contact with foodstuffs unless the teat or dummy complies with the basic rules and criteria applicable to the method of determining release³.

1 For these purposes, 'teat' includes a substitute nipple made of elastomer or rubber that, when attached to a container holding a fluid, permits a baby to obtain the fluid from the container by sucking: N-nitrosamines and N-nitrosatable Substances in Elastomer or Rubber Teats and Dummies (Safety) Regulations 1995, SI 1995/1012, reg 2.

2 For these purposes, dummy' means a soother and includes an article made of elastomer or rubber used to satisfy sucking needs and to pacify infants: *ibid* reg 2.

3 *Ibid* regs 2-4. A teat or dummy must not pass on to release-test liquid (saliva test solution) under the conditions specified in reg 5, Sch 1 (basic rules for determining the release of N-nitrosamines and N-nitrosatable substances) any N-nitrosamine and N-nitrosatable substance detectable by a method which complies with the criteria laid down in reg 4, Sch 2 (criteria applicable to the method for determining the release of N-nitrosamines and N-nitrosatable substances) and which can detect the following quantities: (1) 0,01 milligram in total of N-nitrosamine released/kilogram (of the parts of the teat or dummy made of elastomer or rubber); and (2) 0,1 milligram in total of N-nitrosatable substances/kilogram (of the parts of the teat or dummy made of elastomer or rubber): reg 5. The N-nitrosamines and N-nitrosatable Substances in Elastomer or Rubber Teats and Dummies (Safety) Regulations 1995, SI 1995/1012, implement EC Commission Directive 93/11 (OJ L93, 17.4.93, p 37) (see PARA 393 ante).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(D) Children's Items/582. Wheeled child conveyances.

582. Wheeled child conveyances.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any wheeled child conveyance which does not conform to the required standard¹. For these purposes, 'wheeled child conveyance' means a wheeled vehicle, including a perambulator² or pushchair³, designed for the transport of one or more babies, infants or children, but does not include:

- 1049 (1) any vehicle designed for children with physical disabilities;
- 1050 (2) any toy, any bicycle or similar vehicle or any vehicle designed to be used by a baby, infant or child to move himself about or to aid such movement⁴.

1 Wheeled Child Conveyances (Safety) Regulations 1997, SI 1997/2866, regs 2(1), 3(1). For these purposes, the required standard is the British Standard Specification for safety requirements for wheeled child conveyances BS 7409: 1996 published on 15 April 1996 as amended by Amendment no 1, published on 15 November 1996: Wheeled Child Conveyances (Safety) Regulations 1997, SI 1997/2866, regs 2(1), 3(1). As to the supply of perambulators and pushchairs before 1 January 1999 see reg 3(2), (3). For the meaning of 'perambulator' see note 2 *infra*; and for the meaning of 'pushchair' see note 3 *infra*.

Where there is a requirement that a wheeled child conveyance, perambulator or pushchair is to conform to a British Standard, in whole or in part, such requirement is satisfied if the wheeled child conveyance, perambulator or pushchair conforms to any standard or specification recognised for use in a member state or any other state within the European Economic Area, provided that conformity to such a standard or specification provides a level of safety at least equivalent to that which would be provided by conformity to the relevant British Standard, or to the relevant part of such standard; and any reference to such a requirement is to be construed accordingly: reg 2(4). As to the European Economic Area see PARA 386 note 1 *ante*. As to the British Standards Institution see PARA 446 *ante*.

Where any standard is referred to, that reference is a reference to that standard as it has effect on 3 December 1997, provided that, where any such standard is amended or revised after that date and the amendment or revision is approved by the Secretary of State, that reference is to be construed at any time after such approval as a reference to that standard as so amended or revised: reg 2(3)(a). Where any standard specifies relevant requirements by reference to another standard, that reference is to be construed as a reference to that other standard as it has effect on 3 December 1997, provided that, where any such other standard is amended or revised after that date and the amendment or revision is approved by the Secretary of State, that reference is to be construed at any time after such approval as a reference to that other standard as so amended or revised: reg 2(3)(b).

2 For these purposes, 'perambulator' means a wheeled vehicle designed for the transport in a seated or recumbent position of one or two babies or infants who are placed inside a body of boat- or box-like shape, but does not include (1) any carry-cot or any transporter for a carry-cot; or (2) any toy, any bicycle or similar vehicle or any vehicle designed to be used by a baby, infant or child to move himself about or to aid such movement: *ibid* reg 2(1), (2).

3 For these purposes, 'pushchair' means a wheeled vehicle designed for the transport in a seated or reclining position of one or two infants or young children, distinguished from a perambulator by the absence of a body of boat- or box-like shape, but does not include (1) any vehicle designed for children with physical disabilities; or (2) any toy, any bicycle or similar vehicle or any vehicle designed to be used by a baby, infant or child to move himself about or to aid such movement: *ibid* reg 2(1), (2).

4 *Ibid* reg 2(1), (2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(E) Cigarette Lighter Refills/583. In general.

(E) CIGARETTE LIGHTER REFILLS

583. In general.

No person is to supply any cigarette lighter refill canister containing butane or a substance with butane as a constituent part to any person under the age of 18 years¹.

1 Cigarette Lighter Refill (Safety) Regulations 1999, SI 1999/1844, reg 2.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(F) Clothing/584. Hood cords on children's outer garments.

(F) CLOTHING

584. Hood cords on children's outer garments.

The hood of a child's outer garment¹ must not be designed to be secured by means of a cord drawn through the material².

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any such goods, irrespective of the date of the manufacture of the goods, in respect of which the above requirements are not satisfied, except where that person reasonably believes that such goods will not be used in the United Kingdom³.

1 For these purposes, 'outer garment' means a raincoat, overcoat, anorak or other garment suitable for use as outer wear: Children's Clothing (Hood Cords) Regulations 1976, SI 1976/2, reg 2(1). 'Child's outer garment' means an outer garment having a measurement not exceeding 44 centimetres across the chest when the finished garment is laid out as flat as possible without distorting its natural two-dimensional shape and buttoned or otherwise fastened as it is designed to be in normal wear: reg 2(1).

2 Ibid reg 3.

3 Consumer Protection Act 1987 (Commencement No 1) Order 1987, SI 1987/1680, arts 2, 6, 8, 9.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(F) Clothing/585. Nightwear.

585. Nightwear.

Children's nightwear¹, with the exception of pyjamas, babies' garments² and cotton terry towelling bath robes, is not to be made of any fabric of a kind which, after having been washed³, is not capable of complying with the flammability performance requirements⁴.

Pyjamas, babies' garments and cotton terry towelling bath robes, being children's nightwear, must be duly labelled⁵.

Adults' nightwear⁶ must be duly labelled⁷. Similarly, nightwear which includes any fabric which has been treated with chemicals to make it safer from fire must be duly labelled⁸.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any children's or adults' nightwear, other than secondhand nightwear, in respect of which any of the above requirements is not satisfied⁹; but this prohibition does not apply in any case where the person supplying the nightwear, offering or agreeing to supply the nightwear or exposing or possessing the nightwear for supply believes that it will not be worn in the United Kingdom¹⁰.

Where any person publishes or causes to be published on his behalf any printed advertisement which:

- 1051 (1) contains a description of pyjamas, babies' garments, cotton terry towelling bath robes (being children's nightwear) or adults' nightwear which is sufficient to enable such nightwear to be ordered by reference only to that description; and
- 1052 (2) indicates that he is willing, with or without restrictions, to accept offers made other than by persons who attend for that purpose at his place of business and to send such nightwear to an address nominated by the person making the offer,

he is not to supply, offer to supply, agree to supply, expose for supply or possess for supply any nightwear described in such an advertisement unless the prescribed requirements¹¹ in relation to that advertisement are satisfied¹².

1 For these purposes, 'children's nightwear' means any nightwear which is designed for wear by, and would normally be worn by, a person under the age of 13 years and which, in the case of any item of nightwear mentioned in the Nightwear (Safety) Regulations 1985, SI 1985/2043, reg 3(1), Sch 1 (nightdresses, dressing gowns, bath robes and similar garments), has no measurement in excess of the relevant measurement set out in Sch 1: reg 3(1). 'Nightwear' means nightdresses, pyjamas, dressing gowns, bath robes and other garments of a like nature and use and includes babies' garments: reg 3(1). For the meaning of 'baby's garment' see note 2 infra.

2 For these purposes, 'baby's garment' means any garment which has a chest measurement not exceeding 53 centimetres and which would normally be worn only by a child under the age of three months: *ibid* reg 3(1). 'Chest measurement' means twice the measurement of the garment across the chest when the garment is laid out as flat as possible without distorting its natural two-dimensional shape: reg 3(1).

3 *Ie* in accordance with *ibid* reg 11 (procedure for washing nightwear prior to testing).

4 *Ibid* reg 4(1). The labelling requirements are those set out in reg 4(2), Sch 2: reg 4(2). For these purposes, 'flammability performance requirements' means the flammability performance requirements specified in clauses 3.1.1 and 3.2.1 of BS 5722: Nightwear (Safety) Regulations 1985, SI 1985/2043, reg 3(1). 'BS 5722' means the British Standard Specification for flammability performance of fabrics and fabric assemblies used in sleepwear and dressing gowns BS 5722: 1984 published by the British Standards Institution and which came into effect on 31 August 1984: Nightwear (Safety) Regulations 1985, SI 1985/2043, reg 3(1). As to the testing of goods by an enforcement authority see reg 10. As to the British Standards Institution see PARA 446 ante.

Nightwear is to be regarded as not being made of fabric of a kind which is capable of complying with the flammability performance requirements unless all fabric and fabric assemblies of which the nightwear is composed comply with those requirements: reg 5(1). Where, however, a fabric out of which nightwear is made or with which nightwear is trimmed consists wholly of fibres of a synthetic substance of a kind which, on the application of heat, will melt without decomposing, that fabric is to be taken as complying with the flammability performance requirements, provided that: (1) any fabric stitched to that fabric consists wholly of fibres made of a synthetic substance of a kind which, on the application of heat, will melt without decomposing; and (2) any thread used for the purpose of stitching is of a kind which, on the application of heat, will melt without decomposing: reg 5(2). Nothing in the Nightwear (Safety) Regulations 1985, SI 1985/2043 (as amended) prevents the use of elastic or elastic thread for shirring: reg 5(3). For these purposes, 'fabric assembly' means a series of fabrics, including threads and trimmings, combined at the garment manufacturing stage: reg 3(1).

- 5 Ibid reg 4(2).
- 6 For these purposes, 'adult nightwear' means any nightwear which is not children's nightwear: *ibid* reg 3(1).
- 7 Ibid reg 6. The labelling requirements are those set out in reg 6, Sch 2: reg 6.
- 8 Ibid reg 7. The labelling requirements are those set out in reg 7, Sch 3: reg 7.
- 9 Ibid reg 8(1), (3).
- 10 Ibid reg 8(2).
- 11 *Ie* the requirements of *ibid* reg 9, Sch 4.
- 12 Ibid reg 9.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(F) Clothing/586. Personal protective equipment.

586. Personal protective equipment.

The EC provisions on the approximation of the law of member states relating to personal protective equipment¹ have effect within the United Kingdom for the purpose of laying down the conditions governing the placing of products on the market and their free movement within the Community and the basic safety requirements which such products must satisfy in order to ensure the health protection and safety of users². 'Personal protective equipment' means all equipment (including clothing affording protection against the weather) which is intended to be worn or held by a person at work and which protects him against one or more risks to his health or safety, and any addition or accessory designed to meet that objective³.

Approved bodies appointed as United Kingdom approved bodies or appointed by a member state other than the United Kingdom must be appointed to carry out one or more of the specified conformity assessment procedures⁴ and must be notified⁵ by the United Kingdom or by such other member state, as the case may be, to the Commission and the other member states⁶. The Secretary of State may from time to time appoint such persons as he thinks fit to be approved bodies for these purposes⁷.

1 *Ie* EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (amended by EC Council Directive 93/68 (OJ L220, 30.8.93, p 1); EC Council Directive 93/95 (OJ L276, 9.11.93, p 11); European Parliament and EC Council Directive 96/58 (OJ L236, 18.9.96, p 44)). EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (as amended) was implemented by the Personal Protective Equipment Regulations 2002, SI 2002/1144 (amended by SI 2004/693) (see *infra*) and applied by the Personal Protective Equipment at Work Regulations 1992, SI 1992/2966 (as amended) and the Provision and Use of Work Equipment Regulations 1998, SI 1998/2306 (as amended) (see HEALTH AND SAFETY AT WORK vol 52 (2009) PARAS 482 et seq, 528).

Parts of EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (as amended) are set out in the Personal Protective Equipment Regulations 2002, SI 2002/1144, Schs 1-9.

2 See *ibid* regs 3-7.

For these purposes, the Consumer Protection Act 1987 s 13 (prohibition notices and notices to warn: see PARA 544 ante) applies, to the extent that it does not already do so, to products to which EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (as amended) applies as it applies in relation to relevant goods under the Consumer Protection Act 1987 s 13 and as if in s 13(4), for 'six months' there was substituted 'three months': Personal Protective Equipment Regulations 2002, SI 2002/1144, regs 2(2), 16(1), Sch 10 para 1(2)(b).

The Personal Protective Equipment Regulations 2002, SI 2002/1144 (as amended: see note 1 *supra*) constitute safety provisions for the purposes of the Consumer Protection Act 1987 s 14 (suspension notices: see PARA 549 ante) and s 16 (forfeiture: see PARA 553 ante), and as if in s 14(6) for 'six months' there was substituted 'three months': Personal Protective Equipment Regulations 2002, SI 2002/1144, Sch 10 para 1(2)(c).

A weights and measures authority in Great Britain has the same duty to enforce the Personal Protective Equipment Regulations 2002, SI 2002/1144 (as amended), as it has in relation to the Consumer Protection Act 1987 Pt II (ss 10-19) (as amended) (see PARA 533 et seq ante); and Pt IV (ss 27-35) (enforcement provisions: see PARA 555 et seq ante) applies accordingly: Personal Protective Equipment Regulations 2002, SI 2002/1144, Sch 10 para 1(2)(a), (d).

3 *Ibid* reg 2(1).

4 *Ie* specified in *ibid* reg 11.

5 *Ie* in accordance with EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (as amended).

6 Personal Protective Equipment Regulations 2002, SI 2002/1144, reg 13.

7 *Ibid* reg 14(1). See further reg 14(2)-(7).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(G) Cosmetic Products/587. General requirements.

(G) COSMETIC PRODUCTS

587. General requirements.

No person is to supply¹ any cosmetic product² which is liable to cause damage to human health when it is applied under: (1) normal conditions of use; or (2) conditions of use which are reasonably foreseeable taking into account all the circumstances, including the cosmetic product's presentation, labelling, any instructions for its use and disposal and any other information or indication³ provided by the manufacturer, his agent⁴ or the person who supplies the cosmetic product on the first occasion that it is supplied in the Community⁵.

1 For these purposes, 'supply' includes offering to supply, agreeing to supply, exposing for supply or possessing for supply; and cognate expressions are to be construed accordingly: Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 3(1).

2 For these purposes, 'cosmetic product' means any substance or preparation intended to be placed in contact with any part of the external surfaces of the human body (that is to say, the epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, protecting them,

keeping them in good condition or correcting body odours except where such cleaning, perfuming, protecting, changing, keeping or correcting is wholly for the purpose of treating or preventing disease: *ibid* reg 3(1). 'Cosmetic product intended to come into contact with the mucous membranes' means a cosmetic product intended to be applied in the vicinity of the eyes, on the lips, in the oral cavity or to the external genital organs, and does not include any cosmetic product which is intended to come into only brief contact with the skin: reg 3(1).

3 For these purposes, the provision of any such instructions, information or indication does not exempt any person from the obligation to comply with any other provisions of the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (as amended), which are applicable to him: reg 4(3).

4 For these purposes, 'agent' means an agent established within the Community appointed by a manufacturer of a cosmetic product to act on his behalf in relation to the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (as amended): reg 3(1). For these purposes, 'the Community' means the European Community and other states in the European Economic Area: reg 3(1). As to the European Economic Area see PARA 386 note 1 *ante*.

5 *Ibid* regs 3(1), 4(1). Regulation 4(1) applies only to the supply by the manufacturer in or importer into the United Kingdom or, in the case of cosmetic products manufactured or imported into the United Kingdom on behalf of another person, by that other person: reg 4(2). The Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (as amended) implement EC Council Directive 76/768 (OJ L262, 27.9.76, p 169) (as amended) (see PARA 393 *ante*).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

587-593 Cosmetic Products

SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(G) Cosmetic Products/588. Particular requirements.

588. Particular requirements.

No person is to supply¹ a cosmetic product²:

- 1053 (1) which contains specified substances, colouring agents, preservatives³ or UV filters⁴;
- 1054 (2) which contains any of the substances⁵ designated as a specified risk material⁶, or any ingredient derived from any of those substances⁷;
- 1055 (3) where the final formulation has been tested on animals in order that the cosmetic product might satisfy the relevant requirements⁸ using a method other than an alternative method⁹, where one is specified¹⁰, after 11 September 2004 or after 11 March 2013 in relation to tests concerning repeated dose toxicity, reproductive toxicity and toxicokinetics or 11 March 2009 in relation to all other tests¹¹;
- 1056 (4) which contains any ingredients or combination of ingredients which have been tested on animals in order that the cosmetic product, ingredient or

combination of ingredients might satisfy any relevant requirements using a method other than an alternative method, where one is specified, after 11 September 2004 or after 11 March 2013 in relation to tests concerning repeated dose toxicity, reproductive toxicity and toxicokinetics or 11 March 2009 in relation to all other tests¹².

No cosmetic product containing any specified¹³ substance may be placed on the market after 1 January 2005 or supplied after 1 April 2005¹⁴.

No person is to test a finished cosmetic product¹⁵ on animals where such testing is undertaken in order that the product might satisfy any of the relevant requirements¹⁶. No person is to test any ingredient or combination of ingredients on animals in order to satisfy any of the relevant requirements using a method other than an alternative method, where an alternative method is specified, after 11 September 2004¹⁷; and no person may test any ingredient or combination of ingredients on animals in order to satisfy any of the relevant requirements using a method other than an alternative method after 11 March 2009¹⁸.

The supply of any cosmetic product in respect of which a claim that the product or its ingredients have not been tested on animals appears on the packaging or in any document, notice, label, ring or collar accompanying or referring to the product is only permitted if:

- 1057 (a) the manufacturer and his supplier have not carried out any such tests on the finished product, its prototype or on any of the ingredients contained in the finished product or its prototype;
- 1058 (b) the manufacturer and his supplier have not commissioned any such tests on the finished product, its prototype or on any of the ingredients contained in the finished product or its prototype;
- 1059 (c) the cosmetic product contains no ingredients which have been tested on animals by others for the purpose of developing new cosmetic products¹⁹.

1 As to the meaning of 'supply' see PARA 587 note 1 ante.

2 For the meaning of 'cosmetic product' see PARA 587 note 2 ante. No person may knowingly or recklessly import or export any cosmetic to which any radioactive substance has been added in its production: see the Justification of Practices Involving Ionising Radiation Regulations 2004, SI 2004/1769, reg 20(1). As to enforcement see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 647.

3 For these purposes, 'preservative' means a substance which is added to a cosmetic product for the primary purpose of inhibiting the development of micro-organisms in that product: Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 3(1).

4 See *ibid* reg 5(2). As to the substances, colouring agents, preservatives and UV filters so prescribed see reg 5(2), Schs 3-7 (amended by SI 2004/2988). For these purposes, 'UV filter' means a substance which is added to a sunscreen cosmetic product for the primary purpose of filtering ultraviolet rays for the purpose of protecting the epidermis of the user from harmful effects of such ultraviolet rays: Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 3(1).

The provisions of reg 5(2)-(5) (as amended) are without prejudice to reg 4 (see PARA 587 ante) and are subject to reg 6 (see PARA 589 post): reg 5(1).

5 For these purposes, no account is to be taken of any substance which is present in the cosmetic product only as a trace which could not reasonably have been removed during or after manufacture: *ibid* reg 5(4).

6 *Ie* in European Parliament and Council Regulation 999/2001 (OJ L147, 31.5.2001, p 1) Annex V.

7 Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 5(3). See also note 4 *supra*. Regulation 5(3) does not prohibit the supply of: (1) a cosmetic product which contains any tallow derivative, so long as the relevant method set out in reg 5(5), Sch 8 was used in the manufacture of that derivative and the manufacturer of the derivative has certified that that method was used in its manufacture (reg 5(5)); or (2) any cosmetic product which contains any substance or ingredient referred to in reg 5(3) which was manufactured before 1 April 1998 (reg 5(6)).

8 Ie the requirements of the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (as amended) or of EC Council Directive 76/768 (OJ L262, 27.9.76, p 169) (as amended): Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, regs 3(1), 5(7)-(13).

9 'Alternative method' means a testing method which is listed in ibid Sch 12: reg 3(1).

10 Ie in ibid Sch 12 Pt 1 col 4 or Pt 2 col 4: reg 5(7)(a).

11 Ibid reg 5(7), (8), Sch 12 Pts 1, 2. No date or alternative method is specified in Sch 12 Pt 2. See also note 4 supra.

12 Ibid reg 5(9), (10), Sch 12 Pts 1, 2.

13 Ie listed in EC Council Directive 76/768 (OJ L262, 27.9.76, p 169) Annex II under entry numbers 452-1132 (added by EC Commission Directive 2004/93 (OJ L300, 25.9.2004, p 13)).

14 Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 5(15) (added by SI 2004/2988).

15 'Finished cosmetic product' means the cosmetic product in its final formulation as placed on the market and made available to the final consumer, or its prototype: Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 3(1).

16 Ibid reg 5(11).

17 Ibid reg 5(12), Sch 12 Pts 1, 2.

18 Ibid reg 5(13).

19 Ibid reg 5(14). This does not apply to any cosmetic product placed on the market in a member state before 11 September 2004: reg 5(16). 'Member state' means a state which is a contracting party to the EEA Agreement; and 'EEA Agreement' means the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)), and as amended from time to time: Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 3(1). As to the European Economic Area and the EEA Agreement see PARA 386 note 1 ante.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

587-593 Cosmetic Products

SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(G) Cosmetic Products/589. Authorisation by the Secretary of State.

589. Authorisation by the Secretary of State.

The Secretary of State may authorise the use in a cosmetic product¹ for a maximum period of three years of a particular substance, not being a prescribed substance² or ingredient³.

In giving an authorisation, the Secretary of State may impose conditions relating to the use of a particular substance in a cosmetic product; and such conditions may relate to any matter which the Secretary of State considers appropriate including:

- 1060 (1) the purpose of the substance;
- 1061 (2) the type of cosmetic product;
- 1062 (3) the maximum concentration of the substance in any cosmetic product; and
- 1063 (4) information and marking requirements⁴.

The Secretary of State may, on reasonable notice, vary or revoke any authorisation so given⁵.

On giving, varying or revoking an authorisation, the Secretary of State must arrange for the authorisation, variation or revocation, as the case may be, to be published in such manner as he considers appropriate for bringing it to the attention of persons who, in his opinion, would be likely to have an interest in it⁶.

No person is to be convicted of an offence under the Consumer Protection Act 1987⁷ by reason of a cosmetic product's containing a particular substance, provided that, at the time when, but for this provision, an offence would have been committed, the use of that particular substance in that cosmetic product was duly authorised and all the conditions imposed by the authorisation were complied with⁸.

1 For the meaning of 'cosmetic product' see PARA 587 note 2 ante.

2 Ie not being a substance or ingredient referred to in the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 5(3) (see PARA 588 head (2) ante) or a substance listed in reg 5(2), Schs 3, 4.

3 Ibid reg 6(1).

4 Ibid reg 6(2).

5 Ibid reg 6(3).

6 Ibid reg 6(4).

7 Ie an offence under the Consumer Protection Act 1987 s 12: see PARA 540 ante.

8 Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 6(5).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

587-593 Cosmetic Products

SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(G) Cosmetic Products/590. Marking of cosmetic products.

590. Marking of cosmetic products.

No person is to supply¹ a cosmetic product² unless:

- 1064 (1) the packaging in which it is supplied bears, in lettering which is visible, indelible and easily legible, a list of its cosmetic ingredients³ (preceded by the word 'ingredients') in descending order of weight, the weight to be determined at the time the ingredients are added to the product⁴;
- 1065 (2) the container and packaging in which it is supplied bear the prescribed particulars⁵ in lettering which is visible, indelible and easily legible⁶.

1 As to the meaning of 'supply' see PARA 587 note 1 ante.

2 For the meaning of 'cosmetic product' see PARA 587 note 2 ante.

3 For these purposes, 'cosmetic ingredient' means any chemical substance or preparation of synthetic or natural origin, except for perfume and aromatic compositions, used in the composition of a cosmetic product: Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 3(1). As to the ingredients which are not to be regarded as cosmetic ingredients for the purposes of reg 7(1) see reg 7(9)(a).

4 Ibid reg 7(1). The particulars referred to in reg 7(1) must be in a language easily understood by the consumer: reg 7(5)(b). As to the further requirements in relation to the marking on packaging see reg 7(9)-(12).

5 As to the particulars so specified in ibid reg 7(2)(a)-(i), and as to the further requirements in relation to marking on containers and packaging, see reg 7(3)-(8), (13)-(15).

6 Ibid reg 7(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

587-593 Cosmetic Products

SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(G) Cosmetic Products/591. Product information.

591. Product information.

Where a cosmetic product¹ is manufactured or supplied² in the United Kingdom, a responsible person³ must, for control purposes, keep readily accessible to a United Kingdom competent authority⁴ at the address or registered office specified on the container or packaging of the cosmetic product⁵ the following information⁶:

- 1066 (1) the qualitative and quantitative composition of the product, except to the extent that the product is composed of any perfume or perfume composition, in which case the responsible person is only required to keep the name and code number of the perfume or perfume composition and the identity of the supplier⁷;
- 1067 (2) the physico-chemical and microbiological specifications of the raw materials and the finished product and the purity and microbiological control criteria of the cosmetic product⁸;
- 1068 (3) the method of manufacture which must be in accordance with good manufacturing practice, that is to say that the cosmetic product must be manufactured in such a way that under normal and reasonably foreseeable conditions of use it does not endanger human health or safety⁹;
- 1069 (4) an assessment¹⁰ of the safety for human health of the finished product taking into consideration (a) the general toxicological profile of each ingredient used; (b) its chemical structure; (c) its level of exposure; (d) the specific exposure characteristics of the areas on which the cosmetic product will be applied; and (e) the specific exposure characteristics of the class of individuals for whom the cosmetic product is intended¹¹;
- 1070 (5) a specific assessment¹² of the safety for human health of the finished product taking into consideration the matters specified in head (4) above in respect of cosmetic products intended for use on children under the age of three and for cosmetic products intended exclusively for use in external intimate hygiene¹³;
- 1071 (6) the name and address of the qualified person or persons¹⁴ responsible for the assessment referred to in heads (4) and (5) above¹⁵;
- 1072 (7) existing data on undesirable effects on human health resulting from use of the cosmetic product¹⁶;
- 1073 (8) proof of the effect claimed for the cosmetic product, where justified by the nature of the effect or product¹⁷;
- 1074 (9) data on any animal testing performed by the manufacturer, his agents or suppliers, relating to the development or safety evaluation of the product or its ingredients, including any animal testing performed to meet the legislative or regulatory requirements of countries which are not member states¹⁸.

Where the place of manufacture or initial importation into the Community of a type of cosmetic product is within the United Kingdom, the responsible person must notify a United Kingdom competent authority of the address of the place of manufacture or, as the case may be, initial importation into the Community of that type of cosmetic product before its first supply in the Community¹⁹.

A United Kingdom competent authority may, where difficulties are encountered in providing prompt and appropriate medical treatment, require that any holder of appropriate and adequate information on substances used in cosmetic products make such information available to it, where the difficulties referred to may be overcome or eased by the provision of such information²⁰.

1 For the meaning of 'cosmetic product' see PARA 587 note 2 ante.

2 As to the meaning of 'supply' and cognate expressions see PARA 587 note 1 ante.

3 For these purposes, 'responsible person' means, in relation to a relevant cosmetic product: (1) the manufacturer of that product; (2) the manufacturer's agent; (3) the person to whose order that cosmetic product is manufactured; or (4) where the manufacturer or the person to whose order the cosmetic product is manufactured is not established in the Community and either the manufacturer has not appointed an agent or the manufacturer's agent is not the supplier of that cosmetic product, the person who first supplies the cosmetic product in the Community: Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 8(1)(a). For the meaning of 'agent' see PARA 587 note 4 ante. For the meaning of 'the Community' for these purposes see PARA 587 note 4 ante. Where the responsible person is the manufacturer or the person who first imports the

cosmetic product into the Community, he must possess appropriate experience or an appropriate level of professional qualification in accordance with the legislation and practice of the United Kingdom if it is the place of manufacture or first importation: reg 9(7).

4 The United Kingdom competent authority is the Secretary of State, provided that he may from time to time appoint such persons as he thinks fit to be a United Kingdom competent authority in addition to, or in substitution for, himself: *ibid* reg 8(2). As to the Secretary of State see *PARA 15 ante*.

5 *Ie* in accordance with *ibid* reg 7(2)(a): see *PARA 590 ante*.

6 *Ibid* reg 9(1). Where the manufacturer manufactures a cosmetic product at two or more places within the Community, and one of those places is within the United Kingdom, the responsible person may choose a single place of manufacture within the Community where the information referred to in reg 9(1) will be kept available, provided that, if requested by a United Kingdom competent authority, he informs that authority of the location at which such information is to be kept: reg 9(8). Where the information referred to in reg 9(1) is to be kept accessible to a United Kingdom competent authority, it must be in English or a language readily understood by that authority: reg 9(9).

7 *Ibid* reg 9(1)(a).

8 *Ibid* reg 9(1)(b).

9 *Ibid* reg 9(1)(c).

10 Such an assessment must be carried out in accordance with the principles of good laboratory practice referred to in European Parliament and Council Directive 2004/10 (OJ L050, 20.2.2004, p 44) art 1: Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 9(2).

11 *Ibid* reg 9(1)(d), (2). Head (4)(d), (e) in the text does not apply in respect of cosmetic products placed on the market in the Community prior to 11 September 2004: reg 9(10).

12 See note 10 *supra*.

13 Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 9(1)(e). This does not apply in respect of cosmetic products placed on the market in the Community prior to 11 September 2004: reg 9(10).

14 As to the persons so qualified see *ibid* reg 9(5).

15 *Ibid* reg 9(1)(f).

16 *Ibid* reg 9(1)(g).

17 *Ibid* reg 9(1)(h).

18 *Ibid* reg 9(1)(i). This does not apply in respect of cosmetic products placed on the market in the Community prior to 11 September 2004: reg 9(10). For the meaning of 'member state' see *PARA 588 note 19 ante*.

19 *Ibid* reg 10.

20 *Ibid* reg 11(1). Where the information referred to in reg 11(1) is made available, the United Kingdom competent authority must ensure that such information is used solely for the purposes of the treatment referred to in reg 11(1): reg 11(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see *PARA 725A*.

587-593 Cosmetic Products

SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(G) Cosmetic Products/592. Trade secrecy.

592. Trade secrecy.

A responsible person¹ who, for reasons of trade secrecy, wishes not to include one or more cosmetic ingredients² in the list of cosmetic ingredients otherwise required³ to be shown on the packaging must submit a request to that effect to the competent authority⁴. The applicant⁵ must ensure that:

- 1075 (1) the request for confidentiality includes the prescribed particulars⁶; and
- 1076 (2) any amendments to the particulars provided for in head (1) above are communicated as quickly as possible to the competent authority and, in particular, that all changes to the names of cosmetic products containing the cosmetic ingredient in respect of which confidentiality is or has been sought are communicated to the competent authority at least 15 days before those cosmetic products are supplied under their new name⁷.

Within four months of receipt of a request for confidentiality in respect of which the requirements of head (1) above are satisfied, the competent authority must examine the request and inform the applicant in writing of its decision⁸.

If the competent authority decides to grant its approval to the applicant's request, it must, in so notifying the applicant of its decision, also notify him of the registration number which will replace the cosmetic ingredient⁹ in question¹⁰. A decision granting confidentiality is valid¹¹ for a period of five years¹². An applicant may, however, by submitting a reasoned request to the competent authority, request that that period be extended¹³; but any extension of the period of confidentiality is not to exceed three years¹⁴.

If the competent authority decides to refuse to grant its approval to the applicant's request, it must, in its notification of such refusal, include a statement of the reasons for refusal and a clear explanation of appeals procedures and their time limits¹⁵.

1 For the meaning of 'responsible person' see PARA 591 note 3 ante.

2 For the meaning of 'cosmetic ingredient' see PARA 590 note 3 ante.

3 Ie by the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 7(1): see PARA 590 ante.

4 Ibid reg 12(1). As to the meaning of 'competent authority' see PARA 591 note 4 ante. Regulation 12(1) is without prejudice to the provisions of reg 3 (see PARA 587 ante), reg 4 (as amended) (see PARA 587 ante), reg 8 (see PARA 591 ante) and reg 10 (see PARA 591 ante): reg 12(1).

5 For these purposes, 'applicant' means a responsible person who submits a request for confidentiality: ibid reg 12(2).

6 Ie the particulars laid down in ibid reg 12(3)(a), Sch 10 Pt I.

7 Ibid reg 12(3).

8 Ibid reg 12(4). In exceptional cases the competent authority may inform the applicant in writing that a period of two months, in addition to the four-month period referred to in reg 12(4), is required for the examination of the request: reg 12(7).

9 Ie in the list referred to in ibid reg 7(1).

10 Ibid reg 12(5). The number is to be allocated to the product in accordance with the procedure provided for in reg 12(5), Sch 10 Pt II: reg 12(5). The competent authority may withdraw its approval to an applicant's request for confidentiality if it considers this appropriate, taking into account: (1) any amendments to the particulars provided for in reg 12(3)(a) (see head (1) in the text) which are communicated to it in accordance with reg 12(3)(b) (see head (2) in the text); and (2) any new information which comes to its attention which makes it imperative, particularly for compelling reasons of public health, for it so to act; and, in withdrawing its approval, the competent authority must comply with the provisions of reg 12(4) (see the text to note 8 supra), reg 12(6) (see the text to note 15 infra) and reg 12(7) (see note 8 supra): reg 12(12).

11 Ie subject to ibid reg 12(9)-(12): see note 10 supra; and the text to notes 13-14 infra.

12 Ibid reg 12(8).

13 Ibid reg 12(9). In the event of a reasoned request being so submitted, the competent authority must deal with the request in accordance with reg 12(4)-(6): reg 12(10).

14 Ibid reg 12(11).

15 Ibid reg 12(6).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

587-593 Cosmetic Products

SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(G) Cosmetic Products/593. Contravention of regulations.

593. Contravention of regulations.

Any contravention of the requirements of the Cosmetic Products (Safety) Regulations 2004¹ is to be treated for all purposes as if it were a contravention of a requirement of safety regulations made² under the Consumer Protection Act 1987³; but the term of imprisonment to which a person guilty of an offence of contravening any of the above requirements is liable on summary conviction is not to exceed three months⁴.

Any person who contravenes any of the regulations relating to animal testing⁵ or causes or permits another person to contravene those regulations, is guilty of an offence⁶. Where such an offence committed by a body corporate is proved to have been committed with the consent or connivance of an officer⁷ or to be attributable to any neglect on his part, the officer as well as

the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly⁸.

No proceedings for an offence under the Regulations is to be commenced after the end of the period of three years beginning with the date of the commission of the offence, or the end of the period of one year beginning with the date of the discovery of the offence by the prosecutor, whichever is earlier⁹.

1 Ie a requirement of the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (as amended), except reg 5(7)-(13) (see the text to notes 5-8 infra).

2 Ie safety regulations made under the Consumer Protection Act 1987 s 11 (as amended): see PARA 539 ante.

3 Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 13(1).

4 Ibid reg 13(2) (amended by SI 2004/2988). As to the penalty normally imposed for offences against the safety regulations see the Consumer Protection Act 1987 s 12(5) and PARA 540 ante; and as to enforcement see the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 16(1)-(3) (amended by SI 2004/2988).

Any test of goods purchased under the Consumer Protection Act 1987 s 28 (see PARA 556 ante) or seized under s 29 (see PARA 557 ante) by or on behalf of an enforcement authority for the purpose of ascertaining whether the provisions of the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (as amended) have been contravened must in all cases be carried out in accordance with the provisions of reg 17, Sch 11 paras 2-5; and any test for which a method is specified in Sch 11 para 6 must be carried out in accordance with that method: reg 17.

5 Ie ibid reg 5(7)-(13): see PARA 588 ante.

6 Ibid reg 14(1). Any person guilty of an offence under reg 14(1) is liable, on summary conviction, to a fine not exceeding the statutory maximum or to imprisonment not exceeding three months and, on conviction on indictment, to a fine or to imprisonment not exceeding six months: reg 14(2). As to the statutory maximum see PARA 401 note 31 ante.

For the purposes of enforcement, the provisions of reg 5(7)-(13) are to be treated as if they were safety regulations made under the Consumer Protection Act 1987 s 11 (as amended) (see PARA 539 ante), provided that s 12 (see PARA 539 ante) is not to apply to them: Cosmetic Products (Safety) Regulations 2004, SI 2004/2152, reg 15.

7 'Officer' in relation to a body corporate, means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity: ibid reg 14(4).

8 Ibid reg 14(3). If the affairs of the body corporate are managed by its members, reg 14(3) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: reg 14(5).

9 Ibid reg 18.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

587-593 Cosmetic Products

SI 2004/2152 replaced: Cosmetic Products (Safety) Regulations 2008, SI 2008/1284 (amended by SI 2008/2173, SI 2008/2566, SI 2009/796, SI 2009/1346, SI 2009/2562, SI 2009/3367).

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(H) DANGEROUS SUBSTANCES AND PREPARATIONS

594. Textile articles intended to come into contact with the skin; children's dressing gowns.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any textile article¹ intended to come into contact with the skin, or any child's dressing-gown², whether or not it is intended to come into contact with the skin, which, in either case, has been:

- 1077 (1) treated with tris (2,3-dibromopropyl) phosphate;
- 1078 (2) made from fabric treated with the said substance;
- 1079 (3) made from fabric containing the said substance;
- 1080 (4) treated with tri (aziridin-1-yl) phosphine oxide or polybrominated biphenyls;
- 1081 (5) made from fabric treated with any substance mentioned in head (4) above; or
- 1082 (6) made from fabric containing fibre containing any substance mentioned in head (4) above³.

The above provisions do not apply in any case where the goods in question are supplied for research and development or analysis⁴.

1 For these purposes, 'textile article' includes any garment or linen: Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 4(1)(c).

2 For these purposes, 'child's dressing-gown' means a dressing-gown which has a finished garment chest measurement not exceeding 97 centimetres and an underarm sleeve measurement not exceeding 68 centimetres: *ibid* reg 4(1)(a). 'Finished garment chest measurement' means twice the measurement of the garment across the chest when the garment is laid out as flat as possible without distorting its natural two-dimensional shape and, where appropriate, buttoned or otherwise fastened as it is designed to be in normal wear: *ibid* reg 4(1)(b).

3 *Ibid* regs 1(2), 4(2) (reg 1(2) substituted by SI 1996/2635). The Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844 (as amended), implement EC Council Directive 76/769 (OJ L262, 27.9.76, p 201) (as amended) (see PARA 393 ante).

4 Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 2 (amended by SI 1999/2084).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

594-601 Dangerous Substances and Preparations

These provisions now replaced by REACH Enforcement Regulations 2008, SI 2008/2852: see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 574 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(H) Dangerous Substances and Preparations/595. Ornamental objects, tricks, jokes and games.

595. Ornamental objects, tricks, jokes and games.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply:

- 1083 (1) any ornamental object¹ intended to produce light or colour effects by means of different phases;
- 1084 (2) any trick or joke; or
- 1085 (3) any game for one or more participants or any object intended to be used as such, even with ornamental aspects,

which contain any liquid substance or preparation 'dangerous for supply'².

The above provisions do not apply in any case where the goods in question are supplied for research and development or analysis³.

¹ For these purposes, 'ornamental object' includes any ornamental lamp or ashtray and any other article designed both to be ornamental and to perform some other function: Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 3(1).

² Ibid regs 1(2), 3(2) (reg 1(2) substituted by SI 1996/2635). For these purposes, 'dangerous for supply' has the meaning given by the Chemicals (Hazard Information and Packaging for Supply) Regulations 2002, SI 2002/1689 (as amended): Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 3(2) (amended by SI 1996/2635; SI 2000/2897; SI 2002/1770; SI 2002/3010; SI 2004/1031; and SI 2004/1417).

³ Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 2 (amended by SI 1999/2084).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

594-601 Dangerous Substances and Preparations

These provisions now replaced by REACH Enforcement Regulations 2008, SI 2008/2852: see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 574 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(H) Dangerous Substances and Preparations/596. Novelties.

596. Novelties.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply:

- 1086 (1) any injurious tear-gas capsule, that is to say any article designed or intended to afford amusement to any person by causing discomfort to any other person by means of the use or exploitation of the lachrymatory properties of any substance contained in the article, being a substance which is capable of causing personal injury in the course of, or as a result of, the use of the article;
- 1087 (2) any article which contains more than 1.5 millilitres of liquid consisting of sulphides of ammonia or a mixture or solution of such sulphides with or in any other substance, being an article which is designed or intended to afford amusement to any person by causing discomfort to any other person by means of the use or exploitation of the obnoxious properties of such sulphides; or
- 1088 (3) anything which is designed or intended to afford amusement to any person by causing discomfort to any other person by means of the use or exploitation of the ability or tendency of soap bark powder (*Quillaja saponaria*) or its derivatives containing saponins, powder of the roots of *Helleborus viridis* or of *Helleborus niger*, powder of the roots of *Veratrum album* or of *Veratrum nigrum*, benzidine or its derivatives, 2-nitrobenzaldehyde or wood powder to induce sneezing¹.

The above provisions do not apply in any case where the goods in question are supplied for research and development or analysis².

¹ Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, regs 1(2), 5 (reg 1(2) substituted by SI 1996/2635).

² Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 2 (amended by SI 1999/2084).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

594-601 Dangerous Substances and Preparations

These provisions now replaced by REACH Enforcement Regulations 2008, SI 2008/2852: see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 574 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(H) Dangerous Substances and Preparations/597. Substances and preparations capable of being used as fuel in decorative lamps.

597. Substances and preparations capable of being used as fuel in decorative lamps.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply:

- 1089 (1) any liquid substance or preparation which:
 85
 105. (a) is required to be duly classified¹;
 106. (b) if so classified, would be required to be labelled with risk phrase R65 ('harmful: may cause lung damage if swallowed'); and
 107. (c) can be used as fuel in decorative lamps,
 86
 1090 which contains either perfume or, unless its addition is required for fiscal reasons², a colouring agent or both³;
 1091 (2) any liquid substance or preparation referred to in head (1) above which is intended for use as fuel in decorative lamps, unless the packaging in which it is contained is marked legibly and indelibly with the words 'Keep lamps filled with this liquid out of the reach of children'⁴.

Neither head (1) nor head (2) above prohibits the supply, in a single package, in a quantity of more than 15 litres, of any such liquid substance or preparation⁵.

The above provisions do not apply in any case where the goods in question are supplied for research and development or analysis⁶.

1 In accordance with the Chemicals (Hazard Information and Packaging for Supply) Regulations 2002, SI 2002/1689, reg 4 (classification of substances and preparations dangerous for supply):.

2 As to the addition of a colouring agent to certain oils for fiscal reasons see the Hydrocarbon Oil Regulations 1973, SI 1973/1311 (as amended); and CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 542.

3 Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, regs 1(2), 3A(1), (2) (reg 1(2) substituted by SI 1996/2635; Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 3A added by SI 1999/2084).

4 Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, regs 1(2), 3A(1), (3) (as substituted and added: see note 3 supra).

5 Ibid regs 1(2), 3A(4) (as substituted and added: see note 3 supra).

6 Ibid reg 2 (amended by SI 1999/2084).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

594-601 Dangerous Substances and Preparations

These provisions now replaced by REACH Enforcement Regulations 2008, SI 2008/2852: see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 574 et seq.

Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(H) Dangerous Substances and Preparations/598. Benzene.

598. Benzene.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply:

- 1092 (1) any substance or preparation, other than:
87
 - 108. (a) certain motor fuels¹;
 - 109. (b) substances and preparations for use in industrial processes; and
 - 110. (c) certain waste²,
- 88
 - 1093 containing benzene in concentrations equal to or greater than 0.1 per cent by mass³;
 - 1094 (2) any toy, including any kit for making balloons, or part of a toy which contains benzene, or any substance which is intended for making balloons and contains benzene, where the concentration of benzene in the free state is in excess of five milligrams per kilogram of the mass of the toy or part of the toy or substance, as the case may be⁴.

The above provisions do not apply in any case where the goods in question are supplied for research and development or analysis⁵.

1 Ie motor fuels covered by EC Council Directive 85/210 (OJ L96, 3.4.85, p 25) (amended by EC Council Directive 87/416 (OJ L225, 13.8.87, p 33)).

2 Ie waste covered by EC Council Directive 91/156 (OJ L78, 26.3.91, p 32) or EC Council Directive 91/689 (OJ L377, 31.12.91, p 20).

3 Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 6(1), (2).

4 Ibid reg 6(3).

5 Ibid reg 2 (amended by SI 1999/2084).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

594-601 Dangerous Substances and Preparations

These provisions now replaced by REACH Enforcement Regulations 2008, SI 2008/2852: see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 574 et seq.

Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(H) Dangerous Substances and Preparations/599. Carcinogens, mutagens and substances toxic for reproduction.

599. Carcinogens, mutagens and substances toxic for reproduction.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply to any member of the general public or supply, offer to supply, agree to supply, expose for supply or possess for supply to any person for the purposes of sale to the general public:

- 1095 (1) any substance or any preparation containing any substance which is listed¹ under the heading 'Carcinogenic substances of category 1' or 'Carcinogenic substances of Category 2' and is required² to be labelled 'toxic (T)' or 'very toxic (T+)' together with standard risk phrase R45 ('may cause cancer') or R49 ('may cause cancer by inhalation') or which would be required to be so labelled but for certain exceptions³, where the concentration of that substance is equal to or greater than the prescribed concentration for that substance⁴;
- 1096 (2) any substance or preparation containing any substance which is listed⁵ under the heading 'Mutagenic substances of category 1' or 'Mutagenic substances of Category 2' and is required⁶ to be labelled with standard risk phrase R46 ('may cause heritable genetic damage') or which would be required to be so labelled but for certain exceptions⁷, where the concentration of that substance is equal to or greater than the prescribed concentration for that substance⁸;
- 1097 (3) any substance or preparation containing any substance which is listed⁹ under the heading 'Toxic for reproduction substances of Category 1' or 'Toxic for reproduction substances of Category 2' and is required¹⁰ to be labelled with standard risk phrase R60 ('may impair fertility') or R61 ('may cause harm to the unborn child') or both R60 and R61, or which would be required to be so labelled but for certain exceptions¹¹, where the concentration of that substance is equal to or greater than the prescribed concentration¹² for that substance¹³.

The above provisions do not apply to:

- 1098 (a) a medicinal product¹⁴;
- 1099 (b) a veterinary product¹⁵;
- 1100 (c) a cosmetic product¹⁶;
- 1101 (d) certain motor fuel¹⁷;
- 1102 (e) mineral oil products intended for use as fuel in mobile or fixed combustion plants;
- 1103 (f) fuels sold in closed systems; and
- 1104 (g) artists' paints¹⁸.

Nor do the above provisions apply in any case where the goods in question are supplied for research and development or analysis¹⁹.

1 Ie in the Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 6A, Sch 2 (reg 6A added by SI 1996/2635; Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, Sch 2 substituted by SI 2000/2897 and amended by SI 2002/3010 and SI 2004/1417).

2 Ie under the Chemicals (Hazard Information and Packaging for Supply) Regulations 2002, SI 2002/1689 (as amended).

3 The Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 6A (as added) refer to any of the exceptions contained in the Chemicals (Hazard Information and Packaging for Supply) Regulations 1994, SI 1994/3247, reg 3(1)(a), (f), (n), (o), but these provisions have been revoked.

4 Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 6A (as added: see note 1 supra).

5 See note 1 supra.

6 See note 2 supra.

7 See note 3 supra.

8 Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 6B (added by SI 1996/2635).

9 See note 1 supra.

10 See note 2 supra.

11 See note 3 supra.

12 For these purposes, 'the prescribed concentration' of any substance means either: (1) the concentration specified in the approved supply list; or (2) where no concentration limit for that substance is specified in the approved supply list, the concentration specified in the Chemicals (Hazard Information and Packaging for Supply) Regulations 2002, SI 2002/1689, Sch 3 Pt II para 6 Table VI or VIA: Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 1(2) (substituted by SI 1996/2635).

13 Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 6C (added by SI 1996/2635).

14 For these purposes, 'medicinal product' means: (1) a medicinal product (a) which is a 'relevant medicinal product' within the meaning of the Medicines for Human Use (Marketing Authorisations etc) Regulations 1994, SI 1994/3144, reg 1(2) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 20); (b) which is an 'investigational medicinal product' within the meaning of the Medicines for Human Use (Clinical Trials) Regulations 2004, SI 2004/1031, reg 2(1) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 82); or (c) in respect of which there is for the time being a certificate of registration granted under the Medicines (Homeopathic Medicinal Products for Human Use) Regulations 1994, SI 1994/105 (as amended) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 205); or (2) an article or substance to which provisions of the Medicines Act 1968 apply by virtue of an order made under s 104 or s 105 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 9): Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 1(2) (as substituted (see note 12 supra); and amended by SI 2004/1031).

15 For these purposes, 'veterinary product' means: (1) a medicinal product which is supplied in accordance with an animal test certificate within the meaning of the Medicines Act 1968 s 32(2)(b) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 127); or (2) a product supplied for administration in accordance with the Medicines (Restrictions on the Administration of Veterinary Medicinal Products) Regulations 1994, SI 1994/2987, reg 5(1)(c) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 40): Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 1(2) (as substituted: see note 12 supra).

16 Ie within the meaning of the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (as amended): see PARA 587 note 2 ante.

17 Ie motor fuel which complies with the relevant requirements of the Motor Fuel (Composition and Content) Regulations 1999, SI 1999/3107, reg 3 (as amended): see FUEL AND ENERGY; ENVIRONMENTAL QUALITY AND PUBLIC HEALTH.

18 Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 2A (added by SI 1996/2635).

19 Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 2 (amended by SI 1999/2084).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

594-601 Dangerous Substances and Preparations

These provisions now replaced by REACH Enforcement Regulations 2008, SI 2008/2852: see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 574 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(H) Dangerous Substances and Preparations/600. Chlorinated solvents.

600. Chlorinated solvents.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply to any member of the general public or supply, agree to supply, expose for supply or possess for supply to any person for the purposes of sale to the general public any substance or preparation containing any of the following in concentrations equal to or greater than 0.1 per cent by mass:

- 1105 (1) chloroform;
- 1106 (2) carbon tetrachloride;
- 1107 (3) 1,1,2 - trichloroethane;
- 1108 (4) 1,1,2,2 - tetrachloroethane;
- 1109 (5) 1,1,1,2 - tetrachloroethane;
- 1110 (6) pentachloroethane;
- 1111 (7) 1,1 - dichloroethylene;
- 1112 (8) 1,1,1 - trichloroethane¹.

The above provisions do not apply to:

- 1113 (a) a medicinal product²;
- 1114 (b) a veterinary product³;
- 1115 (c) a cosmetic product⁴.

Nor do the above provisions apply in any case where the goods in question are supplied for research and development or analysis⁵.

¹ Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 6D(1) (added by SI 1996/2635).

² For the meaning of 'medicinal product' see PARA 599 note 14 ante.

³ For the meaning of 'veterinary product' see PARA 599 note 15 ante.

⁴ Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 6D(2) (added by SI 1996/2635). For these purposes, 'cosmetic product' means a cosmetic product within the meaning of the Cosmetic Products (Safety) Regulations 2004, SI 2004/2152 (as amended) (see PARA 587 note 2 ante): Dangerous Substances and Preparations (Safety) (Consolidation) Regulations 1994, SI 1994/2844, reg 6D(2) (as so added).

5 Ibid reg 2 (amended by SI 1999/2084).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

594-601 Dangerous Substances and Preparations

These provisions now replaced by REACH Enforcement Regulations 2008, SI 2008/2852: see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 574 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(H) Dangerous Substances and Preparations/601. Pentabromodiphenyl ether and octabromodiphenyl ether.

601. Pentabromodiphenyl ether and octabromodiphenyl ether.

No person may place on the market: (1) pentabromodiphenyl ether as a substance or as a constituent of substances or of preparations in concentrations higher than 0.1 per cent by mass; (2) any articles which contain pentabromodiphenyl ether in concentrations higher than 0.1 per cent by mass; or (3) any articles which include any flame-retarded parts which contain pentabromodiphenyl ether in concentrations higher than 0.1 per cent by mass¹. No person may use pentabromodiphenyl ether as a substance or as a constituent of substances or of preparations in concentrations higher than 0.1 per cent by mass².

No person may place on the market: (a) octabromodiphenyl ether as a substance or as a constituent of substances or of preparations in concentrations higher than 0.1 per cent by mass; (b) any articles which contain octabromodiphenyl ether in concentrations higher than 0.1 per cent by mass; or (c) any articles which include any flame-retarded parts which contain octabromodiphenyl ether in concentrations higher than 0.1 per cent by mass³. No person may use octabromodiphenyl ether as a substance or as a constituent of substances or of preparations in concentrations higher than 0.1 per cent by mass⁴.

Any person who contravenes the above prohibitions, or causes or permits another person to contravene the prohibitions, is guilty of an offence⁵. Where such an offence is committed by a body corporate and is proved to have been committed with the consent or connivance of an officer⁶, or to be attributable to any neglect on his part, the officer as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly⁷.

The above provisions do not apply to: (i) the placing on the market or use of dangerous substances or preparations for research and development or analysis purposes; (ii) the carriage of dangerous substances or preparations by rail, road, inland waterway, sea or air; (iii) dangerous substances or preparations exported to a country which is not a member state of the European Community nor Norway, Iceland or Liechtenstein; and (iv) dangerous substances or preparations in transit and subject to customs inspection, provided that they undergo no processing⁸.

- 1 Controls on Pentabromodiphenyl Ether and Octabromodiphenyl Ether (No 2) Regulations 2004, SI 2004/3278, reg 4(1). The Controls on Pentabromodiphenyl Ether and Octabromodiphenyl Ether (No 2) Regulations 2004, SI 2004/3278, implement EC Council Directive 76/769 (OJ L262, 27.9.76, p 201) (as amended) (see PARA 393 ante).
- 2 Controls on Pentabromodiphenyl Ether and Octabromodiphenyl Ether (No 2) Regulations 2004, SI 2004/3278, reg 4(2). Regulation 4 does not apply to aircraft emergency evacuation systems before 31 March 2006: reg 4(3).
- 3 Ibid reg 5(1).
- 4 Ibid reg 5(2).
- 5 Ibid reg 6(1). Any person guilty of such an offence is liable, on summary conviction, to a fine not exceeding the statutory maximum or to imprisonment not exceeding three months and, on conviction on indictment, to a fine or to imprisonment not exceeding two years or to both: reg 6(2). As to the statutory maximum see PARA 401 note 31 ante.
- 6 For these purposes, 'officer', in relation to a body corporate, means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity: ibid reg 6(4).
- 7 Ibid reg 6(3). If the affairs of a body corporate are managed by its members, reg 6(3) applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate: reg 6(5).
- 8 Ibid reg 3.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

594-601 Dangerous Substances and Preparations

These provisions now replaced by REACH Enforcement Regulations 2008, SI 2008/2852: see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 574 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(I) Electrical Appliances and Fittings/602. Electrical equipment.

(I) ELECTRICAL APPLIANCES AND FITTINGS

602. Electrical equipment.

No person is to supply any electrical equipment, including any electrical apparatus or device, designed or adapted for use with voltage, in the case of alternating current, of not less than 50 volts nor more than 1,000 volts or, in the case of direct current, of not less than 75 volts nor more than 1,500 volts, other than excluded electrical equipment¹, electrical equipment supplied for export to a place which is not within any member state and any electrical equipment which was placed on the market before 1 January 1997 and complied with the prescribed requirements, in respect of which the following requirements are not satisfied:

- 1116 (1) the equipment must be safe;

- 1117 (2) the equipment must be constructed in accordance with principles generally accepted within the member states as constituting good engineering practice in relation to safety matters and, in particular, must be designed and constructed to ensure that it is safe when connected to the electricity supply system by providing a level of protection against electric shock which relies on a combination of insulation and the protective earthing conductor contained within the electricity supply system or which achieves that level of protection by other means; and
- 1118 (3) the equipment must be in conformity with the prescribed principal elements of the safety objectives for electrical equipment².

The manufacturer of electrical equipment or his authorised representative must affix to all such electrical equipment, or to its packaging, instruction sheet or guarantee certificate, in a visible, easily legible and indelible form the prescribed CE marking by way of confirmation that the electrical equipment conforms with all the relevant requirements which relate to it³. No person is to affix to electrical equipment any markings liable to deceive third parties as to the meaning and form of the CE marking so affixed or which reduces the visibility or legibility of the CE marking so affixed⁴.

1 As to the excluded electrical equipment see the Electrical Equipment (Safety) Regulations 1994, SI 1994/3260, reg 4(2), Sch 2; and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1147 et seq. The Electrical Equipment (Safety) Regulations 1994, SI 1994/3260, implement in part EC Council Directive 73/23 (OJ L77, 26.3.73, p 29) (amended by EC Commission Directive 93/68 (OJ L22, 30.1.93, p 124)) (see PARA 393 ante).

2 See the Electrical Equipment (Safety) Regulations 1994, SI 1994/3260, regs 4(1), (3), (4), 5(1), 14(1); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1148. In determining whether electrical equipment satisfies the requirements of reg 4(1), no regard is to be had to any liability of the equipment to cause radio-electrical interference: reg 5(2). Subject to reg 17(2) (offences relating to domestic animals and to property: see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1149), the Electrical Equipment (Safety) Regulations 1994, SI 1994/3260, are to be treated for all purposes as if they were safety regulations within the meaning of the Consumer Protection Act 1987 s 45(1) (see PARA 539 ante): Electrical Equipment (Safety) Regulations 1994, SI 1994/3260, reg 17(1).

3 See *ibid* reg 9(1); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1148. As to the exception for secondhand equipment see reg 12; and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1148.

4 See *ibid* reg 9(2); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1148.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(I) Electrical Appliances and Fittings/603. Plugs and sockets.

603. Plugs and sockets.

No person is to supply, offer for supply, agree to supply, expose for supply or possess for supply any electrical device, namely any plug, socket or adaptor ordinarily intended for domestic use at a voltage of not less than 200 volts, any fuse link which is suitable for use in any such plug being a standard plug or any cartridge fuse link which is suitable for use in any

other plugs and adaptors, not being an excluded electrical device¹, unless the prescribed requirements² are satisfied in relation to it³.

No person is to supply, offer for supply, agree to supply, expose for supply or possess for supply any electrical appliance which:

- 1119 (1) is designed to operate at a voltage of not less than 200 volts; and
 - 1120 (2) is designed to operate at a maximum rated input of not more than 13 amperes; and
 - 1121 (3) is either:
- 89
- 111. (a) equipment which is fitted with a flexible cable or cord, is designed to be connected to a socket conforming to the prescribed standard by means of that flexible cable or cord and a plug and is ordinarily intended to be so connected directly without the use of a cable connector;
 - 112. (b) a flexible cable or cord which is connected to a portable socket or portable sockets and is designed to be connected to a socket conforming to the prescribed standard by means of a plug;
 - 113. (c) a flexible cable or cord which is designed to be connected to electrical equipment by means of an appliance coupler and to connect that electrical equipment to a socket conforming to the prescribed standard by means of a plug; or
 - 114. (d) a flexible cable or cord which is designed to be connected by means of a cable connector to a flexible cable or cord fitted to electrical equipment, and which is intended to connect that electrical equipment to a socket conforming to the prescribed standard by means of a plug; and
- 90
- 1122 (4) is ordinarily intended for domestic use,

other than an excluded appliance⁴, unless that appliance is correctly fitted with a standard plug which is duly approved⁵ and is fitted with a fuse link which conforms to the prescribed standard and is rated in accordance with the appliance manufacturer's instructions⁶.

No person is to supply, offer for supply, agree to supply, expose for supply or possess for supply any standard plug or conversion plug of a type approved by a notified body in respect of which the prescribed requirements⁷ are not satisfied⁸.

1 As to the excluded electrical devices see the Plugs and Sockets etc (Safety) Regulations 1994, SI 1994/1768, reg 4(1), Sch 1; and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1149. The Plugs and Sockets etc (Safety) Regulations 1994, SI 1994/1768, implement in part EC Council Directive 73/23 (OJ L77, 26.3.73, p 29) (amended by EC Commission Directive 93/68 (OJ L22, 30.1.93, p 124)) (see PARA 393 ante).

2 I.e. the requirements of the Plugs and Sockets etc (Safety) Regulations 1994, SI 1994/1768, reg 6 (requirements for electrical devices), reg 8 (approval of standard plugs), reg 9 (refusals, cancellations and imposition of conditions), and reg 10 (electrical devices other than standard plugs): see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1148.

3 See *ibid* regs 4(1), 5; and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1149. Part I (regs 4-10) does not apply to any plug or socket inside or forming an integral part of electrical equipment which is so designed that the plug is not capable of being engaged with, or disengaged from, the socket without something first being done to the equipment, whether or not including the plug or socket, which requires the use of a tool: reg 4(2). In the case of a plug or socket inside or forming an integral part of electrical equipment and required to conform to a British Standard referred to in reg 4(3), Sch 2, Pt I (regs 4-10) applies only to the extent that it is practicable to do so: reg 4(3).

4 As to the excluded appliances see *ibid* reg 11(2), Sch 3; and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1148.

5 I.e. under *ibid* reg 8: see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1148.

6 See ibid regs 11(1), 12(1); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1148. As to the circumstances in which the prohibition in reg 12(1) does not apply see reg 12(2)-(9); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1150.

7 le the requirements of ibid reg 13(2)-(5): see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1148.

8 See ibid reg 13(1); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1148.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(j) Fireworks/604. Prohibition on supply of category 1, 2 and 3 fireworks.

(j) FIREWORKS

604. Prohibition on supply of category 1, 2 and 3 fireworks.

No person is to supply¹:

- 1123 (1) a category 1 firework², a category 2 firework³ or a category 3 firework⁴ which does not comply with the relevant statutory requirements⁵, but this does not prohibit the supply of any sparkler⁶ designed to be held in the hand which contravenes that prohibition by reason only that it is more than 450 millimetres in length, so long as it is not more than 470 millimetres in length⁷;
- 1124 (2) any of the following fireworks or assemblies⁸:
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 - 115. (a) batteries⁹ in category 2;
 - 116. (b) batteries in category 3;
 - 117. (c) category 2 rockets¹⁰;
 - 118. (d) category 3 rockets¹¹;
 - 119. (e) combinations¹² in category 2;
 - 120. (f) combinations in category 3;
 - 121. (g) mines¹³ in category 2;
 - 122. (h) mines in category 3;
 - 123. (i) Roman candles¹⁴ in category 2;
 - 124. (j) Roman candles in category 3;
 - 125. (k) wheels¹⁵ in category 2; and
 - 126. (l) wheels in category 3,
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 - 1125 which contravenes the size or weight requirements¹⁶ for that firework or assembly¹⁷.

In addition, no person is to supply, or offer or agree to supply, any category 3 firework which, when used, produces a maximum A-weighted impulse sound pressure level exceeding 120 decibels when measured in accordance with the prescribed method¹⁸.

1 For these purposes, 'supply' includes offering to supply, agreeing to supply, exposing for supply and possessing for supply; and cognate expressions are to be construed accordingly: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1).

2 For these purposes, 'category 1 firework' means a firework classified as category 1 under Pt 1 of BS 7114 and includes any assembly so classified: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1). 'Firework' means a device intended for use as a form of entertainment which contains, or otherwise incorporates, explosive composition or pyrotechnic composition, or both, and which, on functioning, burns or explodes, or both, to produce a visual or aural effect, or both: reg 2(1). 'Pyrotechnic composition' means a substance or a mixture of substances designed to produce an effect by heat, light, sound, gas or smoke or a combination of these as the result of non-detonative self-sustaining exothermic chemical reactions: reg 2(1). 'Assembly' means an assembly which includes any firework: reg 2(1). 'Aural effect' does not include any effect which is only incidental to a visual effect (reg 2(1)); and 'visual effect' does not include any effect which is only incidental to an aural effect (reg 2(1)). Virtually identical definitions of 'pyrotechnic composition' and 'assembly' apply in the Fireworks Regulations 2004, SI 2004/1836 (as amended): see reg 3.

'BS 7114' means the British Standard Specification comprising the following parts: (1) BS 7114: Pt 1: 1988, the British Standard Specification for classification of fireworks published on 30 November 1988; (2) BS 7114: Pt 2: 1988, the British Standard Specification for fireworks published on 30 November 1988; and (3) BS 7114: Pt 3: 1988, the British Standard Specification for methods of test for fireworks published on 30 November 1988; and references to Pts 1, 2 and 3 of BS 7114 are to be construed accordingly: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1). The same definition applies in the Fireworks Regulations 2004, SI 2004/1836 (as amended): see reg 3. For the purposes of the Fireworks (Safety) Regulations 1997, SI 1997/2294, Pt 3 of BS 7114 is, however, to be read subject to the amendments set out in the Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(4), Sch 1: reg 2(4). Subject to reg 2(4), any reference to BS 7114 is a reference to that standard as it has effect on 23 September 1997, provided that, where that standard is amended or revised after that date and the amendment or revision is approved by the Secretary of State, that reference is to be construed at any time after such approval as a reference to that other standard as so amended or revised: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(2). Where BS 7114, including Pt 3 of BS 7114 when read in accordance with the Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(4), specifies relevant requirements by reference to another standard, that reference is to be construed as a reference to that other standard as it has effect on 23 September 1997, provided that, where any such other standard is amended or revised after that date and the amendment or revision is approved by the Secretary of State, that reference is to be construed at any time after such approval as a reference to that other standard as so amended or revised: reg 2(3). As to the British Standards Institution see PARA 446 ante.

3 For these purposes, 'category 2 firework' means a firework classified as category 2 under Pt 1 of BS 7114 and includes any assembly so classified; and any reference to a particular firework or assembly being 'in category 2' is to be construed accordingly: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1).

4 For these purposes, 'category 3 firework' means a firework classified as category 3 under Pt 1 of BS 7114 and includes any assembly so classified; and any reference to a particular firework or assembly being 'in category 3' is to be construed accordingly: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1).

5 Ibid reg 3(1). Regulation 3(1) is subject to reg 3(3), (4) and without prejudice to reg 7 (see PARA 609 post): reg 3(1). For these purposes, the relevant requirements are the requirements of Pt 2 of BS 7114 when tested in accordance with the appropriate test method, if any, in Pt 3 of BS 7114: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 3(1). For the purposes of reg 3(1) and reg 3(2) (see infra), no firework or assembly which would otherwise be a category 2 firework or a category 3 firework is to be taken not to be a category 2 firework or a category 3 firework solely because its supply is prohibited by reg 3(2) or by reg 4(2)(a), (c), (d), (e) or (f) (see PARA 605 heads (1), (3)-(6) post): reg 3(4).

The requirements of reg 3(1) and reg 3(2) (see infra) are satisfied if the firework or assembly in question conforms to any standard or specification recognised for use in a member state or any other state within the European Economic Area, provided that conformity to such a standard or specification provides a level of safety at least equivalent to that which would be provided by compliance with those requirements; and any reference to those requirements is to be construed accordingly: reg 2(5). However, for the avoidance of doubt, a standard or specification referred to in reg 2(5) is not to be considered to provide at least an equivalent level of safety to the extent that it provides for labelling or marking in any language other than English: reg 2(6). As to the European Economic Area see PARA 386 note 1 ante.

6 For these purposes, 'sparkler' means a firework comprising a rigid wire partially coated with slow-burning pyrotechnic composition, whose functioning involves the emission of sparks without report: ibid reg 2(1). In the Fireworks Regulations 2004, SI 2004/1836 (as amended), 'sparkler' means a firework, other than a category 3 or category 4 firework, comprising a rigid wire partially coated with slow-burning pyrotechnic composition, whose functioning involves the emission of sparks without a report: reg 3. 'Category 3 firework' means a firework classified as category 3 under Pt 1 of BS 7114, and 'category 4 firework' means a firework classified as category 4 under Pt 1 of BS 7114: Fireworks Regulations 2004, SI 2004/1836, reg 3.

7 Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 3(3).

8 le the fireworks and assemblies referred to in ibid reg 3(1), Sch 2 (amended by SI 2004/1372).

9 For these purposes, 'battery' means an assembly which includes two or more fireworks of the same type, being a type listed in the Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 4(2)(g), Sch 3 (as amended) (see PARA 605 heads (7)(a)-(s) post), and which has one point of ignition: reg 2(1).

10 For these purposes, 'category 2 rocket' means a firework: (1) which comprises a tube containing pyrotechnic composition or pyrotechnic units, or both, equipped with a stick or sticks for the purpose of stabilising its flight; (2) which is designed so that, on functioning, it propels itself into the air; and (3) which is a category 2 firework: ibid reg 2(1). 'Rocket' means a firework: (a) which comprises a tube containing pyrotechnic composition or pyrotechnic units, or both, equipped with a stick or sticks for the purpose of stabilising its flight, or with some other means for that purpose; and (b) which is designed so that, on functioning, it propels itself into the air: reg 2(1).

11 For these purposes, 'category 3 rocket' means a firework: (1) which comprises a tube containing pyrotechnic composition or pyrotechnic units, or both, equipped with a stick or sticks for the purpose of stabilising its flight, or with some other means for that purpose; (2) which is designed so that, on functioning, it propels itself into the air; and (3) which is a category 3 firework: ibid reg 2(1).

12 For these purposes, 'combination' means an assembly, other than a battery, which includes two or more fireworks, both or all of which are listed in ibid Sch 3 (as amended) (see PARA 605 heads (7)(a)-(s) post), and which has one point of ignition: reg 2(1).

13 For these purposes, 'mine' means a firework: (1) which comprises a tube containing a propellant charge and pyrotechnic units; (2) which is designed to be placed on, or fixed or partly buried in, the ground prior to functioning; and (3) whose functioning involves the ejection of all its pyrotechnic units in a single burst, producing a widely dispersed visual or aural effect in the air, or a combination of such effects: ibid reg 2(1).

14 For these purposes, 'Roman candle' means a firework: (1) which comprises a tube containing alternate propelling charge or charges and pyrotechnic unit or units with one or more transmitting fuses; and (2) whose functioning involves the ejection of a pyrotechnic unit or of pyrotechnic units in succession, producing a visual or aural effect, or a series or combination of such effects, in the air: ibid reg 2(1).

15 For these purposes, 'wheel' means an assembly: (1) which includes a tube or tubes containing pyrotechnic composition; (2) which is designed to be attached to a support and to rotate about a fixed point or axis and which is provided with a means of attaching it securely to such a support so that it can so rotate; and (3) whose functioning involves rotation around a fixed point and the emission of sparks and flames, with or without aural effect: ibid reg 2(1).

16 le specified for that firework or assembly in ibid Sch 2 (as amended). The size and weight requirements so specified are: (1) for batteries in category 2, gross mass, excluding any frame, not to exceed 1 kilogram; (2) for batteries in category 3, gross mass, excluding any frame, not to exceed 10 kilograms; (3) for category 2 rockets, gross mass not to exceed 150 grams; (4) for category 3 rockets, gross mass not to exceed 500 grams and internal diameter of rocket motor not to exceed 25 millimetres; (5) for combinations in category 2, gross mass, excluding any frame, not to exceed 1 kilogram; (6) for combinations in category 3, gross mass not to exceed 10 kilograms; (7) for mines in category 2, gross mass not to exceed 125 grams; (8) for mines in category 3, gross mass not to exceed 1.2 kilograms; (9) for Roman candles in category 2, inside body diameter not to exceed 20 millimetres; (10) for Roman candles in category 3, inside body diameter not to exceed 30 millimetres; (11) for wheels in category 2, gross mass, excluding any frame, not to exceed 100 grams; and (12) for wheels in category 3, gross mass, excluding any frame, not to exceed 1.5 kilogram: Sch 2 (amended by SI 2004/1372).

17 Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 3(2). See also note 5 supra. Regulation 3(2) is subject to reg 3(4) (see note 5 supra) and reg 5 (see PARA 606 post): reg 3(2).

18 Fireworks Regulations 2004, SI 2004/1836, reg 8(1). For this purpose, the sound pressure level is to be measured: (1) at a horizontal distance of 15 metres from the testing point at a height of 1 metre above the ground; and (2) using a sound measuring device which conforms to type 1 of BS EN 61672 with a free-field microphone: reg 8(2). 'BS EN 61672' means the British Standard Specification comprising the following parts: (a) BS EN 61672-1:2003, 'Electroacoustics. Sound Level Meters. Specifications', published on 25 March 2003; and (b) BS EN 61672-2:2003, 'Electroacoustics. Sound Level Meters. Pattern Evaluation Tests', published on 11 July 2003: Fireworks Regulations 2004, SI 2004/1836, reg 3.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(j) Fireworks/605. Prohibitions on supply of certain fireworks and assemblies.

605. Prohibitions on supply of certain fireworks and assemblies.

No person is to supply¹ any firework of erratic flight², any mini-rocket³ or any air bomb⁴; nor is any person to supply:

- 1126 (1) any aerial shell⁵, shell-in-mortar⁶, aerial maroon⁷ or maroon-in-mortar⁸ or any assembly which includes one or more aerial shells or aerial maroons and which has one point of ignition;
 - 1127 (2) any category 4 firework⁹ other than one whose supply is prohibited by head (1) above or heads (3), (4), (5) or (7) below;
 - 1128 (3) any battery¹⁰ containing bangers¹¹;
 - 1129 (4) any combination¹², other than a wheel¹³, which includes one or more bangers;
 - 1130 (5) any banger other than a banger which is a category 2 firework¹⁴;
 - 1131 (6) any banger other than a banger whose supply is prohibited by head (5) above; or
 - 1132 (7) any firework or assembly which is not¹⁵:
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- 127. (a) a banger;
 - 128. (b) a battery;
 - 129. (c) a cap¹⁶;
 - 130. (d) a category 2 rocket¹⁷;
 - 131. (e) a category 3 rocket¹⁸;
 - 132. (f) a combination;
 - 133. (g) a cracker snap¹⁹;
 - 134. (h) a fountain²⁰;
 - 135. (i) a mine²¹;
 - 136. (j) a novelty match²²;
 - 137. (k) a party popper²³;
 - 138. (l) a Roman candle²⁴;
 - 139. (m) a serpent²⁵;
 - 140. (n) a set piece²⁶;
 - 141. (o) a smoke device²⁷;
 - 142. (p) a sparkler²⁸;
 - 143. (q) a table bomb²⁹;
 - 144. (r) a throwdown³⁰; or
 - 145. (s) a wheel³¹,

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but the above provisions do not prohibit the supply of any firework of erratic flight or any mini-rocket to any person for use, in the course of a trade or business of his, for special effects purposes in the theatre, on film or on television³².

1 For the meaning of 'supply' see PARA 604 note 1 ante.

2 For these purposes, 'firework of erratic flight' means a firework whose functioning involves its following a random trajectory or a random path along the ground, whether or not it functions within a predetermined range: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1). For the meaning of 'firework' see PARA 604 note 2 ante.

3 Ibid reg 4(1). For these purposes, 'mini-rocket' means a firework which is designed so that, on functioning, it propels itself into the air and which comprises a body or motor: (1) which contains pyrotechnic composition or pyrotechnic units; (2) the outside diameter of which, at the point where the diameter is greatest, is less than 12 millimetres; or (3) if equipped with a stick or sticks for the purposes of stabilising its flight (a) where the firework is intended to be supplied singly, whose overall length (including the length of any such stick or sticks) is less than 900 mm or (not including the length of any such stick or sticks) is less than 195 mm; or (b) where the firework is intended to be supplied in a primary pack, whose overall length (including the length of any such stick or sticks) is less than 400 mm or (not including the length of any such stick or sticks) is less than 125 mm; or (c) where the firework is intended to be supplied in a selection pack, whose overall length (including the length of any such stick or sticks) is less than 300 mm; or (4) if not equipped with a stick or sticks for the purposes of stabilising its flight (i) whose overall length is less than 300 mm; and (ii) is intended to be supplied singly or in a primary pack: reg 2(1) (definition substituted by SI 2004/1372). For the meaning of 'pyrotechnic composition' see PARA 604 note 2 ante.

4 For these purposes, 'air bomb' means a Roman candle (or a combination which includes three or fewer Roman candles) whose functioning comprises the ejection of 11 or fewer pyrotechnic units, and which contains any pyrotechnic unit designed to eject and burst and whose bursting charge is other than black powder and constitutes more than 10% of the pyrotechnic unit: ibid reg 2(1) (definition substituted by SI 2004/1372). For the meaning of 'Roman candle' see PARA 604 note 14 ante.

5 For these purposes, 'aerial shell' means a firework: (1) which is designed to be projected from a mortar; (2) which contains a propellant charge and a bursting charge; (3) which contains pyrotechnic units or loose pyrotechnic composition, or both pyrotechnic units and loose pyrotechnic composition; and (4) whose functioning involves ascent and subsequent bursting of the firework case and ejection of any pyrotechnic units, but for the avoidance of doubt, does not include a rocket: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1). For the meaning of 'rocket' see PARA 604 note 10 ante.

6 For these purposes, 'shell-in-mortar' means: (1) an assembly comprising an aerial shell inside a mortar, from which the aerial shell is designed to be projected; or (2) an assembly comprising two or more mortars one of which contains an aerial shell, where the shell is designed to be projected from the mortar: ibid reg 2(1). For the meaning of 'assembly' see PARA 604 note 2 ante.

7 For these purposes, 'aerial maroon' means a firework: (1) which is designed to be projected from a mortar; (2) which contains a propellant charge and a bursting charge; and (3) whose functioning involves ascent and report, but, for the avoidance of doubt, does not include a rocket: ibid reg 2(1).

8 For these purposes, 'maroon-in-mortar' means: (1) an assembly comprising an aerial maroon inside a mortar, from which the aerial maroon is designed to be projected; or (2) an assembly comprising two or more mortars one of which contains an aerial maroon, where the maroon is designed to be projected from the mortar: ibid reg 2(1).

9 For these purposes, 'category 4 firework' means a firework classified as category 4 under Pt 1 of BS 7114 and includes any assembly so classified: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1). For the meaning of 'BS 7114' see PARA 604 note 2 ante. In general, no person may possess a category 4 firework: Fireworks Regulations 2004, SI 2004/1836, reg 5, subject to exceptions (see reg 6); see EXPLOSIVES.

10 For the meaning of 'battery' see PARA 604 note 9 ante.

11 For these purposes, 'banger' means a firework, other than an air bomb: (1) which comprises a tube which contains black powder and has a fuse; and (2) whose functioning principally involves a report: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1). 'Black powder' means explosive composition which is an intimate mixture of carbon and either potassium nitrate or sodium nitrate, or a similar mixture also containing sulphur: reg 2(1).

12 For the meaning of 'combination' see PARA 604 note 12 ante.

13 For the meaning of 'wheel' see PARA 604 note 15 ante.

14 For the meaning of 'category 2 firework' see PARA 604 note 3 ante.

15 le is not listed in the Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 4(2)(g), Sch 3 (as amended).

16 For these purposes, 'cap' means a firework (including, for the avoidance of doubt, an amorce) designed for use in toys which comprises a non-metallic envelope or cup containing a dot of impact-sensitive pyrotechnic composition, and which produces a report when it is hit: *ibid* reg 2(1). 'Amorce' means a firework which is a percussion cap designed for use in toys, which comprises a paper envelope containing a dot of impact-sensitive pyrotechnic composition and which forms part of a roll: reg 2(1). The same definitions (with the exception of the phrase 'for the avoidance of doubt') apply in the Fireworks Regulations 2004, SI 2004/1836 (as amended): see reg 3.

17 For the meaning of 'category 2 rocket' see PARA 604 note 10 ante.

18 For the meaning of 'category 3 rocket' see PARA 604 note 11 ante.

19 For these purposes, 'cracker snap' means a firework: (1) which comprises two overlapping strips of card or paper with a friction-sensitive explosive composition in sliding contact with an abrasive surface; and (2) which produces a report when pulled apart: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1); Fireworks Regulations 2004, SI 2004/1836, reg 3.

20 For these purposes, 'fountain' means a firework: (1) which comprises a case containing pyrotechnic composition intended to produce sparks and flames; (2) which is designed to be placed on or fixed in the ground or fixed to a support prior to functioning; and (3) whose functioning involves the emission of sparks and flames, either with aural effect, other than report, or without aural effect: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1). As to the meaning of 'aural effect' see PARA 604 note 2 ante.

21 For the meaning of 'mine' see PARA 604 note 13 ante.

22 For these purposes, 'novelty match' means a firework comprising a match with a dot of pyrotechnic composition which is designed to be held in the hand while functioning and whose functioning involves a report or the production of visual effects, or both: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1); Fireworks Regulations 2004, SI 2004/1836, reg 3. As to the meaning of 'visual effect' see PARA 604 note 2 ante.

23 For these purposes, 'party popper' means a firework comprising a device: (1) which is designed to be held in the hand while functioning; (2) which is operated by a pull-string with an abrasive surface in sliding contact with a friction-sensitive pyrotechnic composition; and (3) whose functioning involves a report with the ejection of streamers or confetti, or both: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1); Fireworks Regulations 2004, SI 2004/1836, reg 3.

24 For the meaning of 'Roman candle' see PARA 604 note 14 ante.

25 For these purposes, 'serpent' means a firework comprising a preformed shape of pyrotechnic composition, with or without support, whose functioning involves the generation of expanded residue: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1); Fireworks Regulations 2004, SI 2004/1836, reg 3.

26 For these purposes, 'set piece' means an assembly: (1) which consists of tubes containing pyrotechnic composition linked by a pyrotechnic fuse; (2) which may or may not include one or more fireworks listed in the Fireworks (Safety) Regulations 1997, SI 1997/2294, Sch 3 (as amended); and (3) which, by the emission of sparks or flames, or both, functions to create a picture, moving or otherwise, symbol, design or message: reg 2(1).

27 For these purposes, 'smoke device' means a firework which comprises a preformed shape of pyrotechnic composition or pyrotechnic composition in a container and which, on functioning, emits smoke: *ibid* reg 2(1).

28 For the meaning of 'sparkler' see PARA 604 note 6 ante.

29 For these purposes, 'table bomb' means a firework: (1) which comprises a paper, cardboard or plastic tube with a firm base and closed top; (2) which contains a propellant charge and non-pyrotechnic objects; and (3) whose functioning involves report with the ejection of streamers or novelties, or both: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1).

30 For these purposes, 'throwdown' means a firework comprising impact-sensitive explosive composition and grains of inert material wrapped in paper or foil and which functions to produce a report when thrown onto the ground: *ibid* reg 2(1); Fireworks Regulations 2004, SI 2004/1836, reg 3.

31 Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 4(2), Sch 3 (amended by SI 2004/1372). The Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 4(2)(e), (f) (see heads (5), (6) in the text) does not apply to any banger as part of a wheel: reg 4(4).

32 Ibid reg 4(3).

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For consumer protection from unfair trading see PARA 725A.

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606. Exceptions to prohibitions on supply of certain fireworks and assemblies.

There is no prohibition¹ on the supply² of any firework³ or assembly⁴ to:

1133 (1) any person who is in business as a professional organiser or professional operator of firework displays;

1134 (2) any person, being a person whose trade or business, or part of whose trade or business, is the supply of fireworks or assemblies, for the purpose of supplying them in accordance with the relevant statutory provisions⁵;

1135 (3) any local authority⁶ for the purposes of a firework display put on by that authority or for the use by that authority at a national public celebration or a national commemorative event;

1136 (4) any person for use, in the course of a trade or business of his, for special effects purposes in the theatre, on film or on television;

1137 (5) any local authority, enforcement authority or other body, where that authority or body:

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146. (a) has enforcement powers, conferred by or under any enactment, applying to the firework or assembly in question; and

147. (b) before it purchases the goods, informs the supplier that the purchase is to be made for the purposes of ascertaining whether any provision made by or under any enactment and relating to the safety of the goods has been contravened in relation to those goods;

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1138 (6) any department of the government in the United Kingdom for the purposes of a firework display put on by that department, for use by that department at a national public celebration or a national commemorative event or for use by that department for research or investigations purposes;

1139 (7) any person who:

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148. (a) is in business as a supplier of goods designed and intended for use in conjunction with fireworks or assemblies; and

149. (b) intends to use the firework or assembly in question solely for the purposes of testing those goods to ensure that, when used in conjunction with fireworks or assemblies of the same type, they will perform their intended function or comply with any provision made by or under any enactment and relating to the safety of those goods; or

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1140 (8) any establishment of the naval, military or air forces of the Crown for the purposes of a firework display or for use at a national public celebration or a national commemorative event⁷.

1 le by virtue of the Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 3(2) (see PARA 604 ante) or reg 4(2) (see PARA 605 ante).

2 For the meaning of 'supply' see PARA 604 note 1 ante.

3 For the meaning of 'firework' see PARA 604 note 2 ante.

4 For the meaning of 'assembly' see PARA 604 note 2 ante.

5 le in accordance with the Fireworks (Safety) Regulations 1997, SI 1997/2294: see PARAS 604-605 ante and PARA 608 et seq post.

6 For these purposes, 'local authority' means: (1) in relation to England, a county council, a district council or a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly; and (2) in relation to Wales, a county council or a county borough council: *ibid* reg 2(1).

7 *Ibid* reg 5.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(j) Fireworks/607. Conditions as to supply of fireworks to adults.

607. Conditions as to supply of fireworks to adults.

No person is to supply or expose for supply any adult firework¹, except in accordance with either a licence granted in respect of each premises under his control at which the fireworks are supplied or exposed for supply, or a licence granted to him, if the fireworks which he supplies or exposes for supply are kept at premises which are not under his control².

This does not, however, prohibit the supply or exposing for supply, otherwise than in accordance with a licence, of adult fireworks:

1141 (1) on the first day of the Chinese New Year and the three days immediately preceding it;

1142 (2) on the day of Diwali and the three days immediately preceding it;

1143 (3) during the period beginning on 15 October and ending on 10 November; or

1144 (4) during the period beginning on 26 December and ending on 31 December³.

Nor does the prohibition prohibit the supply or exposing for supply, otherwise than in accordance with a licence, of adult fireworks:

1145 (a) to a person who is employed in, or whose trade or business (or part of whose trade or business) is the supply of fireworks or assemblies⁴, for the purpose

- of that person's supplying them in accordance with the provisions of the Fireworks (Safety) Regulations 1997⁵;
- 1146 (b) to a person who is employed by, or in business as, a professional organiser or operator of firework displays for the purpose of that person's employment or business; or
- 1147 (c) to a person who is employed in, or whose trade or business (or part of whose trade or business) is, the transport of fireworks, for the purpose of that person's trade, employment or business⁶.

No person is to supply any adult firework unless he maintains for a period of three years, beginning with the date on which he supplies that firework, a record of the following information:

- 1148 (i) the name and address of the person who supplied the firework to him;
- 1149 (ii) the name and address of the person to whom he is supplying the firework;
- 1150 (iii) the date when the firework was supplied to him;
- 1151 (iv) the date when he supplied the firework to another person; and
- 1152 (v) the total amount of explosives contained in the firework supplied⁷.

A person who supplies adult fireworks must, if requested by a local licensing authority⁸ within the period mentioned above to provide any of the information mentioned in heads (i) to (iv) above, provide to that authority such information as is specified in the request⁹.

The information requirements above do not apply, however, if, in a single transaction, the total amount of the explosives contained in the fireworks supplied is less than or equal to 50 kilograms¹⁰.

1 'Adult firework' means: (1) any firework which does not comply with the relevant requirements of Pt 2 of BS 7114 when tested in accordance with the appropriate test method (if any) in Pt 3 of BS 7114; or (2) any firework (except for a cap, cracker snap, novelty match, party popper, serpent, sparkler or throwdown) which does comply with those requirements: Fireworks Regulations 2004, SI 2004/1836, reg 3. For the meaning of 'BS 7114' see PARA 604 note 2 ante. For the meanings of 'cap', 'cracker snap', 'novelty match', 'party popper', 'serpent', and 'throwdown' see PARA 605 notes 16, 19, 22, 23, 25, 30 respectively ante and for the meaning of 'sparkler' see PARA 604 note 6 ante.

2 Fireworks Regulations 2004, SI 2004/1836, reg 9(1) (substituted by SI 2004/3262). As to the procedure for obtaining a licence see the Fireworks Regulations 2004, SI 2004/1836, reg 9(3)-(8) (reg 9(3), (4), (7) substituted by SI 2004/3262).

3 Fireworks Regulations 2004, SI 2004/1836, reg 9(2).

4 For the meaning of 'assembly' see PARA 604 note 2 ante.

5 ie the Fireworks (Safety) Regulations 1997, SI 1997/2294 (as amended): Fireworks Regulations 2004, SI 2004/1836, reg 3.

6 Ibid reg 9(2A) (added by SI 2004/3262).

7 Fireworks Regulations 2004, SI 2004/1836, reg 10(3) (substituted by SI 2004/3262).

8 'Local licensing authority' means in relation to: (1) the City of London, the Common Council for the City of London; (2) an area in the rest of London, the London Borough Council for that area; (3) an area where there is a fire and civil defence authority, that authority; (4) the Isles of Scilly, the Council of the Isles of Scilly; (5) an area in the rest of England, the county council for that area or where there is no county council for that area, the district council for that area; and (6) an area in Wales, the county council or the county borough council for that area: Fireworks Regulations 2004, SI 2004/1836, reg 3. See generally LOCAL GOVERNMENT vol 69 (2009) PARA 1 et seq; LONDON GOVERNMENT.

9 Ibid reg 10(3A) (added by SI 2004/3262).

10 Fireworks Regulations 2004, SI 2004/1836, reg 10(4) (substituted by SI 2004/3262).

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(J) Fireworks/608. Prohibition on supply of fireworks and assemblies to persons under the age of eighteen years.

608. Prohibition on supply of fireworks and assemblies to persons under the age of eighteen years.

No person is to supply¹ any firework² or any assembly³, other than a cap⁴, cracker snap⁵, novelty match⁶, party popper⁷, serpent⁸ or throwdown⁹, to any person under the age of 18 years¹⁰.

1 For the meaning of 'supply' see PARA 604 note 1 ante.

2 For the meaning of 'firework' see PARA 604 note 2 ante.

3 For the meaning of 'assembly' see PARA 604 note 2 ante.

4 For the meaning of 'cap' see PARA 605 note 16 ante.

5 For the meaning of 'cracker snap' see PARA 605 note 19 ante.

6 For the meaning of 'novelty match' see PARA 605 note 22 ante.

7 For the meaning of 'party popper' see PARA 605 note 23 ante.

8 For the meaning of 'serpent' see PARA 605 note 25 ante.

9 For the meaning of 'throwdown' see PARA 605 note 30 ante.

10 Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 6 (amended by SI 2004/1372). An offence under the Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 6 (as amended), is specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(J) Fireworks/609. Additional marking requirements for certain fireworks and assemblies.

609. Additional marking requirements for certain fireworks and assemblies.

No person is to supply¹:

- 1153 (1) any firework² or assembly³ whose supply would otherwise⁴ be prohibited⁵;
- 1154 (2) any specified firework or assembly⁶ which contravenes the size or weight requirements specified⁷ for that firework or assembly;
- 1155 (3) any firework of erratic flight⁸ or mini-rocket⁹ whose supply would otherwise¹⁰ be prohibited¹¹,

unless either the firework or assembly or, in the case of a firework referred to in head (3) above, the packaging in which it is supplied is marked with the prescribed words¹².

No person is to supply any sparkler¹³ unless the packet in which it is contained is marked with the prescribed warning¹⁴.

No person is to supply or expose for supply any adult firework¹⁵ or sparkler unless:

- 1156 (a) where adult fireworks or sparklers are supplied or exposed for supply in any premises, he displays in a prominent position in those premises a notice, which measures no less than 420 millimetres by 297 millimetres and whose letters are no less than 16 millimetres high, stating the required information¹⁶; or
- 1157 (b) where adult fireworks or sparklers are supplied or exposed for supply in circumstances not mentioned in head (a) above, he gives the required information to any person to whom the fireworks are supplied or exposed for supply¹⁷.

1 For the meaning of 'supply' see PARA 604 note 1 ante.

2 For the meaning of 'firework' see PARA 604 note 2 ante.

3 For the meaning of 'assembly' see PARA 604 note 2 ante.

4 Ie but for the Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 5: see PARA 606 ante.

5 Ie by ibid reg 4(2): see PARA 605 ante.

6 Ie any firework or assembly listed in ibid reg 7(1)(b), Sch 2 (as amended): see PARA 604 heads (2)(a)-(l) ante.

7 Ie in ibid Sch 2.

8 For the meaning of 'firework of erratic flight' see PARA 605 note 2 ante.

9 For the meaning of 'mini-rocket' see PARA 605 note 3 ante.

10 Ie but for the Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 4(3): see PARA 605 ante.

11 Ie by ibid reg 4(1): see PARA 605 ante.

12 Ibid reg 7(1). The prescribed form of wording is: 'This device must not be sold to, or used by, a member of the general public': reg 7(1). The requirements of reg 7 are satisfied if the firework or assembly in question conforms to any standard or specification recognised for use in a member state or any other state within the European Economic Area, provided that conformity to such a standard or specification provides a level of safety at least equivalent to that which would be provided by compliance with those requirements; and any reference to those requirements is to be construed accordingly: reg 2(5). However, for the avoidance of doubt, a standard or specification referred to in reg 2(5) is not to be considered to provide at least an equivalent level of safety to the extent that it provides for labelling or marking in any language other than English: reg 2(6). As to the European Economic Area see PARA 386 note 1 ante.

13 For the meaning of 'sparkler' see PARA 604 note 6 ante.

14 Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 7(2). The prescribed form of warning is: 'Warning: not to be given to children under five years of age': reg 7(2). See also note 12 *supra*.

15 For the meaning of 'adult firework' see PARA 607 note 1 *ante*.

16 'The required information' means information that it is illegal to sell adult fireworks or sparklers to anyone under the age of 18 (see PARA 608 *ante*), and that it is illegal for anyone under the age of 18 to possess adult fireworks in a public place (see the Fireworks Regulations 2004, SI 2004/1836, reg 4; and EXPLOSIVES): reg 10(2) (amended by SI 2004/3262).

17 Fireworks Regulations 2004, SI 2004/1836, reg 10(1) (amended by SI 2004/3262).

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(j) Fireworks/610. Prohibition on splitting up primary packs and selection packs.

610. Prohibition on splitting up primary packs and selection packs.

No person who carries on a business involving, to whatever extent, the supply¹ of fireworks² by retail is to supply any firework which he has removed, caused to be removed, or knows to have been removed from a primary pack³ or a selection pack⁴.

1 For the meaning of 'supply' see PARA 604 note 1 *ante*.

2 For the meaning of 'firework' see PARA 604 note 2 *ante*.

3 For these purposes, 'primary pack' means a package of fireworks of the same type, all of which are either category 1 fireworks, category 2 fireworks or category 3 fireworks, which is intended to be offered for retail sale as a single unit: Fireworks (Safety) Regulations 1997, SI 1997/2294, reg 2(1). For the meaning of 'category 1 firework' see PARA 604 note 2 *ante*; for the meaning of 'category 2 firework' see PARA 604 note 3 *ante*; and for the meaning of 'category 3 firework' see PARA 604 note 4 *ante*.

4 *Ibid* reg 8. For these purposes, 'selection pack' means a package of fireworks of more than one type intended to be offered for retail sale as a single unit: reg 2(1).

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(j) Fireworks/611. Proceedings for offences.

611. Proceedings for offences.

In England and Wales a magistrates' court may try an information in respect of an offence¹ arising from a contravention of the safety provisions relating to fireworks² if the information is laid within 12 months from the time when the offence was committed³.

1 le an offence under the Consumer Protection Act 1987 s 12: see PARA 540 ante.

2 le the Fireworks (Safety) Regulations 1997, SI 1997/2294: see PARA 604 et seq ante.

3 Ibid reg 9. Offences under the Consumer Protection Act 1987 s 12 in relation to the Fireworks (Safety) Regulations 1997, SI 1997/2294, are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(K) Gas Appliances/612. Gas appliances.

(K) GAS APPLIANCES

612. Gas appliances.

No manufacturer or his authorised representative established in the Community is to supply¹:

1158 (1) an appliance² or a fitting which does not comply with the essential safety requirements³;

1159 (2) an appliance or a fitting in respect of which there is not in force at that time an EC type-examination certificate and an EC declaration of conformity or an EC type-examination certificate and:

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150. (a) either an EC declaration of conformity (guarantee of production or product quality) or an EC declaration of conformity or an EC declaration of conformity (EC verification); and

151. (b) either an EC declaration of conformity issued by a notified body or a fitting certificate; or

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1160 an EC declaration of conformity (EC unit verification) and an EC certificate of conformity issued by a notified body, or a corresponding declaration issued by a manufacturer or his authorised representative established in the Community, or a corresponding certificate issued under the law of another member state⁴.

Nor is any person to supply:

- 1161 (i) an appliance which, when normally used, is not safe⁵;
- 1162 (ii) an appliance to which the CE marking has not been affixed or a fitting without a fitting certificate which has been issued⁶.

The above provisions do not apply in any case in which a person placing an appliance or fitting on the market reasonably believes that it will not be put into service in the United Kingdom or in any other member state⁷. Nor do they apply to:

- 1163 (A) any appliance which does not bear the CE marking or any fitting in respect of which a fitting certificate has not been issued, and which, in either case, was supplied for the first time in the Community before 1 January 1992⁸;
- 1164 (B) any fitting, whenever manufactured, supplied for incorporation in appliances which appliances do not bear the CE marking and were supplied for the first time in the Community before 1 January 1996⁹;
- 1165 (C) any appliance or fitting which has at any time been put into service by another person and is supplied by a person who supplies appliances or fittings in the course of any business, whether after repairing or reconditioning them or not¹⁰.

1 For these purposes, 'supply', in relation to an appliance or fitting: (1) includes offering to supply, agreeing to supply, exposing for supply and possessing for supply; and (2) except in the Gas Appliances (Safety) Regulations 1995, SI 1995/1629, reg 4(5) (see head (iii) in the text) or in relation to an appliance which has previously been put into service by any person, includes its first putting into service in the United Kingdom by the manufacturer or by the importer into the United Kingdom: reg 2(1).

2 For these purposes, 'appliance' means an appliance burning gaseous fuel, ie any fuel which is in a gaseous state at a temperature of 15°C at a pressure of 1 bar, used for cooking, heating, hot-water production, refrigeration, lighting or washing and having, where applicable, a normal water temperature not exceeding 105°C and includes forced draught burners and heating bodies to be equipped with such burners but does not include an appliance specifically designed for use in an industrial process carried out on industrial premises: *ibid* reg 2(1).

3 See *ibid* reg 7(1); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 782. Subject to reg 29 (offences relating to domestic animals and to property: see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 786), the Gas Appliances (Safety) Regulations 1995, SI 1995/1629, are to be treated for all purposes as if they were safety regulations within the meaning of the Consumer Protection Act 1987 s 45(1) (see PARA 539 ante): Gas Appliances (Safety) Regulations 1995, SI 1995/1629, reg 32. The Gas Appliances (Safety) Regulations 1995, SI 1995/1629 implement EC Council Directive 90/396 (OJ L196, 26.7.90, p 15) (amended by EC Council Directive 93/68 (OJ L199, 9.8.93, p 1)) (see PARA 393 ante).

4 See the Gas Appliances (Safety) Regulations 1995, SI 1995/1629, reg 8; and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 782.

5 See *ibid* reg 7(2); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 782.

6 See *ibid* reg 7(3); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 782.

7 See *ibid* reg 9; and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 782.

8 See *ibid* reg 4(1)(a), (b); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 782. Before 1 January 1996: (1) in the case of any appliance or fitting to which the Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149 (see PARA 613 post) or the Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693 (see PARA 614 post) apply, the Gas Appliances (Safety) Regulations 1995, SI 1995/1629 do not apply if the Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149 or the Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693, as the case may require, are complied with; and (2) in the case of any other appliance or fitting, the Gas Appliances (Safety) Regulations 1995, SI 1995/1629 do not apply if the general safety requirement construed in accordance with the Consumer Protection Act 1987 s 10(2), (3) (as amended) (see PARA 533 ante) or the Health and Safety at Work etc Act 1974 s 6 (as amended) (general duties of manufacturers as regards articles and substances for use at work: see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 531), is complied with: see the Gas Appliances (Safety) Regulations 1995, SI 1995/1629, reg 4(2); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 782.

9 See *ibid* reg 4(1)(c); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 782.

10 See *ibid* reg 4(5); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 782.

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For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(K) Gas Appliances/613. Secondhand gas cooking appliances.

613. Secondhand gas cooking appliances.

No person is to supply, offer for supply, agree to supply, expose for supply or possess for supply any secondhand equipment (an 'appliance') which is designed or suitable for domestic use in a dwelling, ship or caravan and is designed for cooking by means of burning of gas¹, whether or not the equipment has other functions as well and whether it is designed to rest directly on the floor or on a table or other raised surface or to be fixed to a wall or other upright structure or supported by any other equipment, not being equipment which is designed for use out-of-doors or in a tent, in respect of which any of the prescribed requirements² is not satisfied³.

An appliance must be in such a condition that, when it is in normal use⁴:

- 1166 (1) all its gas-carrying components are sufficiently sound to prevent any likelihood of death or personal injury arising from the escape of gas;
- 1167 (2) the door of any oven⁵ comprised in the appliance is sealed in such a manner as to prevent the escape of the products of combustion in such quantity as to give rise to any likelihood of death or personal injury;
- 1168 (3) any device forming part of the appliance designed to ignite any burner operates so as to ensure the prompt ignition of the burner;
- 1169 (4) the ignition of any burner by an automatic or manual device results in the cross-lighting to all flame ports in the burner;
- 1170 (5) the stability of the flame from any burner after a period of more than one minute after ignition is such as to ensure that the base of the flame does not move away, either in whole or in part, from the burner port and the flame does not return inside the body of the burner;
- 1171 (6) the quantity of carbon monoxide in the products of combustion is not such as to give rise to any likelihood of death or personal injury;
- 1172 (7) any device which is designed to shut off the supply of gas to any burner when the flame is unintentionally extinguished operates to ensure that the supply of gas intended to be controlled by the device is promptly and safely shut off;
- 1173 (8) in the case of an appliance fitted with a burner the ignition of which can take place in a closed compartment with the door closed, the gas rate to any such burner which is not controlled by a flame supervision device⁶ does not exceed 600 watts;
- 1174 (9) in the case of an appliance fitted with a shut-down lid⁷, any device which is designed to shut off automatically the supply of gas to every burner comprised in

- the hot-plate⁸ when the lid is shut down operates to ensure that the supply of gas intended to be controlled by the device is promptly and safely shut off;
- 1175 (10) the surface temperature of any parts of the appliance other than working surfaces and any part of a surface which is adjacent to any part of any hob unit or a working surface of the appliance or the periphery of any oven vent or any other aperture necessary for the functioning of the appliance is not such as to give rise to any likelihood of death or personal injury through incidental contact with any part of the appliance or through contact with those parts of the appliance intended to be touched when it is in normal use;
- 1176 (11) the heat emitted by the appliance is not such as to cause any adjacent walls, floors or materials to reach a temperature giving rise to any likelihood of a fire hazard or personal injury;
- 1177 (12) in the case of an appliance fitted with any lids, over doors, splash-backs or other components comprised wholly or partly of glass, the type of glass employed, its thickness and its size are such as to prevent the breakage of the glass giving rise to any likelihood of death or personal injury;
- 1178 (13) all accessible parts of the appliance are free from sharp edges;
- 1179 (14) in the case of an appliance designed to stand unsecured on a floor, table or other level surface, the appliance is stable when the oven doors and grill doors are open and when a load of 15 kilograms is placed at the centre of the oven door where an oven drop-door⁹ is fitted or is placed at the centre of the top edge of the door where an oven door with a vertical axis is fitted;
- 1180 (15) any pan support¹⁰ comprised in the appliance is such as to ensure the stability of any cooking vessels designed to be placed on it;
- 1181 (16) any tap¹¹ handle¹² of the appliance is so designed as to ensure that it is not liable to be turned on accidentally and is otherwise capable of easy operation; and
- 1182 (17) any variation which might reasonably be expected in the rate, pressure¹³ or composition of the gas supply or a failure of, or any subsequent restoration of, any electrical or other source of energy which is auxiliary to the gas supply is not such as to give rise to any likelihood of death or personal injury¹⁴.

An appliance must be in such a condition that the characteristics of the appliance required to comply with the above provisions will not be altered in the course of the normal use of the appliance, whether through the distortion or deterioration of any materials used in its construction or through the accidental displacement of any components comprised in the appliance¹⁵.

All information necessary for the safe installation, adjustment, maintenance and operation of an appliance must be given by markings on the appliance itself or, where that is not practicable, in a document or documents accompanying the appliance¹⁶. The name of, and sufficient particulars to identify, the manufacturer and, in the case of an appliance imported into the United Kingdom, the importer of an appliance must be indelibly marked on the appliance, or on a durable label securely fixed to the appliance with its entire surface in contact with it, in a position where the particulars can be easily read when the appliance is installed, adjusted, maintained or in operation¹⁷. It is not a sufficient compliance with these provisions¹⁸ to give information in a language other than English¹⁹.

The above provisions are without prejudice to any other provisions made by or under any enactment relating to an appliance²⁰.

1 For these purposes, 'gas' includes liquefied petroleum gas: Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149, reg 2(1).

2 le the requirements of the Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149: see infra.

3 Ibid regs 2(1), 3(1). Regulation 3(1) does not, however, apply to any appliance which conforms to all the requirements of European Standard EN 30 relating to the situations met in Europe generally and to the national situations in the United Kingdom for appliances supplied and used there published to come into effect on 30 May 1980 or of British Standard 5386: Pt 3 1980 published to come into effect on 30 May 1980 or Pt 4 1983 published to come into effect on 31 May 1983 concerning the safety of appliances or which, although not conforming to these requirements, is at least as safe as it would be if it did so conform: Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149, reg 3(2). For these purposes: (1) where any standard is mentioned, that reference is to that standard as it has effect on 7 February 1989, including any amendment or revision made or taking effect on or before that date, provided that, where any such standard has been amended or revised after that date and the amendment has been approved by the Secretary of State under reg 6, that reference is to be construed at any time after the amendment or revision as a reference to that standard as so amended or revised; (2) where any standard specifies relevant requirements by reference to another standard, that reference is to be construed as a reference to that other standard as it has effect on 7 February 1989, including any amendment or revision to that other standard made or taking effect on or before that date, provided that, where any such other standard has been amended or revised after that date and the amendment or revision has been approved by the Secretary of State under reg 6, that reference is to be construed at any time after the amendment or revision as a reference to that other standard as so amended or revised; (3) any reference to a British Standard of a particular number published to come into effect on a particular date is a reference to the British Standard Specification of that number published by the British Standards Institution to come into effect on the date in question: Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149, reg 2(3). As to the British Standards Institution see PARA 446 ante.

The Secretary of State may, if he thinks it appropriate to do so, approve any amendment or revision of a standard, being an amendment or revision made or taking effect after 7 February 1989: reg 6(1). Any such approval is to be effected by the publication by the Secretary of State, in such manner as he considers appropriate, of a notice of approval together with the place where copies of the amendment or revision to which the approval relates may be obtained: reg 6(2). The notice must state the date on which the approval is to take effect: reg 6(3). A register of approvals so given must be kept by the Secretary of State at such premises and in such form as he may determine and must be open to public inspection: reg 6(4).

The Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149, were originally revoked as from 1 January 1996 by the Gas Appliances (Safety) Regulations 1992, SI 1992/711, reg 1(3). The Gas Appliances (Safety) Regulations 1992, SI 1992/711, were themselves revoked and replaced as from 18 July 1995 by the Gas Appliances (Safety) Regulations 1995, SI 1995/1629, reg 1(4) (see PARA 612 ante), subject to a saving. Regulation 1(3) now disapplies the Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149, as from 1 January 1996, to the extent only that they apply to appliances or fittings to which the Gas Appliances (Safety) Regulations 1995, SI 1995/1629 apply, the effect of this being to retain the Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149 in force for secondhand appliances only, to which the Gas Appliances (Safety) Regulations 1995, SI 1995/1629, do not apply: see reg 4(5); and PARA 612 head (c) ante.

4 For these purposes, an appliance is to be treated as being in normal use when it has been properly assembled, installed and maintained, connected to a supply of gas for which it was designed and, if in operation, is being operated with proper care, having regard, in particular, to any instructions and warnings supplied with the appliance: Gas Cooking Appliances (Safety) Regulations 1989, SI 1989/149, reg 2(2).

5 For these purposes, 'oven' means a closed compartment comprised in an appliance designed for roasting and baking food: *ibid* reg 2(1).

6 For these purposes, 'flame supervision device' means a device including a sensing element which causes the gas supply to a burner to be opened or closed according to the presence or absence of the flame which activates the sensing element: *ibid* reg 2(1).

7 For these purposes, 'shut-down lid' means a lid designed to be shut down over a hot-plate: *ibid* reg 2(1). For the meaning of 'hot-plate' see note 8 *infra*.

8 For these purposes, 'hot-plate' means an appliance comprising one or more burners and designed to support cooking vessels: *ibid* reg 2(1).

9 For these purposes, 'oven drop-door' means a door with a horizontal axis of rotation about its lower edge: *ibid* reg 2(1).

10 For these purposes, 'pan support' means a support placed above a hot-plate burner which keeps the cooking vessel being heated at a set distance from the burner: *ibid* reg 2(1).

11 For these purposes, 'tap' means a device designed to isolate a burner from the gas supply to it and, if applicable, to adjust its rate during use: *ibid* reg 2(1).

12 For these purposes, 'tap handle' means a manually operated device used to open or close a tap: *ibid* reg 2(1).

13 For these purposes, 'gas supply pressure' means the difference between the static pressure measured at the inlet connection of the appliance and the atmospheric pressure: *ibid* reg 2(1).

14 *Ibid* reg 4(1).

15 *Ibid* reg 4(2).

16 *Ibid* reg 5(1). Without prejudice to the generality of reg 5(1): (1) an appliance must bear instructions, set out in legible and durable characters and displayed either on the fascia of the appliance or on the tap handles, indicating which tap controls which burner and the closed, open and, if applicable, reduced rate positions for each tap; (2) in the case of an appliance incorporating a shut-down lid which is not so constructed that the hot-plate burners are automatically shut off when the lid is shut down, the appliance must bear a warning, set out in legible and durable characters, under the lid, that it is dangerous to close the lid without extinguishing the hot-plate burners: reg 5(2).

17 *Ie* *ibid* reg 5.

18 *Ibid* reg 5(3).

19 *Ibid* reg 5(4).

20 *Ibid* reg 7.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(K) Gas Appliances/614. Fireguards for secondhand heating appliances.

614. Fireguards for secondhand heating appliances.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any secondhand¹ gas fire² or oil heater (a 'heating appliance') in respect of which any of the requirements of these provisions is not satisfied³.

A heating appliance must be fitted with a guard such that the appliance is capable of satisfying the prescribed tests and specified requirements⁴.

The above provisions do not apply to:

1183 (1) any heating appliance fitted with a guard such that the appliance complies with any standard or specification recognised for use in a member state⁵ where such compliance provides an equivalent level of safety⁶;

1184 (2) any heating appliance which is not ordinarily intended for use in residential premises⁷;

1185 (3) a heating appliance which is so constructed that, when the appliance is burning gas or oil, any flame is inclosed within the appliance so that:

101

152. (a) there is no likelihood of personal injury from burning; and

153. (b) there is no likelihood of ignition of any fabric,

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1186 by reason of, in either case, contact with or closeness to any flame or any part of the appliance which becomes incandescent⁸; or

1187 (4) any gas fire which is designed for installation in a fireplace recess or a flue box⁹ and supplied with clear instructions in English for installation in terms such that, when those instructions are followed, the installed fire will meet the following conditions¹⁰;

103

154. (a) no naked flame or incandescent part of the firebed must project more than 50 millimetres from the vertical plane of the fireplace opening¹¹;

155. (b) the forward projection of any naked flame or incandescent part of the firebed must be inclosed on all sides except the front¹²;

156. (c) there must be a hearth which projects at least 300 millimetres in front of any naked flame, such as the pilot or burner, and any incandescent part of the firebed¹³;

157. (d) the hearth and any surround that is fitted must project at least 150 millimetres beyond each side of the naked flame or incandescent part of the firebed at its widest point¹⁴;

158. (e) the periphery of the hearth must be at least 50 millimetres above the floor level¹⁵.

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1 The Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693 were originally revoked as from 1 January 1996 by the Gas Appliances (Safety) Regulations 1992, SI 1992/711, reg 1(3), to the extent only that they applied to appliances. The Gas Appliances (Safety) Regulations 1992, SI 1992/711 were themselves revoked and replaced as from 18 July 1995 by the Gas Appliances (Safety) Regulations 1995, SI 1995/1629, reg 1(4) (see PARA 612 ante) subject to a saving. Regulation 1(3) now disapplies the Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693, as from 1 January 1996, to the extent only that they apply to appliances or fittings to which the Gas Appliances (Safety) Regulations 1995, SI 1995/1629 apply, the effect of this being to retain the Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693, in force for secondhand appliances only, to which the Gas Appliances (Safety) Regulations 1995, SI 1995/1629 do not apply: see reg 4(5); and PARA 612 head (c) ante.

2 For these purposes, 'gas fire' includes: (1) a gas-burning heating appliance in which the source of the gas is in liquid form or the gas is contained in a portable container; and (2) a gas-burning appliance intended to simulate a solid fuel fire: Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693, reg 3(c).

3 Ibid reg 3(d), 4.

4 Ibid reg 5. Regulation 5 is subject to reg 6 (see infra): reg 5. The prescribed tests and specified requirements are those specified in BS 1945 cl 1.3 (which contains design and performance requirements which apply to all types of heating appliances) and, in the case of gas fires, cl 2 and, in the case of oil heaters, cl 4: Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693, reg 5. For these purposes, 'BS 1945' means the British Standard Specification for Fireguards for Heating Appliances (Gas, Electric and Oil-Burning) BS 1945: 1971 published on 30 July 1972 as amended by Amendment no 1 published on 12 April 1972, subject to any further amendments made thereto and approved by the Secretary of State: Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693, reg 3(a). As to the British Standards Institution see PARA 446 ante.

5 For these purposes, 'member state' means member state of the European Community: ibid reg 6(1).

6 Ibid reg 6(1). For these purposes, 'equivalent level of safety' means a level of safety equivalent to that which would be provided if the appliance satisfied the tests and requirements specified by those clauses of BS 1945 which are relevant, pursuant to the Heating Appliances (Fireguards) (Safety) Regulations 1991, SI 1991/2693, reg 5 (see supra), to the type of appliance in question: reg 6(1).

7 Ibid reg 6(2). For these purposes, 'residential premises' includes premises intended for temporary accommodation except tents but does not include any part of residential premises which consists of outbuildings such as garages or greenhouses: reg 3(e).

8 Ibid reg 6(3).

9 For these purposes, 'flue box' means an inclosure constructed to perform the function of a fireplace recess: *ibid* reg 3(b).

10 *Ibid* reg 6(4).

11 *Ibid* reg 6(4), Schedule para 1.

12 *Ibid* Schedule para 2.

13 *Ibid* Schedule para 3.

14 *Ibid* Schedule para 4.

15 *Ibid* Schedule para 5.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(L) Household Items and Furniture/615. Ceramic ware.

(L) HOUSEHOLD ITEMS AND FURNITURE

615. Ceramic ware.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any ceramic ware¹, other than ceramic ware not intended to come into contact with foodstuffs, in respect of which any of the prescribed requirements relating to the permissible release of lead and cadmium² is not satisfied³.

1 For these purposes, 'ceramic ware' has the meaning given in cl 2 of BS 6748; and 'BS 6748' means the British Standard Specification for limits of metal release from ceramic ware, glassware, glass ceramic ware and vitreous enamel ware BS 6748: 1986 published by the British Standards Institution on 29 August 1986: Ceramic Ware (Safety) Regulations 1988, SI 1988/1647, reg 3(1). As to the British Standards Institution see PARA 446 ante.

2 Ceramic ware satisfies the requirements of BS 6748 applicable to such ware when tested in accordance with the provisions of cl 4 of and the Appendix to BS 6748: Ceramic Ware (Safety) Regulations 1988, SI 1988/1647, reg 4. Any reference to any requirement or test specified in BS 6748 includes a reference to any requirement or test incorporated in BS 6748 by reference to any other British Standard Specification as amended before 29 August 1986: Ceramic Ware (Safety) Regulations 1988, SI 1988/1647, reg 3(2).

3 *Ibid* regs 3(1), 5.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

615 Ceramic ware

TEXT AND NOTES--Replaced.

The quantities of lead and cadmium transferred from a ceramic article must not exceed specified limits: Ceramic Articles in Contact with Food (England) Regulations 2006, SI 2006/1179, reg 3(1), Sch 1; Ceramic Articles in Contact with Food (Wales) Regulations 2006, SI 2006/1704, reg 3(1), Sch 1. 'Ceramic article' means an article, other than an antique, manufactured from a mixture of inorganic materials with a generally high argillaceous or silicate content to which small quantities of organic materials may have been added, and is intended to come into contact with foodstuffs: see SI 2006/1179 reg 2; SI 2006/1704 reg 2. No person may manufacture, import or place on the market, a ceramic article which does not comply with the prescribed requirements relating to the permissible quantities of lead and cadmium: see SI 2006/1179 regs 2, 3(3); SI 2006/1704 regs 2, 3(3). Compliance is to be determined by testing and analysis unless it is demonstrated that the materials used to make the ceramic article did not contain lead or cadmium: see SI 2006/1179 reg 3(2), Sch 2; SI 2006/1704 reg 3(2), Sch 2. A manufacturer or seller of a ceramic article which is not yet in contact with food must provide a written declaration to accompany the article at the marketing stages up to and including the retail stage: see SI 2006/1179 reg 4, Sch 3 (amended by SI 2007/2790); SI 2006/1704 reg 4, Sch 3 (Sch 3 amended by SI 2007/3252). Each food authority in its area and each port health authority in its district is required to execute and enforce SI 2006/1179 and SI 2006/1704: SI 2006/1179 reg 5; SI 2006/1704 reg 5. Contravention of SI 2006/1179 or SI 2006/1704 (as the case may be) is an offence: see SI 2006/1179 reg 6; SI 2006/1704 reg 6.

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616. Cooking utensils.

No kitchen utensil in which to cook food is to be coated, on any surface designed to come into contact with the food, with a tin or other metallic coating which, apart from any local contamination derived from solder forming part of the utensil, contains lead or any compound of lead so that the proportion, by weight, of lead calculated as the element (Pb) exceeds 20 parts in 10,000 parts of the coating¹.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any kitchen utensil, irrespective of the date of the manufacture of the utensil, in respect of which the above requirements are not satisfied, except where that person reasonably believes that the utensil will not be used in the United Kingdom².

1 Cooking Utensils (Safety) Regulations 1972, SI 1972/1957, reg 2.

2 Consumer Protection Act 1987 (Commencement No 1) Order 1987, SI 1987/1680, arts 2, 6, 8, 9.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(L) Household Items and Furniture/617. Furniture and furnishings.

617. Furniture and furnishings.

The following requirements¹ have been imposed in relation to furniture² and furnishings; but those requirements do not apply in relation to the supply³ of any goods manufactured before 1 January 1950, the supply of materials when the person supplying them knows or has reasonable cause to believe that they will be used for re-covering or re-upholstering furniture manufactured before that date or in any case where the person supplying goods to which those requirements relate knows or has reasonable cause to believe that the goods will not be used in the United Kingdom⁴:

- 1188 (1) no furniture, other than mattresses, bed-bases, pillows and cushions, is to include upholstery which does not pass the cigarette test⁵;
- 1189 (2) no furniture is to include:
- 105 159. (a) any filling material which fails the relevant ignitability test⁶;
- 160. (b) as filling any foam in crumb form unless both the foam from which the crumb is derived and the foam in crumb form itself passes the relevant ignitability tests⁷;
- 106 1190 (3) no person is to supply any polyurethane foam in slab or cushion form which fails the prescribed test⁸, any foam in crumb form which may not be included in furniture⁹ or any latex rubber foam which fails the prescribed test¹⁰, in any case where he knows or has reasonable cause to believe that the material will be used for filling a cushion or pillow or for the purpose of upholstering or re-upholstering furniture¹¹;
- 1191 (4) if furniture, other than mattresses, bed-bases, pillows, cushions and insulated bags designed for carrying infants under the age of six months, which contains filling material is supplied with a cover on it (whether or not the cover is over the filling material), any visible part of the cover must pass the appropriate match test¹² and any invisible part of the cover the appropriate match test¹³;
- 1192 (5) loose covers, other than stretch covers, for furniture, other than mattresses, bed-bases, pillows and cushions, must pass the appropriate match test¹⁴ and stretch covers for any furniture, other than mattresses, bed-bases, pillows and cushions, must pass the appropriate match test¹⁵;
- 1193 (6) the appropriate display label¹⁶ must be attached to furniture, other than mattresses, bed-bases, pillows and cushions, which is exposed for supply by retail¹⁷;
- 1194 (7) permanent labels must be attached to furniture, other than mattresses and bed-bases, which include upholstery and to covers, other than permanent covers¹⁸, and, if the label is not in the longer form¹⁹, the additional prescribed information²⁰ must be supplied to an enforcement authority, if required²¹;
- 1195 (8) manufacturers and importers must give to an enforcement authority or any of its officers such information as it or he may reasonably require for the purpose of enabling the authority to enforce any of these requirements relating to any furniture other than mattresses, bed-bases, pillows and cushions²²;
- 1196 (9) secondhand furniture is required to comply with certain of the above requirements²³;

1197 (10) the supply of any furniture or other article in respect of which any of the above requirements²⁴ is not satisfied is prohibited, except in the case of goods which are supplied as part of a caravan which is being supplied secondhand²⁵.

1 Ie the requirements of the Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324 (amended by SI 1989/2358; and SI 1993/207).

2 For these purposes, 'furniture' means: (1) furniture of any description which is ordinarily intended for private use in a dwelling and includes beds and divans (including the bases and headboards of both), sofa-beds, children's furniture, cots (including carry-cots, playpens, prams and pushchairs and any other article of a like nature and use designed to contain a baby or small child), cushions, high-chairs, mattresses (of any size) and pillows, but does not include bedding or floor coverings (including carpets and mats); (2) furniture which is ordinarily intended for private use in the open air but which is also suitable for use in a dwelling; and (3) any collection of components designed or intended to be assembled into any article of furniture defined in heads (1), (2) supra: Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324, reg 3(1). 'Dwelling' includes any caravan, but does not include boats or any other vessels or motor vehicles: reg 3(1).

3 For these purposes, where the context so admits, 'supply' includes offering and agreeing to supply and exposing and possessing for supply; and cognate expressions are to be construed accordingly: *ibid* reg 3(1).

4 *Ibid* reg 4.

5 See *ibid* reg 5(1), (3) (reg 5 substituted by SI 1989/2358). For the meaning of 'the cigarette test' see the Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324, reg 5(1), Sch 4 Pt I (amended by SI 1989/2358). An invisible part of the cover on any part of furniture which includes upholstery is not required to pass the test in the Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324, reg 5(1) (as substituted) if that upholstery, including such invisible part of the cover, passes the cigarette test in Sch 4 Pt II (added by SI 1989/2358): Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324, reg 5(2) (as so substituted).

6 See *ibid* reg 6(1). For these purposes, 'the relevant ignitability test' means the test in Sch 1 Pt I (polyurethane foam in slab or cushion form), Sch 1 Pt II (polyurethane foam in crumb form), Sch 1 Pt III (latex rubber foam), Sch 2 Pt I (non-foam filling materials singly), Sch 2 Pt II (composite fillings for furniture other than mattresses, bed-bases, cushions and pillows), Sch 2 Pt III (pillows and cushions with primary covers) and Sch 2 Pt IV (composite fillings of mattresses and bed-bases), as the case may be: see reg 3(1). As to filling materials for cushions and pillows see reg 6(3), (4).

7 See *ibid* reg 6(2). The relevant ignitability test is that specified in Sch 1 Pt I (foam from which the crumb is derived) or Sch 1 Pt II (the foam in crumb form itself), as the case may be: reg 6(2).

8 Ie the test specified in *ibid* Sch 1 Pt I.

9 Ie by virtue of *ibid* reg 6(2): see *supra*.

10 Ie the test specified in *ibid* Sch 1 Pt III.

11 See *ibid* reg 7(1) (substituted by SI 1989/2358). See also the Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324, reg 7(2) (substituted by SI 1989/2358) (prohibition on supply of other filling material).

12 Ie the match test in the Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324, Sch 5 Pt I.

13 See *ibid* reg 8(1), (5)(b) (reg 8 substituted by SI 1989/2358). For these purposes, 'the match test' means the match test in Sch 5 Pt III (added by SI 1989/2358): Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324, reg 8(1) (as so substituted). Where furniture is supplied with a cover on it and there is between it and any part of the cover an interliner which passes the test in reg 8(2) (as substituted), Sch 3, then, provided that such part of the cover is made of a relevant material, it need not pass the match test which would otherwise have been applicable to it under reg 8(1) (as substituted): reg 8(2) (as so substituted). No person is to supply any cover or fabric knowing or having reasonable cause to believe that it will be used to provide or replace: (1) a visible part of the permanent cover of any furniture, other than mattresses, bed-bases, pillows, cushions and insulated bags designed for carrying infants under the age of six months, which contains filling material; or (2) an invisible part of such a permanent cover, unless the cover or fabric passes, in the case of head (1) *supra*, the match test in Sch 5 Pt I or, in the case of head (2) *supra*, the match test in Sch 5 Pt III (as added): reg 8(3), (5)(b) (as so substituted).

Regulation 8(3) (as substituted) does not apply if the fabric or cover supplied is made of a relevant material and the person who supplies it knows or has reasonable cause to believe that it will be used to replace or provide any part, whether visible or invisible, of the permanent cover on furniture and that there is or will be between the furniture and such part an interliner which passes the test in Sch 3: reg 8(4) (substituted by SI 1989/2358). For these purposes, 'relevant material' means a material containing at least 75% by weight of cotton, flax, viscose, modal, silk or wool, used separately or together and not coated with polyurethane or a polyurethane preparation: Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324, reg 8(5)(a) (as so substituted).

- 14 For these purposes, 'the appropriate match test' means the match test in ibid Sch 5 Pt I: reg 9(1).
- 15 See ibid reg 9(1)-(3). For these purposes, 'the appropriate match test' means the match test in Sch 5 Pt II: reg 9(2).
- 16 Ie as set out in ibid Sch 6.
- 17 See ibid reg 10(1), (2).
- 18 See ibid reg 11.
- 19 Ie as specified in ibid Sch 7 Pts I, II.
- 20 Ie as set out in ibid reg 12.
- 21 See ibid reg 12(1)-(4).
- 22 See ibid reg 13(1)-(3).
- 23 See ibid reg 14(1)-(4) (amended by SI 1989/2358; SI 1993/207).
- 24 Ie any of the requirements of the Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324 (as amended).
- 25 See ibid reg 15(1), (2).

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

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618. Bunk beds.

A bunk bed¹ must be so constructed:

- 1198 (1) as to prevent any reasonable possibility of any part of the body of a child under six years of age becoming wedged or trapped in any part of the bed's structure which is at or above the height of any part of the bed's sleeping surface², including the under-surface, so as to give rise to any risk of death or serious personal injury, including, but without prejudice to the generality of that, any risk of strangulation, suffocation or injury to the neck or spinal column³;
- 1199 (2) as to ensure that no gaps, other than permissible gaps⁴, exist at or above the height mentioned in head (1) above:

161. (a) in the sleeping surface;
 162. (b) in the head-board;
 163. (c) in the foot-board;
 164. (d) in any retaining structure at the side of the sleeping surface;
 165. (e) between the sleeping surface and any of the components mentioned in heads (2)(a) to (2)(d) above; or
 166. (f) between any ladder, whether a fixed or permanent part of the bed or designed to be hooked onto the bed and the sleeping surface or any of the component parts mentioned in heads (2)(a) to (2)(d) above⁵.
- 108

Nothing in head (2) above prevents the existence in a bunk bed of gaps arising from reasonable manufacturing tolerance or the existence of any gap in any retaining structure at the side of the sleeping surface of a bunk bed where the purpose of such a gap is to allow access to that surface by a person intending to sleep on it, provided that any such gap is at least 300 millimetres wide⁶.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply:

- 1200 (i) any bunk bed in respect of which any of the above requirements is not satisfied or would not be satisfied if any part of the bed intended to be adjusted were adjusted; or
- 1201 (ii) any collection of components designed or intended to be assembled into a bunk bed if that collection is not accompanied by full and clear instructions indicating the manner in which the components are to be assembled or, where that collection is accompanied by such instructions, the bed, when assembled in accordance with those instructions, would be a bed of the description referred to in head (i) above⁷.

1 For these purposes, 'bunk bed' means any bed having a sleeping surface which, or any part including the under-surface, of which, would be 800 millimetres or more vertically above any horizontal surface on which the bed were placed in such a position as would be usual for the purpose of enabling a person to sleep on the bed; and references to 'height', in relation to a bunk bed or any part of one, are to be construed accordingly: Bunk Beds (Entrapment Hazards) (Safety) Regulations 1987, SI 1987/1337, reg 2.

2 For these purposes, 'sleeping surface', in relation to a bunk bed, means the surface, excluding any mattress or upholstery, intended to support a sleeping person: *ibid* reg 2. 'Mattress' does not include any spring or wire frame intended to support a mattress: reg 2.

3 *Ibid* reg 3(1).

4 For these purposes, 'permissible gap' means: (1) in relation to a gap in the sleeping surface of a bunk bed, a gap of not more than 75 millimetres; and (2) in relation to any other gap in the structure of a bunk bed, a gap of not less than 60 millimetres nor more than 75 millimetres, where the gap is measured by the method prescribed by *ibid* reg 2, Schedule: reg 2.

5 *Ibid* reg 3(2). Regulation 3(2) is without prejudice to the generality of reg 3(1) (see the text to notes 1-3 *supra*) and subject to reg 3(3) (see the text to note 6 *infra*): reg 3(2).

6 *Ibid* reg 3(3).

7 *Ibid* reg 4.

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For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(M) Imitation Products/619. Food imitations.

(M) IMITATION PRODUCTS

619. Food imitations.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any manufactured goods¹ which are ordinarily intended for private use and are not food² but which:

1202 (1) have a form, odour, colour, appearance, packaging, labelling, volume or size which is likely to cause persons, in particular, children to confuse them with food and in consequence to place them in their mouths or suck them or swallow them; and

1203 (2) where such action as is mentioned in head (1) above is taken in relation to them, may cause death or personal injury³.

1 For these purposes, 'goods' does not include those mentioned in the Consumer Protection Act 1987 s 11(7) (a)-(d) (as amended) (see PARA 539 note 3 heads (1)-(4) ante) or marbles, products bona fide intended for use to represent food in a dolls' house or other model scene or setting or anything consisting entirely of articles or substances used as ingredients in the preparation of food: Food Imitations (Safety) Regulations 1989, SI 1989/1291, reg 3.

2 For these purposes, 'food' means food for human consumption and includes drink, chewing gum and other products of a like nature and use and articles and substances used as ingredients in the preparation of food and drink or of such products: *ibid* reg 3.

3 *Ibid* reg 4. The Food Imitations (Safety) Regulations 1989, SI 1989/1291 implement EC Council Directive 87/357 (OJ L192, 11.7.87, p 49) (see PARA 393 ante).

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For consumer protection from unfair trading see PARA 725A.

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620. Imitation dummies.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any goods¹ which are designed or constructed primarily as goods for private use:

- 1204 (1) which have a form, colour, appearance, packaging or labelling which may cause persons, in particular children, to confuse them with dummies², even if such goods are smaller than dummies, and in consequence place them in their mouths or suck them or swallow them; and
- 1205 (2) where such action as is mentioned in head (1) above is taken in relation to them, may cause death or personal injury³.

1 For these purposes, 'goods' does not include: (1) goods which comply with the requirements of BS 5239: 1988 or with any standard or specification recognised for use in a member state where such compliance provides a level of safety equivalent to that which would be provided if the goods complied with the requirements of BS 5239: 1988; or (2) toys to which the Toys (Safety) Regulations 1995, SI 1995/204 (see PARA 579 ante) apply: Imitation Dummies (Safety) Regulations 1993, SI 1993/2923, reg 3(2); Interpretation Act 1978 s 17(2)(b). 'BS 5239: 1988' means the British Standard Specification for babies' dummies published by the British Standards Institution on 31 October 1988, as amended on 31 May 1989 and 28 February 1991, subject to any amendments made thereto and approved by the Secretary of State: Imitation Dummies (Safety) Regulations 1993, SI 1993/2923, reg 2. As to the British Standards Institution see PARA 446 ante.

2 For these purposes, 'dummies' means a substitute nipple for a baby to suck on or bite on that is not designed to facilitate a baby obtaining fluid: *ibid* reg 2.

3 *Ibid* reg 3(1).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(N) Medical Devices/621. Medical devices and accessories.

(N) MEDICAL DEVICES

621. Medical devices and accessories.

Medical devices¹ and their accessories, single-use combination products, and systems and procedure packs ('relevant devices'²), other than:

- 1206 (1) active implantable medical devices³ and their accessories;
- 1207 (2) in vitro diagnostic medical devices⁴ and their accessories; and
- 1208 (3) devices that come within the scope of EC Council Directive of 14 June 1993 concerning medical devices⁵ and another directive ('the other directive') issued by one or more of the institutions of the Community⁶, where the other directive includes a provision allowing the manufacturer⁷ of the device to choose, during a transitional period that has not ended, which set of arrangements applies to it, and the manufacturer chooses to follow the set of arrangements in the other directive⁸;
- 1209 (4) medicinal products governed by European Parliament and EC Council Directive of 6 November 2001 on the Community Code relating to medicinal products for human use⁹ (including medicinal products derived from human blood or human plasma¹⁰);
- 1210 (5) human blood, human blood products, plasma or blood cells of human origin;

- 1211 (6) devices that incorporate, at the time of placing on the market¹¹, human blood, blood products, plasma or blood cells of human origin, except for stable derivatives devices;
- 1212 (7) transplants or tissues¹² or cells of human origin or products incorporating or derived from tissues or cells of human origin;
- 1213 (8) transplants or tissues or cells of animal¹³ origin, unless a device is manufactured utilising animal tissue which is rendered non-viable or non-viable products derived from animal tissue;
- 1214 (9) cosmetic products¹⁴; or
- 1215 (10) products whose principal intended purpose is such that they fall under EC Council Directive of 21 December 1989 on the approximation of the laws of the member states relating to personal protective equipment¹⁵,

which are placed on the market or put into service¹⁶ must comply with the relevant essential requirements¹⁷ which apply to them¹⁸.

No person is to supply¹⁹ a relevant device:

- 1216 (a) if that supply is also a placing on the market or putting into service of that device; or
- 1217 (b) in circumstances where that device has been placed on the market or put into service,

unless that device meets those essential requirements which apply to it²⁰.

In determining which are the relevant essential requirements for a device and whether or not the device complies with any of the relevant essential requirements, account is to be taken of its intended purpose²¹.

Every relevant device, other than a device which is custom-made or intended for clinical investigation²², placed on the market must bear the CE marking, affixed following the prescribed procedure²³, in a visible, legible and indelible form on the device or its sterile pack, where practicable and appropriate, on the instructions for use and, where applicable, on the sales packaging; and, where relevant, the marking must be accompanied by the relevant notified body or conformity assessment body identification number for that device²⁴. No person is to supply a relevant device, if that supply is also a placing on the market or putting into service, or if that supply is of a device that has been placed on the market or put into service, unless similar requirements as to the placing of the CE marking have been complied with²⁵. No person is to affix any mark or inscription to, or provide any information comprising a mark or inscription on a relevant device or its sterile pack, the instructions for use for a relevant device, or any sales packaging for a relevant device, which is likely to mislead a third party with regard to the meaning or the graphics of the CE marking or which reduces the visibility or the legibility of the CE marking²⁶.

The provisions above²⁷ do not apply where, following a duly justified request and in the interests of the protection of health, the Secretary of State has authorised, where appropriate for a specified period, the placing on the market or putting into service of a particular relevant device or relevant devices of a particular class or description without a CE marking, where appropriate subject to conditions (which are complied with), and has not withdrawn that authorisation²⁸.

There are further provisions relating to:

- 1218 (i) the supply of systems and procedure packs, and devices to be sterilised before use²⁹;
- 1219 (ii) the supply of custom-made general medical devices³⁰;

- 1220 (iii) the supply of general medical devices for clinical investigations³¹;
- 1221 (iv) the registration of persons placing general medical devices on the market³²;
- 1222 (v) additional requirements relating to the use of animal tissues³³;
- 1223 (vi) notified bodies, conformity assessment bodies and marking of products³⁴;
- 1224 (vii) enforcement³⁵;
- 1225 (viii) the setting up of a centralised system of records containing information on incidents occurring after devices have been placed on the market³⁶;
- 1226 (ix) fees chargeable by UK notified bodies and EC conformity assessment bodies for work done by them³⁷; and
- 1227 (x) the notification of decisions by the Secretary of State and the notified bodies³⁸.

No person is to affix the CE marking for a medical device to a product which is not a medical device, or to supply a product (if that supply is also a placing on the market, or if that supply is of a product which has been placed on the market) which has affixed to it the CE marking for a medical device if that product is not a medical device³⁹. No person is to provide information comprising a CE marking for a medical device on a product, the instructions for use for a product, or the sales packaging for a product if the product is not a medical device⁴⁰. Restrictions also apply to the affixing of a notified body or conformity assessment body number to a medical device⁴¹.

1 Including stable derivatives devices: Medical Devices Regulations 2002, SI 2002/618, reg 6. 'Medical device' means an instrument, apparatus, appliance, material or other article, whether used alone or in combination, together with any software necessary for its proper application, which:

- 5 (1) is intended by the manufacturer to be used for human beings for the purpose of:
 - 1. (a) diagnosis, prevention, monitoring, treatment or alleviation of disease;
1
 - 2. (b) diagnosis, monitoring, treatment, alleviation of or compensation for an injury or handicap;
2
 - 3. (c) investigation, replacement or modification of the anatomy or of a physiological process; or
3
 - 4. (d) control of conception; and
4
- 6 (2) does not achieve its principal intended action in or on the human body by pharmacological, immunological or metabolic means, even if it is assisted in its function by such means,

and includes devices intended to administer a medicinal product or which incorporate as an integral part a substance which, if used separately, would be a medicinal product and which is liable to act upon the body with action ancillary to that of the device: reg 2(1).

'Stable derivatives device' means a medical device that contains human blood, blood products, plasma or blood cells of human origin, and which incorporates, as an integral part, a substance which: (i) if used separately, may be considered to be a medicinal product constituent or a medicinal product derived from human blood or human plasma within the meaning of European Parliament and EC Council Directive 2001/83 (OJ L311, 28.11.2001, p 67) art 1.10; and (ii) is liable to act upon the human body with action ancillary to that of the device: Medical Devices Regulations 2002, SI 2002/618, reg 2(1).

2 See *ibid* reg 6.

3 'Active implantable medical device' means a medical device which:

- 7 (1) relies for its functioning on a source of electrical energy or a source of power other than that generated directly by the human body or by gravity; and
- 8 (2) is intended to be totally or partially introduced into the human body (whether surgically or medically, including being introduced into a natural orifice) and which is intended to remain in

the human body after completion of the surgical or medical procedure during which it is introduced,

even if it is intended to administer a medicinal product or incorporates as an integral part a substance which, if used separately, would be a medicinal product: *ibid* reg 2(1).

4 For the meaning of 'in vitro diagnostic medical device' see PARA 622 note 1 post.

5 *Ie* EC Council Directive 93/42 (OJ L169, 12.7.93, p 1) (as amended).

6 For these purposes, 'the Community' means in the context of any requirement relating to an in vitro diagnostic medical device, the European Community, and in the context of any requirement relating to any other medical device, the European Economic Area: reg 2(1). 'European Economic Area' means the European Economic Area created by the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)) (the 'EEA Agreement'): Medical Devices Regulations 2002, SI 2002/618, reg 2(1). As to the European Economic Area and the EEA Agreement see PARA 386 note 1 ante.

7 'Manufacturer' means: (1) the person with responsibility for the design, manufacture, packaging and labelling of a device before it is placed on the market under his own name, regardless of whether these operations are carried out by that person himself or on his behalf by a third party; or (2) any other person who assembles, packages, processes, fully refurbishes or labels one or more ready-made products or assigns to them their intended purpose as a device with a view to their being placed on the market under his own name, apart from a person who assembles or adapts devices already on the market to their intended purpose for an individual patient: *ibid* reg 2(1).

8 *Ibid* reg 6.

9 *Ie* European Parliament and EC Council Directive 2001/83 (OJ L311, 28.11.2001, p 67).

10 *Ie* governed by European Parliament and EC Council Directive 2001/83 (OJ L311, 28.11.2001, p 67) Title X.

11 'Placing on the market' means, in relation to a medical device, the first making available in return for payment or free of charge of a new or fully refurbished device, other than a device intended for clinical investigation, with a view to distribution, use, or both, on the Community market: Medical Devices Regulations 2002, SI 2002/618, reg 2(1). A relevant device or a single use combination product being shown at a trade fair, exhibition, demonstration or similar gathering is not being placed on the market if a visible sign clearly indicates that the device or product cannot be marketed or put into service until it complies with the requirements of EC Council Directive 93/42 (OJ L169, 12.7.93, p 1) or the Medical Devices Regulations 2002, SI 2002/618 (as amended): reg 12(1).

12 'Tissue' means an organisation of cells and/or extra-cellular constituents: *ibid* reg 2(1) (definition added by SI 2003/1697).

13 'Animal' means any animal from a bovine, ovine or caprine species, as well as deer, elk, mink and cats: Medical Devices Regulations 2002, SI 2002/618, reg 2(1) (definition added by SI 2003/1697).

14 *Ie* governed by EC Council Directive 76/768 (OJ L262, 27.9.76, p 169) (as amended).

15 *Ie* EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (as amended). See PARA 586 ante.

16 'Putting into service' means, in relation to any medical device other than an active implantable medical device, the first making available of the device in the Community to a final user, including where a device is used in a professional context for the purposes of medical analysis without being marketed: Medical Devices Regulations 2002, SI 2002/618, reg 2(1). A relevant device or a single use combination product being shown at a trade fair, exhibition, demonstration or similar gathering is not being put into service if a visible sign clearly indicates that the device or product cannot be marketed or put into service until it complies with the requirements of EC Council Directive 93/42 (OJ L169, 12.7.93, p 1) or the Medical Devices Regulations 2002, SI 2002/618 (as amended): reg 12(1).

17 'Relevant essential requirements', in relation to a medical device, means the essential requirements set out in EC Council Directive 90/385 (OJ L189, 20.7.90, p 17) Annex 1, EC Council Directive 93/42 (OJ L169, 12.7.93, p 1) Annex I or EC Council Directive 98/79 (OJ L331, 7.12.98, p 1) Annex I which apply to it, but not including, in the case of a device intended for clinical investigation, such of those requirements, or aspects of them, as are the subject of the investigation: Medical Devices Regulations 2002, SI 2002/618, reg 2(1). 'Intended for clinical investigation' means, in relation to any medical device other than an active implantable medical device, that it is intended for use by a duly qualified medical practitioner or a professional user when conducting investigations of that device in an adequate human clinical environment: reg 2(1).

18 Ibid reg 8(1). The Medical Devices Regulations 2002, SI 2002/618 (as amended), implement EC Council Directive 93/42 (OJ L169, 12.7.93, p 1) (amended by EC Council Directive 98/79 (OJ L331, 7.12.98, p 1)) (see PARA 393 ante).

19 'Supply', in relation to a medical device, means: (1) the supply of, or the offer or agreement to supply, the device; or (2) the exposure or possession for supply of the device: Medical Devices Regulations 2002, SI 2002/618, reg 2(1).

20 Ibid reg 8(2).

21 Ibid reg 9(1). For these purposes, 'intended purpose' means, in relation to a device, the use to which the device is intended according to the data supplied by the manufacturer on the labelling, the instructions for use and/or the promotional materials: reg 2(1). As to the classification of medical devices see reg 7; and as to the essential requirements for medical devices see reg 9(2)-(8).

22 Ibid reg 12(2).

23 Ie the procedure mentioned in ibid reg 13 (amended by SI 2003/1697). As to the general provisions relating to conformity assessment procedures see the Medical Devices Regulations 2002, SI 2002/618, regs 17, 18.

24 Ibid reg 10(1), (3). As to CE marking of general medical devices that come within the scope of more than one directive see reg 11. Regulation 10 does not apply to a relevant device which is a system or procedure pack, unless: (1) the system or procedure pack incorporates a medical device which does not bear a CE marking; or (2) the chosen combination of medical devices is not compatible in view of their original intended use: reg 12(3). Nor does reg 10 apply to single-use combination products, unless the medicinal product which forms part of that product is liable to act on the human body with action ancillary to that of the medical device which forms part of that product: reg 12(4).

25 Ibid reg 10(2), (4).

26 Ibid reg 10(5).

27 Ie ibid regs 8, 10.

28 Ibid reg 12(5).

29 Ibid reg 14.

30 Ibid reg 15.

31 Ibid reg 16.

32 Ibid reg 19.

33 Ibid reg 19A (added by SI 2003/1697).

34 Medical Devices Regulations 2002, SI 2002/618, Pt V (regs 44A-51) (amended by SI 2003/1697).

35 Medical Devices Regulations 2002, SI 2002/618, reg 61 (amended by SI 2003/1400). Notwithstanding that they are made partly in exercise of powers other than those conferred by the Consumer Protection Act 1987 s 11 (as amended) (see PARA 539 ante), the Medical Devices Regulations 2002, SI 2002/618 (as amended), are to be regarded for all purposes relating to enforcement (whether by criminal proceedings, notices or otherwise) as safety regulations as defined in the Consumer Protection Act 1987 (see PARA 539 ante), and any provision of the Medical Devices Regulations 2002, SI 2002/618 (as amended), made under those other powers is to be regarded for those purposes as a safety provision as defined in the Consumer Protection Act 1987 (see PARA 529 note 3 ante): Medical Devices Regulations 2002, SI 2002/618, reg 61(1) (amended by SI 2003/1400). Except as provided by the Medical Devices Regulations 2002, SI 2002/618, reg 61(3), each weights and measures authority in Great Britain is relieved of its duty imposed by the Consumer Protection Act 1987 s 27(1) (see PARA 555 ante), in so far as it is exercisable in relation to devices, and that duty is transferred to the Secretary of State: Medical Devices Regulations 2002, SI 2002/618, reg 61(2). Regulation 61(2) does not, however, relieve an authority of its duty in relation to devices which are consumer goods for the purposes of the Consumer Protection Act 1987 Pt II (ss 10-19) (as amended) (see PARA 534 ante); and, apart from the power to serve restriction notices which is exercisable solely by the Secretary of State (Medical Devices Regulations 2002, SI 2002/618, reg 61(4)), accordingly each weights and measures authority in Great Britain must, concurrently with the Secretary of State, enforce the Medical Devices Regulations 2002, SI 2002/618 (as amended), in relation to such devices: reg 61(3). As to compliance notices see reg 62; as to restriction notices see reg 63.

- 36 See *ibid* reg 65.
- 37 *Ibid* reg 49.
- 38 *Ibid* reg 64.
- 39 *Ibid* reg 51(1).
- 40 *Ibid* reg 51(2).
- 41 *Ibid* reg 50.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

621 Medical devices and accessories

TEXT AND NOTES 1-20--Where a hazard exists, devices which are also machinery must also meet the essential health and safety requirements set out in European Parliament and EC Council Directive 2006/42 (OJ L157, 9.6.2006, p 24) Annex I to the extent to which those requirements are more specific than the essential requirements in Directive 93/42: SI 2002/618 reg 8(3) (added by SI 2008/2936 with effect from 21 March 2010). As to the meaning of 'hazard' and 'machinery' see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 232.

NOTE 1--In the definition of 'medical device', for the words 'an instrument, apparatus, appliance, material or other article, whether used alone or in combination, together with any software necessary for its proper application' substitute 'any instrument, apparatus, appliance, software, material or other article, whether used alone or in combination, together with any accessories, including the software intended by its manufacturer to be used specifically for diagnosis or therapeutic purposes or both and necessary for its proper application': SI 2002/618 reg 2(1) (amended by SI 2008/2936 with effect from 21 March 2010).

NOTE 13--Definition of 'animal' now stated to be for the purpose of SI 2002/618 regs 13, 17, 19A and 47: reg 2(1) (amended by SI 2008/2936 with effect from 21 March 2010).

NOTE 17--'Intended for clinical investigation' now means intended for use by a registered medical practitioner when conducting investigations of that device in an adequate human clinical environment, or intended for use by any other person in a member state who, by virtue of their professional qualification, is authorised to carry out investigations of that device in an adequate human clinical environment: SI 2002/618 reg 2(1) (definition substituted by SI 2008/2936 with effect from 21 March 2010).

NOTE 21--See also SI 2002/618 reg 9(5A), (9) (added by SI 2008/2936 with effect from 21 March 2010).

NOTE 23--SI 2002/618 reg 18 amended: SI 2008/2936 (with effect from 21 March 2010).

NOTES 29-32--SI 2002/618 regs 14-16, 19 amended: SI 2008/2936 (with effect from 21 March 2010).

NOTE 34--SI 2002/618 reg 47 further amended: SI 2008/2936 (with effect from 21 March 2010).

NOTE 35--Reference to the 1987 Act Pt II omitted from SI 2002/618 reg 61(3) (as amended by SI 2005/2909). For these purposes 'consumer goods' now means any goods which are ordinarily intended for private use or consumption: SI 2002/618 reg 61(7A) (added by SI 2005/2909). SI 2002/618 reg 63 amended: SI 2008/2936 (with effect from 21 March 2010).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(N) Medical Devices/622. In vitro diagnostic medical devices.

622. In vitro diagnostic medical devices.

In vitro diagnostic medical devices¹ which are placed on the market² or put into service³ or supplied⁴ must comply with the relevant essential requirements⁵.

Every relevant device and accessory to such a device, other than products manufactured and used only within the same health institution and either on the premises of their manufacture or on premises in the immediate vicinity without having been transferred to another legal entity⁶, placed on the market must, where practicable and appropriate, bear the CE marking, affixed following the prescribed procedure⁷, in a visible, legible and indelible form on the device and, where practicable and appropriate, that marking must be accompanied by the relevant notified body identification number⁸. No device is to be placed on the market, put into service or supplied unless a CE marking appears on any sales packaging and the instructions for use for that device, and that CE marking is accompanied by any relevant notified body or conformity assessment body identification number for that device⁹. No device is to bear a mark or inscription which is likely to mislead third parties with regard to the meaning or the graphics of the CE marking¹⁰. A relevant device being shown at a trade fair, exhibition, scientific gathering or technical gathering is not being placed on the market or put into service if the device is not used on any specimen taken from the participants, and a visible sign clearly indicates that the device cannot be marketed or put into service until it complies with the essential requirements¹¹.

There are further provisions relating to:

- 1228 (1) devices for performance evaluation¹²;
- 1229 (2) the registration of persons placing devices on the market¹³;
- 1230 (3) the designation of the notified bodies which are to carry out various tasks¹⁴;
- 1231 (4) fees chargeable by notified bodies for work done by them¹⁵;
- 1232 (5) enforcement¹⁶; and
- 1233 (6) the notification of decisions by the Secretary of State and the notified bodies¹⁷.

No person is to put into service or supply a relevant device, if that supply is also a putting into service of that device, or in circumstances where that device has been placed on the market or put into service, which is not ready for use¹⁸. No person is to affix a CE marking for a relevant device to a product which is not a relevant device, or place on the market or supply, if that supply is also a placing on the market, a product which has affixed to it a CE marking for a relevant device if that product is not a relevant device¹⁹. No person is to provide information comprising a CE marking for a relevant device on a product, the instructions for use for a product or the sales packaging of a product if the product is not a relevant device²⁰.

- 1 'In vitro diagnostic medical device' means a medical device which: (1) is a reagent, reagent product, calibrator, control material, kit, instrument, apparatus, equipment or system, whether used alone or in combination; and (2) is intended by the manufacturer to be used in vitro for the examination of specimens, including blood and tissue donations, derived from the human body, solely or principally for the purpose of providing information (a) concerning a physiological or pathological state; (b) concerning a congenital abnormality; (c) to determine the safety and compatibility of donations, including blood and tissue donations, with potential recipients; or (d) to monitor therapeutic measures, and includes a specimen receptacle but not a product for general laboratory use, unless that product, in view of its characteristics, is specifically intended by its manufacturer to be used for in vitro diagnostic examination: Medical Devices Regulations 2002, SI 2002/618, reg 2(1).
- 2 For the meaning of 'placed on the market' see PARA 621 note 11 ante.
- 3 'Putting into service' means the making available of the device to a registered medical practitioner for implantation: Medical Devices Regulations 2002, SI 2002/618, reg 2(1).
- 4 For the meaning of 'supply' see PARA 621 note 19 ante.
- 5 See the Medical Devices Regulations 2002, SI 2002/618, regs 34, 35.
- 6 Ibid reg 33(1)(a).
- 7 See ibid reg 40. As to supplemental provisions relating to conformity assessment procedures see regs 41, 47 (reg 47 amended by SI 2003/1697).
- 8 Medical Devices Regulations 2002, SI 2002/618, reg 36(1), (2).
- 9 Ibid reg 36(3), (4).
- 10 Ibid reg 36(5).
- 11 Ibid reg 39(1). The Secretary of State may authorise the placing on the market or putting into service of a particular relevant device or relevant devices of a particular class or description without a CE marking: reg 39(2).
- 12 See ibid reg 43.
- 13 See ibid reg 44.
- 14 See ibid regs 42, 45, 47 (regs 45, 47 amended by SI 2003/1697).
- 15 See the Medical Devices Regulations 2002, SI 2002/618, reg 49.
- 16 See ibid regs 61-63; and PARA 621 note 35 ante.
- 17 See ibid reg 64.
- 18 Ibid reg 38.
- 19 Ibid reg 51(1).
- 20 Ibid reg 51(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

622 In vitro diagnostic medical devices

NOTE 7--SI 2002/618 reg 47 further amended: SI 2008/2936 (with effect from 21 March 2010).

NOTE 16--SI 2002/618 reg 61 amended: SI 2007/400.

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(O) OIL HEATERS

623. Domestic unflued oil heaters.

An oil heater¹ must bear a warning²:

- 1234 (1) against using petrol as a fuel;
- 1235 (2) against carrying the heater when alight;
- 1236 (3) against using the heater in an unventilated place;
- 1237 (4) against using the heater where it may be exposed to draughts; and
- 1238 (5) except in the case of an oil heater having a fuel container which cannot be filled without being removed from the heater, against filling when alight³;

and a self-extinguishing oil heater must bear instructions about any necessary periodical or other attention needed to maintain or restore its self-extinguishing capability⁴.

An oil heater must be of good construction, sound materials and adequate strength⁵. No part of an oil heater in which a crack or distortion might affect its proper working is to be made of drawn brass unless any stress caused by the process of drawing and capable of causing such a crack or distortion is eliminated⁶. If it is necessary for its safe operation that it should be levelled, an oil heater must include a device for levelling it⁷.

There are detailed provisions relating to:

- 1239 (a) fuel containers⁸;
- 1240 (b) the fuel system⁹;
- 1241 (c) the stability of heaters¹⁰;
- 1242 (d) safety in overturning¹¹;
- 1243 (e) the spilling of fuel¹²;
- 1244 (f) flame regulators¹³;
- 1245 (g) removable parts¹⁴;
- 1246 (h) pressure heaters¹⁵;
- 1247 (i) the emission of carbon monoxide¹⁶;
- 1248 (j) flame stability¹⁷;
- 1249 (k) fuel creep¹⁸;
- 1250 (l) flame creep¹⁹;
- 1251 (m) the emission of smoke²⁰;
- 1252 (n) surface temperature²¹;
- 1253 (o) fuel temperature²²;
- 1254 (p) operation under out-of-level conditions²³;
- 1255 (q) fire risk to walls and doors²⁴;
- 1256 (r) draught resistance²⁵;
- 1257 (s) flame flash-back²⁶;
- 1258 (t) automatic fuel supply regulators²⁷; and
- 1259 (u) the testing of oil heaters²⁸ and authorised testers²⁹.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply an oil heater, irrespective of the date of the manufacture of the oil heater, in respect of which the above requirements are not satisfied, except where that person reasonably believes that the oil heater will not be used in the United Kingdom³⁰.

1 For these purposes, 'oil heater' means an appliance suitable for use in any dwelling and designed for the heating of space by means of burning kerosene within the meaning of EC Council Regulation 3000/75 (OJ L304, 24.11.75, p 1) Section V Ch 27 (commonly called paraffin), not being an appliance designed for use with a flue for the removal into the open air, either directly or by connection with another flue or flues, of gases produced by the burning of kerosene: Oil Heaters (Safety) Regulations 1977, SI 1977/167, reg 2(1). EC Council Regulation 3000/75 (OJ L304, 24.11.75, p 1) was revoked by EC Council Regulation 2658/87 (OJ L256, 7.9.87, p 1) (substituted by EC Commission Regulation 2261/98 (OJ L292, 30.10.98, p 1), which contains no corresponding meaning of kerosene.

2 The warnings must be distinguished by the word 'Warning' or the word 'Caution' or some other expression indicating that the warning is given for the purpose of safety: Oil Heaters (Safety) Regulations 1977, SI 1977/167, reg 5(2). The warnings must be set out in legible and durable characters and displayed either on the heater itself or on a durable label stoutly affixed to it: reg 5(4).

3 Ibid reg 5(1).

4 Ibid reg 5(3). The instructions must be set out in legible and durable characters and displayed either on the heater itself or on a durable label stoutly affixed to it: reg 5(4).

5 Ibid reg 6(1).

6 Ibid reg 6(2).

7 Ibid reg 6(3).

8 See ibid reg 7.

9 See ibid reg 8.

10 See ibid reg 9.

11 See ibid reg 10.

12 See ibid reg 11.

13 See ibid reg 12.

14 See ibid reg 13.

15 See ibid reg 14.

16 See ibid reg 15.

17 See ibid reg 16.

18 See ibid reg 17.

19 See ibid reg 18.

20 See ibid reg 19.

21 See ibid reg 20.

22 See ibid reg 21.

23 See ibid reg 22.

24 See ibid reg 23.

25 See ibid reg 24.

26 See *ibid* reg 25.

27 See *ibid* reg 26.

28 See *ibid* reg 4.

29 See *ibid* reg 28.

UPDATE

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

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(P) PENCILS AND GRAPHIC INSTRUMENTS

624. Coatings of paint on pencils, pens and brushes.

No person is to supply¹ a pencil, pen or brush², other than a pencil, pen or brush previously supplied before 1 August 1974, which fails to satisfy the prescribed requirements³. Those requirements are that a pencil, pen or brush is not to have any coating of paint⁴ which:

1260 (1) contains soluble⁵ arsenic, cadmium, hexavalent chromium or mercury, or any soluble compound of arsenic, cadmium, hexavalent chromium or mercury, so that the proportion, by weight, of the element calculated as such exceeds 100 milligrams/kilogram of that coating;

1261 (2) contains soluble antimony or lead, or any soluble compound of antimony or lead, so that the proportion, by weight, of the element calculated as such exceeds 250 milligrams/kilogram of that coating; or

1262 (3) contains soluble barium, or any soluble compound of barium, so that the proportion, by weight, of the element calculated as such exceeds 1,000 milligrams/kilogram of that coating⁶.

1 For these purposes, 'supply' includes offering to supply, agreeing to supply, exposing for supply and possessing for supply; and cognate expressions are to be construed accordingly: Pencils and Graphic Instruments (Safety) Regulations 1998, SI 1998/2406, reg 3(1).

2 For these purposes, 'brush' does not include any brush which measures more than 12 millimetres across the breadth of the end of the ferrule: *ibid* reg 3(1).

3 *Ibid* regs 1(2), 4(1). Regulation 4(1) does not, however, prohibit the supply of any pencil, pen or brush which fails to satisfy the requirements of reg 4(2) (see the text to notes 4-6 *infra*) if, although it has a coating of paint which contains an element or compound referred to in reg 4(2), the element or compound contained in the coating is not capable of being dissolved by following the sample removal/preparation procedure in BS EN 71-3 appropriate to the coating in question: Pencils and Graphic Instruments (Safety) Regulations 1998, SI 1998/2406, reg 4(3). For these purposes, 'BS EN 71-3' means the British Standard Specification for the safety of toys - Pt 3: migration of certain elements BS EN 71-3: 1995 published by the British Standards Institution on 15 June 1995: Pencils and Graphic Instruments (Safety) Regulations 1998, SI 1998/2406, reg 3(1). A reference to

BS EN 71-3 is a reference to that standard as it has effect on 26 September 1998, provided that, where that standard is amended or revised after that date and the amendment or revision is approved by the Secretary of State, that reference is to be construed at any time after such approval as a reference to that standard as so amended or revised: Pencils and Graphic Instruments (Safety) Regulations 1998, SI 1998/2406, reg 3(2). BS EN 71-3 is to be read as though it applied to the articles to which the Pencils and Graphic Instruments (Safety) Regulations 1998, SI 1998/2406, apply and every reference to 1,1,1 trichloroethane were a reference to *n*-heptane: reg 3(3). As to the British Standards Institution see PARA 446 ante.

4 For these purposes, 'paint' includes lacquer, varnish and other similar preparations: *ibid* reg 3(1).

5 For these purposes, 'soluble', in relation to an element or compound contained in a coating or substance, means capable of being dissolved by the method described in *ibid* reg 3(1), Schedule: reg 3(1).

6 *Ibid* reg 4(2). The requirements of reg 4(2) are satisfied if the pencil, pen or brush conforms to any standard or specification recognised for use in a member state or any other state within the European Economic Area, provided that conformity to such a standard or specification provides a level of safety at least equivalent to that which would be provided by compliance with those requirements; and any reference to those requirements is to be construed accordingly: reg 3(4). As to the European Economic Area see PARA 386 note 1 ante.

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For consumer protection from unfair trading see PARA 725A.

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625. Substances used in pencils, crayons, chalk and other similar articles.

No person is to supply¹ a pencil, crayon, chalk or other similar article, including any pencil-lead for a propelling pencil, other than a pencil, crayon, chalk or similar article, including any pencil-lead for a propelling pencil, previously supplied before 1 August 1974, which fails to satisfy the prescribed requirements². Those requirements are that a pencil, crayon, chalk or other similar article, including any pencil-lead for a propelling pencil, is not to consist of or contain any substance in the form of a pencil-lead or stick and intended to leave a trace of the substance when the pencil, crayon, chalk or other article is used for writing, drawing or marking which:

1263 (1) contains soluble³ arsenic, cadmium, hexavalent chromium or mercury, or any soluble compound of arsenic, cadmium, hexavalent chromium or mercury, so that the proportion, by weight, of the element calculated as such exceeds 100 milligrams/kilogram of that substance;

1264 (2) contains soluble antimony or lead, or any soluble compound of antimony or lead, so that the proportion, by weight, of the element calculated as such exceeds 250 milligrams/kilogram of that substance; or

1265 (3) contains soluble barium, or any soluble compound of barium, so that the proportion, by weight, of the element calculated as such exceeds 100 milligrams/kilogram of that substance⁴.

1 For the meaning of 'supply' see PARA 624 note 1 ante.

2 For the meaning of 'soluble' see PARA 624 note 5 ante.

3 Pencils and Graphic Instruments (Safety) Regulations 1998, SI 1998/2406, regs 1(2), 5(1). Regulation 5(1) does not prohibit the supply of any pencil, crayon, chalk or other similar article, including any pencil-lead for a propelling pencil, which fails to satisfy the requirements of reg 5(2) (see the text to note 4 *infra*) if, although it consists of or contains a substance referred to in reg 5(2) which contains an element or compound also referred to in reg 5(2), the element or compound contained in the substance is not capable of being dissolved by following the sample removal/preparation procedure in BS EN 71-3 appropriate to the substance in question: Pencils and Graphic Instruments (Safety) Regulations 1998, SI 1998/2406, reg 5(3). For the meaning of 'BS EN 71-3' see PARA 624 note 3 *ante*.

4 Pencils and Graphic Instruments (Safety) Regulations 1998, SI 1998/2406, reg 5(2). The requirements of reg 5(2) are satisfied if the pencil, crayon, chalk or other similar article conforms to any standard or specification recognised for use in a member state or any other state within the European Economic Area, provided that conformity to such a standard or specification provides a level of safety at least equivalent to that which would be provided by compliance with those requirements; and any reference to those requirements is to be construed accordingly: reg 3(4). As to the European Economic Area see PARA 386 note 1 *ante*.

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(Q) TOBACCO PRODUCTS

(a) *Tobacco Advertising and Promotion*

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

626. Prohibition of tobacco advertising.

A person who in the course of a business publishes¹ a tobacco advertisement², or causes one to be published, in the United Kingdom is guilty of an offence³. A person who in the course of a business prints, devises or distributes⁴ in the United Kingdom a tobacco advertisement which is published in the United Kingdom, or causes such a tobacco advertisement to be so printed, devised or distributed, is guilty of an offence⁵.

If a newspaper, periodical or other publication ('the publication') containing a tobacco advertisement is in the course of a business published in the United Kingdom: (1) any proprietor or editor of the publication is guilty of an offence⁶; (2) any person who, directly or indirectly, procured the inclusion of the advertisement in the publication is guilty of an offence⁷; and (3) any person who sells the publication, or offers it for sale, or otherwise makes it available to the public⁸ is guilty of an offence⁹.

1 References to publishing include any means of publishing including, in particular, publishing by any electronic means, for example by means of the internet: Tobacco Advertising and Promotion Act 2002 s 21. The Secretary of State may by order amend any provision of the Act if he considers it appropriate to do so in consequence of any developments in technology relating to publishing or distributing by electronic means: s 7. As to regulations and orders under the Act see s 19.

2 'Tobacco advertisement' means an advertisement whose purpose is to promote a tobacco product, or whose effect is to do so: *ibid* s 1. 'Tobacco product' means a product consisting wholly or partly of tobacco and intended to be smoked, sniffed, sucked or chewed: s 1. 'Purpose' includes one of a number of purposes: s 21.

3 Ibid s 2(1). Section 2 is in force as from 31 July 2005 for all purposes other than website advertising: see the Advertising and Promotion Act 2002 (Commencement No 7) Order 2004, SI 2004/3138, art 2.

4 Distributing a tobacco advertisement includes transmitting it in electronic form, participating in doing so, and providing the means of transmission: Tobacco Advertising and Promotion Act 2002 s 2(3).

5 Ibid s 2(2). It is not an offence under s 2(1) for a person who does not carry on business in the United Kingdom to publish or cause to be published a tobacco advertisement by means of a website which is accessed in the United Kingdom, and, in that case, devising the advertisement or causing it to be devised is not an offence under s 2(2): s 2(4).

6 Ibid s 3(a).

7 Ibid s 3(b).

8 'Public' means the public generally, any section of the public or individually selected members of the public: ibid s 21.

9 Ibid s 3(c).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

626 Prohibition of tobacco advertising

TEXT AND NOTES--Where by means of an information society service, provided in the course of a business, a tobacco advertisement is published (1) in the United Kingdom, or (2) in an EEA state other than the United Kingdom, by a service provider established in the United Kingdom, (a) any proprietor of the information society service or any editor of the information contained in the information society service is guilty of an offence, and (b) any person who (directly or indirectly) procured the inclusion of the tobacco advertisement in the information contained in the information society service is guilty of an offence: Tobacco Advertising and Promotion Act 2002 s 3A (added by the Tobacco Advertising and Promotion Act 2002 etc (Amendment) Regulations 2006, SI 2006/2369). 'EEA state' means a member State, Norway, Iceland or Liechtenstein: 2002 Act s 21(1) (definition added by SI 2006/2369).

'Information society services' (i) has the meaning set out in EC Council Directive 2000/31 art 2(a) laying down a procedure for the provision of information in the field of technical standards and regulations (as amended by EC Council Directive 98/48), and (ii) is summarised in Directive 2000/31 recital 17 as covering 'any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service': 2002 Act s 21(1) (definition added by SI 2006/2369). 'Service provider' means a person providing an information society service: 2002 Act s 21(1) (definition added by SI 2006/2369). See further Coroners and Justice Act 2009 s 143 (implementation of E-Commerce and Services directives: penalties).

For the purposes of the 2002 Act (A) an establishment, in connection with an information society service, is the place at which the service provider effectively pursues an economic activity for an indefinite period; (B) the presence or use in a particular place of equipment or other technical means of providing an information society service does not, of itself, constitute that place as an establishment of the kind mentioned in head (A); (C) where it cannot be determined from which of a number of

establishments a given information society service is provided, that service is to be regarded as provided from the establishment where the service provider has the centre of his activities relating to the service, and references to a person being established in any place must be construed accordingly: s 21(2) (added by SI 2006/2369).

The Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013 apply, notwithstanding reg 3(2), to the 2002 Act: Electronic Commerce (EC Directive) (Extension) Regulations 2003, SI 2003/115 (amended by SI 2006/2369).

NOTES 1, 2, 8--2002 s 21 renumbered as s 21(1): SI 2006/2369.

NOTE 3--2002 Act s 2 now in force for remaining purposes: SI 2006/2372.

NOTE 5--A service provider established in the United Kingdom who, in the course of providing information society services, does anything in an EEA state other than the United Kingdom which, if done in the United Kingdom, would constitute an offence under the 2002 Act s 2(1) or (2) is guilty of an offence: s 2(4) (substituted by SI 2006/2369).

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627. Exclusions from the general prohibition.

No offence is committed¹ in relation to a tobacco advertisement²: (1) if it is, or is contained in, a communication made in the course of a business which is part of the tobacco trade, and for the purposes³ of that trade, and directed solely at persons⁴ who are engaged in, or employed by, a business which is also part of that trade in their capacity as such persons⁵; (2) if it is, or is contained in, the communication made in reply to a particular request by an individual for information about a tobacco product⁶; or (3) if it is contained in a publication (other than an in-flight magazine) whose principal market is not the United Kingdom, or any part of it, or if it is contained in any internet version of such a publication⁷.

The Secretary of State may provide in regulations⁸ that no offence is committed⁹ in relation to a tobacco advertisement which: (a) is in a place or on a website where tobacco products are offered for sale¹⁰; and (b) complies with requirements specified in the regulations¹¹.

1 Ie under the Tobacco Advertising and Promotion Act 2002 s 2 or s 3: see PARA 626 ante.

2 For the meaning of 'tobacco advertisement' see PARA 626 note 2 ante.

3 For the meaning of 'purpose' see PARA 626 note 2 ante.

4 Ie any person who: (1) is responsible for making decisions on behalf of a business which is part of the tobacco trade about the purchase of tobacco products which are to be sold in the course of that business; (2) occupies a position in the management structure of the business in question which is equivalent in seniority to, or of greater seniority than, that of any such person; or (3) is the person who, or is a member of the board of directors or other body of persons (however described) which, is responsible for the conduct of the business in question: Tobacco Advertising and Promotion Act 2002 s 4(2). For the meaning of 'tobacco product' see PARA 626 note 2 ante.

5 Ibid s 4(1)(a).

6 Ibid s 4(1)(b).

7 Ibid s 4(1)(c).

8 As to the power to make regulations see ibid s 19.

9 Ie under ibid s 2: see PARA 626 ante.

10 Ibid ss 4(3)(a), 21.

11 Ibid ss 4(3)(b), 21. The regulations may, in particular, provide for the meaning of 'place': s 4(4). See the Tobacco Advertising and Promotion (Point of Sale) Regulations 2004, SI 2004/765.

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

627 Exclusions from the general prohibition

TEXT AND NOTES 1-7--Or, head (4) if it is published by means of an information society service by a person who does not carry on business in an EEA state and it is not intended to be accessed principally by persons in one or more EEA states (or any part of them): Tobacco Advertising and Promotion Act 2002 s 4(1)(d) (added by the Tobacco Advertising and Promotion Act 2002 etc (Amendment) Regulations 2006, SI 2006/2369). As to the liability of information society service providers see further 2002 Act s 4(5), Schedule (both added by SI 2006/2369). For the meaning of 'EEA state' see PARA 626.

NOTE 2--The supply of information to an individual is not a tobacco advertisement if (1) an information society service provides a means by which tobacco products may be purchased which includes the provision of information about a tobacco product, and (2) the information becomes available only after the individual has initiated the process of making the purchase: 2002 Act s 4(1B) (added by SI 2006/2369).

TEXT AND NOTE 6--Head (2) applies to a communication made by means of an information society service only if the request was made (a) by means of an information society service which does not advertise any tobacco product to persons (i) who have not made such a request, or (ii) who have not initiated a process by which a tobacco product may be purchased by means of that service; or (b) without using an information society service: 2002 Act s 4(1A) (added by SI 2006/2369).

TEXT AND NOTE 7--Now, head (3) if it is contained in a publication (other than in an in-flight magazine) (a) which is printed in a country which is not an EEA state, and (b) whose principal market is not one or more of the EEA states (or any part of them): 2002 Act s 4(1)(c) (substituted by SI 2006/2369).

TEXT AND NOTE 10--In head (a) words 'on a website' omitted: 2002 Act s 4(3) (amended by SI 2006/2369).

NOTE 10--2002 Act s 21 renumbered as s 21(1): SI 2006/2369.

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628. Defences.

A person does not commit an offence¹ in connection with an advertisement whose purpose² is to promote a tobacco product³, if he did not know, and had no reason to suspect, that the purpose of the advertisement was to promote a tobacco product⁴. A person does not commit such an offence in connection with an advertisement whose effect is to promote a tobacco product if he could not reasonably have foreseen that that would be the effect of the advertisement⁵. A person does not commit an offence⁶ if he did not know, and had no reason to suspect, that the tobacco advertisement⁷ would be published⁸ in the United Kingdom⁹.

A person does not commit an offence¹⁰ of distributing or causing the distribution of a tobacco advertisement other than in electronic form¹¹ if he did not know, and had no reason to suspect, that what he distributed or caused to be distributed was, or contained, a tobacco advertisement¹². In relation to a tobacco advertisement which is distributed in electronic form, a person does not commit an offence¹³ of distributing it or causing its distribution if: (1) he was unaware that what he distributed or caused to be distributed was, or contained, a tobacco advertisement; (2) having become aware of it, it was not reasonably practicable for him to prevent its further distribution; or (3) he did not carry on business in the United Kingdom at the relevant time¹⁴. A person does not commit an offence¹⁵ if he did not know, and had no reason to suspect, that the publication contained a tobacco advertisement¹⁶.

1 Ie under the Tobacco Advertising and Promotion Act 2002 s 2 or s 3(a) or (b): see PARA 626 ante.

2 For the meaning of 'purpose' see PARA 626 note 2 ante.

3 For the meaning of 'tobacco product' see PARA 626 note 2 ante.

4 Tobacco Advertising and Promotion Act 2002 s 5(1). Where a person relies on a defence under s 5 and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not: s 17.

5 Ibid s 5(2).

6 Ie under ibid s 2(2) or s 3(a) or (b): see PARA 626 ante.

7 For the meaning of 'tobacco advertisement' see PARA 626 note 2 ante.

8 As to references to 'publishing' see PARA 626 note 1 ante.

9 Tobacco Advertising and Promotion Act 2002 s 5(3).

10 Ie an offence under ibid s 2(2): see PARA 626 ante.

11 Ie otherwise than as mentioned in ibid s 2(3).

12 Ibid s 5(4).

13 Ie an offence under ibid s 2(2): see PARA 626 ante.

14 Ibid s 5(5).

15 Ie under ibid s 3(c): see PARA 626 ante.

16 Ibid s 5(6).

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For consumer protection from unfair trading see PARA 725A.

628 Defences

TEXT AND NOTES--A person does not commit an offence under the Tobacco Advertising and Promotion Act 2002 s 2(4) or 3A(1)(b) (see PARA 626 TEXT AND NOTES head (2)) if he did not know, and had no reason to suspect, that the tobacco advertisement would be published in another EEA state: s 5(3A) (added by the Tobacco Advertising and Promotion Act 2002 etc (Amendment) Regulations 2006, SI 2006/2369). For the meaning of 'EEA state' see PARA 626.

A person does not commit an offence under the 2002 Act s 2(4) of distributing or causing the distribution of a tobacco advertisement if (1) he was unaware that what he distributed or caused to be distributed was, or contained, a tobacco advertisement, or (2) having become aware of it, it was not reasonably practicable for him to prevent its further distribution: s 5(5A) (added by SI 2006/2369).

NOTE 1--Or under the 2002 Act s 3A(1)(a) or (b) (see PARA 626 TEXT AND NOTES heads (1), (2)): s 5(1) (amended by SI 2006/2369).

NOTE 6--Or under the 2002 Act s 3A(1)(a) (see PARA 626 TEXT AND NOTES head (1)): s 5(3) (amended by SI 2006/2369).

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629. Specialist tobacconists.

A person does not commit an offence¹ if the tobacco advertisement²: (1) was in, or fixed to the outside of the premises of, a specialist tobacconist³; (2) was not for cigarettes or hand-rolling tobacco; and (3) complied with any requirements specified by the Secretary of State in regulations⁴ in relation to tobacco advertisements on the premises of specialist tobacconists⁵.

¹ See under the Tobacco Advertising and Promotion Act 2002 s 2: see PARA 626 ante.

² For the meaning of 'tobacco advertisement' see PARA 626 note 2 ante.

³ A specialist tobacconist is a shop selling tobacco products by retail, whether or not it also sells other things, more than half of whose sales on the premises in question derive from the sale of cigars, snuff, pipe tobacco and smoking accessories: Tobacco Advertising and Promotion Act 2002 s 6(2). Those sales are to be measured by sale price during the most recent period of 12 months for which accounts are available, or during the period for which the shop has been established, if it has not been established long enough for 12 months' accounts to be available: s 6(3). 'Shop' includes a self-contained part of a shop and, in that case, 'premises' means that self-contained part of the shop: s 6(4). For the meaning of 'tobacco product' see PARA 626 note 2 ante.

⁴ As to the power to make regulations see PARA 626 note 1 ante.

⁵ Tobacco Advertising and Promotion Act 2002 ss 6(1), 21. Where a person relies on a defence under s 6(1) and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not: s 17.

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For consumer protection from unfair trading see PARA 725A.

629 Specialist tobacconists

NOTE 5--Tobacco Advertising and Promotion Act 2002 s 21 renumbered as s 21(1): SI 2006/2369.

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630. Displays of tobacco products.

A person who in the course of a business displays or causes to be displayed tobacco products¹ or their prices in a place or on a website where tobacco products are offered for sale is guilty of an offence if the display does not comply with such requirements, if any, as may be specified by the Secretary of State in regulations². It is not an offence³ for a person who does not carry on business in the United Kingdom to display or cause to be displayed tobacco products or their prices by means of a website which is accessed in the United Kingdom⁴.

1 For the meaning of 'tobacco product' see PARA 626 note 2 ante.

2 Tobacco Advertising and Promotion Act 2002 ss 8(1), 21. The regulations may, in particular, provide for the meaning of 'place': s 8(3). Such regulations must make provision for a display which also amounts to an advertisement to be treated for the purpose of offences under the Act as an advertisement and not as a display, or as a display and not as an advertisement: s 8(4). As to the power to make regulations see s 19.

3 *Ie* under *ibid* s 8(1).

4 *Ibid* s 8(2).

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For consumer protection from unfair trading see PARA 725A.

630 Displays of tobacco products

NOTE 2--Tobacco Advertising and Promotion Act 2002 s 21 renumbered as s 21(1): Tobacco Advertising and Promotion Act 2002 etc (Amendment) Regulations 2006, SI 2006/2369.

TEXT AND NOTE 4--Now refers to a person who does not carry on business in an EEA state: Tobacco Advertising and Promotion Act 2002 s 8(2) (amended by SI 2006/2369). For the meaning of 'EEA state' see PARA 626.

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631. Prohibition of free distributions.

A person is guilty of an offence if in the course of a business he gives any product or coupon¹ away to the public² in the United Kingdom, or causes or permits that to happen, and the purpose³ or effect of giving the product or coupon away is to promote a tobacco product⁴. However, no such offence is committed if the business is part of the tobacco trade and the product or coupon is given away for the purposes of that trade⁵. A person does not commit such an offence: (1) where it is alleged that the purpose of giving the product or coupon away was to promote a tobacco product, if he did not know and had no reason to suspect that that was its purpose; or (2) where it is alleged that the effect of giving the product or coupon away was to promote a tobacco product, if he could not reasonably have foreseen that that would be its effect⁶.

1 'Coupon' means a document or other thing which, whether by itself or not, can be redeemed for a product or service or for cash or any other benefit: Tobacco Advertising and Promotion Act 2002 s 9(6).

2 For the meaning of 'public' see PARA 626 note 8 ante.

3 For the meaning of 'purpose' see PARA 626 note 2 ante.

4 Tobacco Advertising and Promotion Act 2002 s 9(1). For the meaning of 'tobacco product' see PARA 626 note 2 ante. It does not matter whether the product or coupon accompanies something else, or is given away separately: s 9(2). The Secretary of State may make regulations providing for s 9 to apply to making products or coupons available for a nominal sum or at a substantial discount as it applies to giving them away: s 9(7). If regulations made under s 9(7) provide for s 9 to apply to making products or coupons available at a substantial discount, they must provide for the meaning of 'substantial discount': s 9(8). The regulations may provide that s 9 is to apply in that case with such specified modifications, if any, as the Secretary of State considers appropriate: s 9(9). As to the power to make regulations see s 19.

5 Ibid s 9(3)(a), (b). This exclusion applies only where each person to whom the product or coupon is given: (1) is engaged in, or employed by, a business which is also part of the tobacco trade, and (a) is responsible for making decisions on behalf of the business about the purchase of tobacco products which are to be sold in the course of that business; (b) occupies a position in the management structure of the business in question which is equivalent in seniority to, or of greater seniority than, that of any such person; or (c) is the person who, or is a member of the board of directors or other body of persons (however described) which, is responsible for the conduct of the business in question; and (2) the product or coupon is given to each such person in his capacity as such a person: s 9(3)(c), (d), (4).

6 Ibid s 9(5). Where a person relies on a defence under s 9(5) and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not: s 17.

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632. Prohibition of sponsorship.

A person who is party to a sponsorship agreement¹ is guilty of an offence if the purpose² or effect of anything done as a result of the agreement is to promote a tobacco product³ in the United Kingdom⁴. A person does not commit such an offence: (1) where it is alleged that the purpose of what was done as a result of the agreement was to promote a tobacco product in the United Kingdom, if he did not know, and had no reason to suspect, that that was its purpose⁵; or (2) where it is alleged that the effect of what was done as a result of the agreement was to promote a tobacco product in the United Kingdom, if he could not reasonably have foreseen that that would be its effect⁶; (3) if he did not know and had no reason to suspect that the contribution⁷ was made in the course of a business⁸.

1 A sponsorship agreement is an agreement under which, in the course of a business, a party to it makes a contribution towards something, whether the contribution is in money or takes any other form, eg the provision of services or of contributions in kind: Tobacco Advertising and Promotion Act 2002 s 10(2). For transitional provision see s 20; and the Tobacco Advertising and Promotion (Sponsorship) Transitional Regulations 2003, SI 2003/77. As to the power to make regulations see the Tobacco Advertising and Promotion Act 2002 s 19.

2 For the meaning of 'purpose' see PARA 626 note 2 ante.

3 For the meaning of 'tobacco product' see PARA 626 note 2 ante.

4 Tobacco Advertising and Promotion Act 2002 s 10(1).

5 Ibid s 10(3)(a).

6 Ibid s 10(3)(b).

7 As to contributions see note 1 supra

8 Tobacco Advertising and Promotion Act 2002 s 10(4). Where a person relies on a defence under s 10(3) or (4) and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not: s 17.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(a) Tobacco Advertising and Promotion/633. Brandsharing.

633. Brandsharing.

The Secretary of State may by regulations¹ make provision prohibiting or restricting, in such circumstances and subject to such exceptions as may be specified in the regulations, the use: (1) in connection with any service or product, other than a tobacco product², of any name, emblem or other feature of a specified description which is the same as, or similar to, a name, emblem or other feature so specified which is connected with a tobacco product³; or (2) in connection with any tobacco product, of any name, emblem or other feature of a specified

description which is the same as, or similar to, a name, emblem or other feature so specified which is connected with any service or product other than a tobacco product⁴.

¹ As to the power to make regulations see PARA 626 note 1 ante.

² For the meaning of 'tobacco product' see PARA 626 note 2 ante.

³ Tobacco Advertising and Promotion Act 2002 s 11(1)(a).

⁴ Ibid s 11(1)(b). Provision made under s 11(1) may prohibit or restrict only that use whose purpose is to promote a tobacco product, or whose effect is to do so: s 11(2). For the meaning of 'purpose' see PARA 626 note 2 ante. If regulations under s 11 provide for a prohibition or restriction to be subject to an exception, they may also make such provision as the Secretary of State considers appropriate for a corresponding exception to have effect for the purposes of offences under s 2 (see PARA 626 ante), s 3 (see PARA 626 ante), s 8 (see PARA 630 ante), s 9 (see PARA 631 ante) or s 10 (see PARA 632 ante): s 11(3). A person who contravenes a prohibition or restriction contained in regulations made under s 11 is guilty of an offence: s 11(4). As to the power to make regulations see s 19. As to penalties see PARA 638 post.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

633 Brandsharing

NOTES 3, 4--See the Tobacco Advertising and Promotion (Brandsharing) Regulations 2004, SI 2004/1824.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(a) Tobacco Advertising and Promotion/634. Television and radio broadcasting.

634. Television and radio broadcasting.

The Tobacco Advertising and Promotion Act 2002 does not apply in relation to anything included in: (1) independent television services regulated by the Office of Communications¹ which is not an additional television service²; (2) an additional television service comprised in the public teletext service³; (3) independent radio services regulated by the Office of Communications⁴ other than a digital additional sound service⁵; or (4) a service provided by the British Broadcasting Corporation⁶ or Sianel Pedwar Cymru (the Welsh Authority)⁷.

¹ I.e. a service falling within the Communications Act 2003 s 211(1): see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 329. As to the Office of Communications see PARA 403 ante.

² I.e. within the meaning of ibid Pt 3 (ss 198-362).

³ Tobacco Advertising and Promotion Act 2002 s 12(3) (substituted by the Communications Act 2003 s 406(1), Sch 17 para 173(1), (2)).

⁴ I.e. services falling within the Communications Act 2003 s 245(1): see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 440.

5 Tobacco Advertising and Promotion Act 2002 s 12(5) (substituted by the Communications Act 2003 Sch 17 para 173(3)). The reference to a digital additional sound service is to a service within the meaning of the Communications Act 2003 Pt 3.

6 As to the British Broadcasting Corporation see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 306 et seq.

7 Tobacco Advertising and Promotion Act 2002 s 12(6). As to Sianel Pedwar Cymru see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 395 et seq.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(a) Tobacco Advertising and Promotion/635. Enforcement.

635. Enforcement.

It is the duty of a weights and measures authority¹ to enforce within its area the provisions of the Tobacco Advertising and Promotion Act 2002 and regulations² made under it³. However, the Secretary of State may direct, in relation to cases of a particular description or a particular case, that any duty imposed on a weights and measures authority is to be discharged by the Secretary of State and not by the weights and measures authority⁴. The Secretary of State may take over the conduct of any proceedings instituted by another person under any provision of the Tobacco Advertising and Promotion Act 2002 or regulations made under it⁵.

1 As to weights and measures authorities see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 20.

2 As to the power to make regulations see PARA 626 note 1 ante.

3 Tobacco Advertising and Promotion Act 2002 s 13(1), (2). For the purposes of the trying of offences under the Act or regulations made under it, any such offence committed in England or Wales may be treated as having been committed in any place in England or Wales, so that any magistrates' court in England or Wales has jurisdiction to try the offence: s 13(7). As to the territorial limits of magistrates' courts see MAGISTRATES vol 29(2) (Reissue) PARA 521. All offences under the Tobacco Advertising and Promotion Act 2002 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

4 Tobacco Advertising and Promotion Act 2002 ss 13(3), 21.

5 Ibid ss 13(5), 21.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

635 Enforcement

NOTE 2--Tobacco Advertising and Promotion Act 2002 s 21 renumbered as s 21(1): Tobacco Advertising and Promotion Act 2002 etc (Amendment) Regulations 2006, SI 2006/2369.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(a) Tobacco Advertising and Promotion/636. Powers of entry.

636. Powers of entry.

A duly authorised officer has the right, on producing, if so required, his written authority¹: (1) at any reasonable hour to enter any premises, other than premises used only as a private dwelling house, which he considers it is necessary for him to enter for the purpose² of the proper exercise of his functions under the Tobacco Advertising and Promotion Act 2002³; (2) to carry out on those premises such inspections and examinations as he considers necessary for that purpose⁴; (3) where he considers it necessary for that purpose, to require the production of any book, document, data, record (in whatever form it is held) or product and inspect it, and take copies of or extracts from it⁵; (4) to take possession of any book, document, data, record (in whatever form it is held) or product which is on the premises and retain it for as long as he considers necessary for that purpose⁶; (5) to require any person to give him such information, or afford him such facilities and assistance, as he considers necessary for that purpose⁷. A duly authorised officer may make such purchases and secure the provision of such services as he considers necessary for the purpose of the proper exercise of his functions under the Tobacco Advertising and Promotion Act 2002⁸.

If a justice of the peace is satisfied by any written information on oath that for the purpose of the proper exercise of the functions of a weights and measures authority under the Tobacco Advertising and Promotion Act 2002 there are reasonable grounds for entry into any premises, other than premises used only as a private dwelling house, and: (a) that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant has been given to the occupier; or (b) that an application for admission, or the giving of such notice, would defeat the object of the entry or that the premises are unoccupied or that the occupier is temporarily absent and it might defeat the object of the entry to await his return, the justice may by warrant signed by him authorise any duly authorised officer to enter the premises, if need be by force⁹.

A duly authorised officer entering any premises by virtue of these powers¹⁰ may take with him when he enters those premises such other persons and such equipment as he considers necessary¹¹. On leaving any premises which a duly authorised officer is authorised to enter by a warrant¹², that officer must, if the premises are unoccupied or the occupier is temporarily absent, leave the premises as effectively secured against trespassers as he found them¹³. Where a duly authorised officer takes possession of any item¹⁴, he must leave on the premises from which the item was removed a statement giving particulars of what he has taken and stating that he has taken possession of it¹⁵.

1 Tobacco Advertising and Promotion Act 2002 s 14(1). A person is not obliged by s 14(1) to answer any question or produce any document which he would be entitled to refuse to answer or to produce in or for the purposes of proceedings in a court in England and Wales, where the question is asked or the document is required by a duly authorised officer in England and Wales: s 14(3)(a).

2 For the meaning of 'purpose' see PARA 626 note 2 ante.

3 Tobacco Advertising and Promotion Act 2002 s 14(1)(a).

- 4 Ibid s 14(1)(b).
- 5 Ibid s 14(1)(c).
- 6 Ibid s 14(1)(d).
- 7 Ibid s 14(1)(e).
- 8 Ibid s 14(2).
- 9 Ibid s 14(4). A warrant under s 14(4) continues in force until the end of the period of one month beginning with the date on which he signs it: s 14(4).
- 10 Ie by virtue of ibid s 14(1) or (4).
- 11 Ibid s 14(5).
- 12 Ie a warrant issued under ibid s 14(4).
- 13 Ibid s 14(6).
- 14 Ie by virtue of ibid s 14(1)(d).
- 15 Ibid s 14(7). Where the Secretary of State makes a direction under s 13(3) (see PARA 635 ante), s 14 has effect, in relation to any case or case of a description specified in the direction, as if references to a duly authorised officer of a weights and measures authority were references to a person acting on behalf of the Secretary of State: ss 14(10), 21. Where the Secretary of State takes over any proceedings under s 13(5) (see PARA 635 ante), s 14 has effect, in relation to any case which is the subject of such proceedings, as if references to a duly authorised officer of a weights and measures authority were references to a person acting on behalf of the Secretary of State: s 14(12).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

636 Powers of entry

NOTE 15--Tobacco Advertising and Promotion Act 2002 s 21 renumbered as s 21(1): Tobacco Advertising and Promotion Act 2002 etc (Amendment) Regulations 2006, SI 2006/2369.

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637. Obstruction of officers.

A person who intentionally obstructs a duly authorised officer who is acting in the proper exercise of his functions under the Tobacco Advertising and Promotion Act 2002¹, or without reasonable cause fails to comply with any requirement made of him by such an officer who is so acting, is guilty of an offence². A person who, in giving any information which is properly required of him by such a duly authorised officer, makes a statement which is false in a material particular is guilty of an offence³. However, a person does not commit an offence if he

did not know the material particular was false, and he had reasonable grounds to believe that it was true⁴.

1 Tobacco Advertising and Promotion Act 2002 s 15(1).

2 Ibid s 15(2)(a). As to penalties see PARA 638 post.

3 Ibid s 15(2)(b).

4 Ibid s 15(3). Where a person relies on a defence under s 15(3) and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not: s 17. Where the Secretary of State makes a direction under s 13(3) (see PARA 635 ante), s 15 has effect, in relation to any case or case of a description specified in the direction, as if references to a duly authorised officer of a weights and measures authority were references to a person acting on behalf of the Secretary of State: ss 14(10), 21. Where the Secretary of State takes over any proceedings under s 13(5) (see PARA 635 ante), s 15 has effect, in relation to any case which is the subject of such proceedings, as if references to a duly authorised officer of a weights and measures authority were references to a person acting on behalf of the Secretary of State: s 14(12).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

637 Obstruction of officers

NOTE 4--Tobacco Advertising and Promotion Act 2002 s 21 renumbered as s 21(1): Tobacco Advertising and Promotion Act 2002 etc (Amendment) Regulations 2006, SI 2006/2369.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(a) Tobacco Advertising and Promotion/638. Penalties.

638. Penalties.

A person guilty of an offence of intentionally obstructing a duly authorised officer¹, or of failing to comply with any requirement made of him by such an officer², is liable on summary conviction to a fine³. A person guilty of any other offence under the Tobacco Advertising and Promotion Act 2002 is also subject to a penalty⁴.

1 Ie an offence under the Tobacco Advertising and Promotion Act 2002 s 15(1): see PARA 637 ante.

2 Ie an offence under ibid s 15(1)(b): see PARA 637 ante.

3 Ibid s 16(1). The fine must not exceed level 3 on the standard scale: s 16(1). As to the standard scale see PARA 498 note 3 ante.

4 Ibid s 16(2). A person guilty of any other offence is liable on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding level 5 on the standard scale, or to both, or on conviction on indictment to imprisonment for a term not exceeding two years, or to a fine, or to both: s 16(2)(a), (b).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

638 Penalties

TEXT AND NOTES--A person guilty of an offence under the Tobacco Advertising and Promotion Act 2002 s 2(4) (see PARA 626) or 3A(1) (see PARA 626), is liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding the statutory maximum, or both, or on conviction on indictment to imprisonment for a term not exceeding two years, or a fine, or both: s 16(1A) (added by the Tobacco Advertising and Promotion Act 2002 etc (Amendment) Regulations 2006, SI 2006/2369). As to the statutory maximum see PARA 401 NOTE 29.

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639. Offences by corporations.

If an offence committed by a body corporate is proved to have been committed with the consent or connivance of an officer¹, or to be attributable to any neglect on his part, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly².

¹ 'Officer', in relation to a body corporate, means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity: Tobacco Advertising and Promotion Act 2002 s 18(2).

² Ibid s 18(1). If the affairs of a body corporate are managed by its members, s 18(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 18(3).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(b) Requirements as to Manufacture, Presentation and Sale/640. Prohibitions on supply of non-compliant tobacco products.

(b) Requirements as to Manufacture, Presentation and Sale

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640. Prohibitions on supply of non-compliant tobacco products.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any tobacco product¹, other than a tobacco product which is or is to be supplied for consumption outside the United Kingdom, in respect of which the producer² has not complied with a requirement concerning:

- 1266 (1) the statement of the tar, nicotine and carbon monoxide yields on packets of cigarettes³;
- 1267 (2) the testing of cigarettes, samples and information⁴;
- 1268 (3) the procedure for determining yields of tar, nicotine and carbon monoxide⁵;
- 1269 (4) the warnings on tobacco products⁶;
- 1270 (5) the size of the warnings⁷;
- 1271 (6) the appearance of warnings and yield statements⁸; and
- 1272 (7) the product identification markings⁹,

which relates to that product¹⁰.

1 For these purposes, 'tobacco product' means a product consisting wholly or partly of tobacco, whether genetically modified or not, and intended to be smoked, sniffed, sucked or chewed: Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 2(1).

2 For these purposes, 'producer', in relation to a tobacco product, means a person who in the course of a business: (1) manufactures it; (2) puts a name, trade mark or other distinguishing mark on it, by which he holds himself out to be its manufacturer or originator; or (3) imports it into the United Kingdom, with a view to the product being supplied for consumption in the United Kingdom or through the travel retail sector; and 'produce' is to be construed accordingly: *ibid* reg 2(1). 'Travel retail sector' means retail outlets in the United Kingdom at which duty free tobacco products may be purchased only by people who are travelling on journeys to destinations outside the European Community: *ibid* reg 2(1).

3 *Ie* the statement in *ibid* reg 4: see PARA 643 post.

4 *Ie* in accordance with *ibid* reg 5: see PARA 645 post.

5 *Ie* in accordance with *ibid* reg 6: see PARA 646 post.

6 *Ie* the warnings in *ibid* reg 7: see PARA 642 post.

7 *Ie* in compliance with *ibid* reg 8: see PARA 644 post.

8 *Ie* in compliance with *ibid* reg 9: see PARA 644 post.

9 *Ie* the information in *ibid* reg 10: see PARA 647 post.

10 *Ibid* regs 2(1), 14(1), (2). Where in relation to a brand of cigarettes the producer is required by reg 6 to provide on the packet a statement of tar, nicotine and carbon monoxide yields notified to him by, or agreed with, the Secretary of State (see PARA 646 post), the producer must not, after the expiry of a period of three months beginning with the date of expiry of the period of nine months mentioned in reg 6(4)(a) or (b) or the date of the agreement, supply a packet of cigarettes which does not provide that statement: *ibid* reg 14(3).

The Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041 implement European Parliament and EC Council Directive 2001/37 (OJ L 194, 18.7.2001, p 26) (see PARA 393 ante).

Notwithstanding that they are partly made in exercise of powers other than those conferred by the Consumer Protection Act 1987 s 11 (as amended) (see PARA 539 ante), the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041 are to be regarded for the purposes of enforcement, whether by criminal proceedings or otherwise, as safety regulations as defined in the Consumer Protection Act 1987 (see PARA 539 ante); and any provision of the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041 made under those other powers is to be regarded as a safety provision as defined in the Consumer Protection Act 1987 (see PARA 529 note 3 ante): Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 15(1). The requirement of reg 5(2) (see

PARA 645 head (3) post) to provide samples is to be treated, for the purposes of the Consumer Protection Act 1987 s 12(4)(a) (see PARA 540 head (a) ante) as though it were a requirement to give information: Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 15(3). A person guilty of an offence under reg 15(3) is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale: reg 15(4). As to the standard scale see PARA 498 note 3 ante.

Offences under the Consumer Protection Act 1987 s 12 in relation to the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante. See also the Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003, SI 2003/1593, art 2, Schedule.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640-649 Requirements as to Manufacture, Presentation and Sale

SI 2002/3041 amended: SI 2007/2473.

640 Prohibitions on supply of non-compliant tobacco products

NOTE 10--SI 2003/1593 Schedule amended: SI 2008/1277.

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641. Maximum tar, nicotine and carbon monoxide yields of cigarettes.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any cigarette the yield¹ of which exceeds the maximum permitted yield of tar², nicotine³ or carbon monoxide⁴.

Where a person contravenes the prohibition on manufacturing cigarettes which exceed the maximum permitted yields, that person is guilty of an offence and the enforcement provisions of the Consumer Protection Act 1987⁵ apply to that manufacture as they apply to supply in contravention of a prohibition in safety regulations⁶.

1 For these purposes, 'yield' means the smoke yield per cigarette as determined using ISO4387, ISO8243, ISO8454 and ISO10315 as appropriate and for carbon monoxide allowing a measurement tolerance of plus or minus 20% subject to a minimum measurement tolerance of plus or minus 1 mg: Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 2(1). 'ISO4387' means the International Standard entitled Cigarettes - Determination of total and nicotine-free dry particulate matter using a routine analytical cigarette-smoking machine ISO4387: 2000 third edition published by the International Organisation for Standardisation on 6 April 2000; 'ISO8243' means the International Standard entitled Cigarettes - Sampling ISO8243: 1991 second edition published by the International Organisation for Standardisation on 15 October 1991; 'ISO8454' means the International Standard entitled Cigarettes - Determination of carbon monoxide in the vapour phase of cigarette smoke - NDIR method ISO8454: 1995

second edition published by the International Organisation for Standardisation on 15 November 1995; and 'ISO10315' means the International Standard entitled Cigarettes - Determination of nicotine in smoke condensates - Gas-chromatographic method ISO10315: 2000 second edition published by the International Organisation for Standardisation on 30 March 2000: Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 2(1). Any reference to a Standard is a reference to that Standard as it has effect on 10 December 2002, including any amendment to that Standard taking effect on or before that date; and, where any Standard mentioned specifies relevant requirements by reference to another Standard, that reference is to be construed as a reference to that other Standard as it has effect on 10 December 2002, including any amendment to that other Standard taking effect on or before that date: reg 2(2). As to the procedures for determining the yield see reg 6; and PARA 646 post.

2 For these purposes, 'tar' means the raw anhydrous nicotine-free condensate of smoke: Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 2(1).

3 For these purposes, 'nicotine' means nicotinic alkaloids: *ibid* reg 2(1).

4 Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, regs 2(1), 3(1), (2). For these purposes, 'the maximum permitted yield' means: (1) in the case of tar, 10 milligrams per cigarette; (2) in the case of nicotine, 1 milligram per cigarette; and (3) in the case of carbon monoxide, 10 milligrams per cigarette: reg 2(1). Regulation 3 is not in force as to cigarettes which are or are to be supplied for export outside the European Economic Area and the manufacture of such cigarettes until 1 January 2007: see reg 1(a)(ii). As to the European Economic Area see PARA 386 note 1 ante.

A person who imports tobacco products of any brand into the United Kingdom from another EEA state with a view to their being supplied for consumption in the United Kingdom is to be regarded as complying with the requirements of reg 3 if the packet complies with the European Parliament and EC Council Directive 2001/37 (OJ L 194, 18.7.2001, p 26) art 3: Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 13. 'EEA state' means a state which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)) (the 'EEA Agreement'): Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 2(1). As to the European Economic Area and the EEA Agreement see PARA 386 note 1 ante.

5 *Ie* the Consumer Protection Act 1987 Pt IV (ss 27-35): see PARA 555 et seq ante.

6 Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 15(2). A person guilty of an offence under reg 15(2) is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale: reg 15(4). As to safety regulations see PARA 539 ante. As to the standard scale see PARA 498 note 3 ante.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640-649 Requirements as to Manufacture, Presentation and Sale

SI 2002/3041 amended: SI 2007/2473.

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642. Warnings on tobacco products.

A producer¹ of a tobacco product², other than tobacco for oral use³ and smokeless tobacco products, must ensure that its packet⁴ carries, on the most visible surface⁵, one of the following

warnings: 'Smoking kills' or 'Smoking seriously harms you and others around you'⁶; and on the other most visible surface⁷, an additional warning from the prescribed list⁸. Those additional warnings are as follows.

- 1273 (1) Smokers die younger.
- 1274 (2) Smoking clogs the arteries and causes heart attacks and strokes.
- 1275 (3) Smoking causes fatal lung cancer.
- 1276 (4) Smoking when pregnant harms your baby.
- 1277 (5) Protect children: don't make them breathe your smoke.
- 1278 (6) Your doctor or your pharmacist can help you stop smoking.
- 1279 (7) Smoking is highly addictive, don't start.
- 1280 (8) Stopping smoking reduces the risk of fatal heart and lung diseases.
- 1281 (9) Smoking can cause a slow and painful death.
- 1282 (10) Get help to stop smoking: ring 0800 169 0169.
- 1283 (11) Smoking may reduce the blood flow and causes impotence.
- 1284 (12) Smoking causes ageing of the skin.
- 1285 (13) Smoking can damage the sperm and decreases fertility.
- 1286 (14) Smoke contains benzene, nitrosamines, formaldehyde and hydrogen cyanide⁹.

A producer of a brand of a tobacco product other than tobacco for oral use and smokeless tobacco products must ensure that: (a) each of the two primary warnings above appears on between 47.5 per cent and 52.5 per cent; and (b) each of the additional warnings appears on between 4.16 per cent and 8.33 per cent, of the total number of packets of tobacco products of that brand which he produces over any period of 12 months¹⁰.

A producer of a smokeless tobacco product must ensure that its packet carries, on the most visible surface, the warning: 'This tobacco product can damage your health and is addictive'¹¹.

1 For the meaning of 'producer', in relation to a tobacco product, see PARA 640 note 2 ante.

2 For the meaning of 'tobacco product' see PARA 640 note 1 ante.

3 For these purposes, 'tobacco for oral use' means any product made wholly or partly of tobacco which is: (1) intended for oral use, unless it is intended to be smoked or chewed; and (2) either (a) in powder or particulate form or any combination of these forms, whether presented in sachet portions or porous sachets or in any other way, or (b) presented in a form resembling a food product: Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 2(1).

4 For these purposes, 'packet', in relation to a tobacco product, means any box, package, container, wrapping or other receptacle which contains the product, and in which the product is, or is intended to be, presented for retail supply, excluding any additional transparent outer wrapping which may be discarded on opening and excluding any wrapping of individual cigars or cigarillos, and where any such receptacle is or is to be contained in another receptacle (excluding such outer wrapping), includes each such receptacle: *ibid* reg 2(1).

5 For these purposes, 'most visible surface', in relation to a rectangular cigarette package, means that surface of the packet which is, or is equal in area to, the largest surface and either faces a person opening that packet or, where no surface faces a person opening the packet, carries most prominently the name, trademark or other distinguishing mark of the brand of cigarettes, and in relation to other packets for tobacco products means the most conspicuous surface: *ibid* reg 2(1). 'Rectangular', in relation to a packet of cigarettes, denotes a packet having only rectangular surfaces: reg 2(1).

6 *Ibid* reg 7(1)(a).

7 'Other most visible surface', in relation to a rectangular cigarette packet means the side opposite to the most visible surface: *ibid* reg 2(1).

8 *Ibid* reg 7(1)(b). As to the visibility and position of warnings see PARA 644 post; and as to the statement of the tar, nicotine and carbon monoxide yields see PARA 643 post.

9 Ibid reg 7(1)(b), Schedule. A producer of a tobacco product intended only for supply in the travel retail sector may use the warning 'Get help to stop smoking: consult your doctor or pharmacist' on that product instead of the warning numbered 10 in the Schedule: reg 7(2). For the meaning of 'travel retail sector' see PARA 640 note 2 ante.

10 Ibid reg 7(3). In the case of packets other than the packet which immediately encloses the tobacco products, the period for measuring the frequency of the warnings set out in the Schedule is three years: reg 7(4).

11 Ibid reg 7(5).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640-649 Requirements as to Manufacture, Presentation and Sale

SI 2002/3041 amended: SI 2007/2473.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(b) Requirements as to Manufacture, Presentation and Sale/643. Statement of tar, nicotine and carbon monoxide yields in cigarettes.

643. Statement of tar, nicotine and carbon monoxide yields in cigarettes.

A producer¹ of cigarettes must ensure that each packet² of cigarettes which he produces carries a statement of the tar³, nicotine⁴ and carbon monoxide yields⁵ of the cigarettes contained in it⁶.

The statement:

- 1287 (1) as to the tar yield must be shown as a figure rounded to the nearest whole number and expressed in milligrams in the form 'x mg tar';
- 1288 (2) as to the nicotine yield must be shown as a figure rounded to one decimal place and expressed in milligrams in the form 'x.y mg nicotine';
- 1289 (3) as to the carbon monoxide yield must be shown as a figure rounded to the nearest whole number and expressed in milligrams in the form 'x mg carbon monoxide'⁷.

The statement of yields must:

- 1290 (a) be printed on one side of the packet;
- 1291 (b) cover an area amounting to at least 10 per cent of that side of the packet;
- and
- 1292 (c) comply with the requirements⁸ as to size and layout⁹.

1 For the meaning of 'producer', in relation to a tobacco product, see PARA 640 note 2 ante.

2 For the meaning of 'packet', in relation to a tobacco product, see PARA 642 note 4 ante.

- 3 For the meaning of 'tar' see PARA 641 note 2 ante.
- 4 For the meaning of 'nicotine' see PARA 641 note 3 ante.
- 5 For the meaning of 'yield' see PARA 641 note 1 ante.
- 6 Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 4(1).
- 7 Ibid reg 4(2).
- 8 le the provisions of ibid reg 9: see PARA 644 post.
- 9 Ibid reg 4(3).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640-649 Requirements as to Manufacture, Presentation and Sale

SI 2002/3041 amended: SI 2007/2473.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(b) Requirements as to Manufacture, Presentation and Sale/644. Size and position of warnings and yield statements.

644. Size and position of warnings and yield statements.

The warnings required¹ to be placed on the most visible surface² of the packet³ of a tobacco product⁴ other than tobacco for oral use⁵ and smokeless tobacco products must cover an area amounting to at least 30 per cent of the external area of the most visible surface of the packet⁶. The additional warnings⁷ must cover an area amounting to at least 40 per cent of the external area of the other most visible surface of the packet⁸. Where the area of the most visible surface of the packet of a tobacco product other than cigarettes exceeds 75 square centimetres the required warnings must each cover an area of at least 22.5 square centimetres⁹.

On each packet of a tobacco product the text of the required yield statements¹⁰ and of the required warnings¹¹ must be:

- 1293 (1) indelible;
- 1294 (2) legible;
- 1295 (3) printed in black Helvetica bold type on a white background;
- 1296 (4) in a font size consistent throughout the text which ensures that the text occupies the greatest possible proportion of the area specified for the relevant statement or warning¹²;
- 1297 (5) in lower-case type, except for the first letter of the text;
- 1298 (6) centred in the area in which the text is required to be printed, PARALLEL to the top edge of the packet;

- 1299 (7) surrounded by a black border outside the area specified for the relevant statement or warning which must be not less than 3 millimetres and not more than 4 millimetres in width, and not interfere with the text of the yield statement or warning;
- 1300 (8) irremovably printed¹³ on the packet¹⁴.

The yield statements and warnings must not be printed on the tax stamps on any packet of a tobacco product; or be hidden, obscured or interrupted by other written or pictorial matter or the opening of the packet¹⁵.

- 1 le by the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 7(1)(a), (4): see PARA 642 ante.
- 2 For the meaning of 'most visible surface' see PARA 642 note 5 ante.
- 3 For the meaning of 'packet', in relation to a tobacco product, see PARA 642 note 4 ante.
- 4 For the meaning of 'tobacco product' see PARA 640 note 1 ante.
- 5 For the meaning of 'tobacco for oral use' see PARA 642 note 3 ante.
- 6 Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 8(1) (a).
- 7 le the warnings required by ibid reg 7(1)(b): see PARA 642 ante.
- 8 Ibid reg 8(1)(b). For the meaning of 'other most visible surface' see PARA 642 note 7 ante.
- 9 Ibid reg 8(2).
- 10 le the statements required in accordance with ibid reg 4: see PARA 643 ante.
- 11 le in accordance with ibid reg 7.
- 12 le the statement or warning required by ibid reg 4(3) or reg 8.
- 13 In the case of tobacco products other than cigarettes the warnings required in accordance with ibid regs 4 and 7 may be affixed to the packet by means of an irremovable sticker: reg 9(2).
- 14 Ibid reg 9(1). A person who imports tobacco products of any brand into the United Kingdom from another EEA state with a view to their being supplied for consumption in the United Kingdom is to be regarded as complying with the requirements of regs 8, 9 if the packet complies with the European Parliament and EC Council Directive 2001/37 (OJ L 194, 18.7.2001, p 26) art 5: Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 13. For the meaning of 'EEA state' see PARA 641 note 4 ante.
- 15 Ibid reg 9(3).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640-649 Requirements as to Manufacture, Presentation and Sale

SI 2002/3041 amended: SI 2007/2473.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(b) Requirements as to Manufacture, Presentation and Sale/645. Testing of cigarettes, samples and information.

645. Testing of cigarettes, samples and information.

The Secretary of State may test cigarettes for the purposes of establishing their tar¹, nicotine² and carbon monoxide yields and the accuracy of the statement of those yields³ on any packet⁴ of cigarettes; and, in testing the cigarettes, the Secretary of State must select samples⁵ and conduct the tests in accordance with the prescribed⁶ procedure⁷.

For the purposes of enabling the Secretary of State to perform his functions under the above provisions, a producer⁸ of cigarettes must:

- 1301 (1) provide the Secretary of State with such samples, at such times and intervals, and from such sources, as the Secretary of State may reasonably require;
 - 1302 (2) within the period of one week beginning with the date on which he first supplies a new brand⁹ in the United Kingdom, notify the Secretary of State of the tar, nicotine and carbon monoxide yields shown and expressed in the prescribed statement¹⁰;
 - 1303 (3) before 1 October in each year notify the Secretary of State:
- 109
- 167. (a) of the names of all brands of cigarettes produced and to be produced by him during the 12 months preceding that 1 October and of the tar, nicotine and carbon monoxide yields determined by the producer and shown and expressed in the prescribed statement¹¹; and
 - 168. (b) of the renaming or discontinuance of any brand produced by him within the period of 12 months preceding that 1 October¹².
- 110

1 For the meaning of 'tar' see PARA 641 note 2 ante.

2 For the meaning of 'nicotine' see PARA 641 note 3 ante.

3 As to the statement of yields see PARA 643 ante.

4 For the meaning of 'packet', in relation to a tobacco product, see PARA 642 note 4 ante.

5 Ie in accordance with ISO 8243. For the meaning of 'ISO 8243' see PARA 641 note 1 ante.

6 Ie in accordance with ISO 4387, ISO8454 and ISO10315. For the meaning of 'ISO 4387', 'ISO8454' and 'ISO10315' see PARA 641 note 1 ante.

7 Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 5(1).

8 For the meaning of 'producer', in relation to a tobacco product, see PARA 640 note 2 ante.

9 For these purposes, 'new brand' includes a brand of cigarettes which has the same composition as, even if it has a different name from, a brand previously produced, and includes a brand which, though having the same name as one previously produced, has a specification which is sufficiently different to bring about a different yield of tar, nicotine or carbon monoxide: Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 5(3).

10 Ie as shown and expressed as specified in ibid reg 4(2); see PARA 643 ante.

11 See note 10 supra.

¹² Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 5(2).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640-649 Requirements as to Manufacture, Presentation and Sale

SI 2002/3041 amended: SI 2007/2473.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(b) Requirements as to Manufacture, Presentation and Sale/646. Procedure for determining yields of tar, nicotine and carbon monoxide.

646. Procedure for determining yields of tar, nicotine and carbon monoxide.

Where the Secretary of State considers, having tested cigarettes¹, that: (1) the yield of tar², nicotine³ or carbon monoxide exceeds the relevant maximum permitted yield⁴; or (2) that the tests do not confirm the accuracy of the yield of tar, nicotine or carbon monoxide notified to him by the producer⁵, he may notify the producer of that opinion and the yields of tar, nicotine and carbon monoxide he considers to be accurate⁶.

A producer may within one month beginning with the date on which he receives such notification inform the Secretary of State in writing that he does not agree with the accuracy of the yields notified to him by the Secretary of State, and where he does so he may make representations with a view to agreeing the correct yield with the Secretary of State⁷.

Where a producer receives notification that the Secretary of State's tests do not confirm the accuracy of the yield of tar, nicotine or carbon monoxide, and he does not inform the Secretary of State in accordance with the provision above that he does not agree with the accuracy of the yields so notified, he must, with effect from the date of expiry of the period of three months beginning with the date on which he receives that notification, provide, as the information which he is required⁸ to provide on packets⁹ of those cigarettes, a statement of the tar, nicotine and carbon monoxide yields as notified by the Secretary of State¹⁰.

Where a producer informs and makes representations to the Secretary of State as to the correct yields¹¹ and:

- 1304 (a) they reach agreement within the period of nine months beginning with the date on which the producer received notification from the Secretary of State, the producer must provide, with effect from three months after the date of the agreement, as the information he is required¹² to provide, the statement of the tar, nicotine and carbon monoxide yields as so agreed, and in any proceedings to enforce the regulatory provisions¹³ it will be presumed until the contrary is proved that the tar, nicotine and carbon monoxide yields of cigarettes of the same composition are the yields as so agreed;
- 1305 (b) they fail to reach agreement within the period of nine months beginning with the date on which the producer received notification, the producer must

provide, within three months after the date of expiry of that period, as the information which he is required to provide, the statement of tar, nicotine and carbon monoxide yields as notified by the Secretary of State, or if different, the statement of tar, nicotine and carbon monoxide yields most recently notified to him before the expiry of that period by the Secretary of State¹⁴.

1 Ie under the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 5(1): see PARA 645 ante.

2 For the meaning of 'tar' see PARA 641 note 2 ante.

3 For the meaning of 'nicotine' see PARA 641 note 3 ante.

4 For the meaning of 'maximum permitted yield' see PARA 641 note 4 ante.

5 Ie in accordance with the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 5(2)(b) or (c): see PARA 645 heads (2), (3) ante. For the meaning of 'producer', in relation to a tobacco product, see PARA 640 note 2 ante.

6 Ibid reg 6(1). Regulation 6(1)(a) (see head (1) in the text) is not in force as to cigarettes which are or are to be supplied for export outside the European Economic Area and the manufacture of such cigarettes until 1 January 2007: see reg 1(a)(ii). As to the European Economic Area see PARA 386 note 1 ante.

7 Ibid reg 6(2).

8 Ie by ibid reg 4: see PARA 643 ante.

9 For the meaning of 'packet', in relation to a tobacco product, see PARA 642 note 4 ante.

10 Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 6(3).

11 Ie under ibid reg 6(2).

12 See note 8 supra.

13 Ie the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041.

14 Ibid reg 6(4).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640-649 Requirements as to Manufacture, Presentation and Sale

SI 2002/3041 amended: SI 2007/2473.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(b) Requirements as to Manufacture, Presentation and Sale/647. Product identification markings.

647. Product identification markings.

A producer¹ of a tobacco product² other than tobacco for oral use³ must ensure that each packet⁴ of that product carries a code marking, whether by batch numbering or otherwise, whereby the place, the date and, in the case of a product other than cigars, the time, of its manufacture may be determined⁵.

A producer of a tobacco product must provide to the Secretary of State such information as he may require to enable him to interpret the code marking on that tobacco product for the purpose of any of his functions under the regulatory provisions⁶ relating to the manufacture, presentation and sale of tobacco products⁷.

1 For the meaning of 'producer', in relation to a tobacco product, see PARA 640 note 2 ante.

2 For the meaning of 'tobacco product' see PARA 640 note 1 ante.

3 For the meaning of 'tobacco for oral use' see PARA 642 note 3 ante.

4 For the meaning of 'packet', in relation to a tobacco product, see PARA 642 note 4 ante.

5 Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 10(1).

6 I.e. the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041.

7 Ibid reg 10(2). A person who imports tobacco products of any brand into the United Kingdom from another EEA state with a view to their being supplied for consumption in the United Kingdom is to be regarded as complying with the requirements of reg 10 if the packet complies with European Parliament and EC Council Directive 2001/37 (OJ L 194, 18.7.2001, p 26) art 5: Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 13. For the meaning of 'EEA state' see PARA 641 note 4 ante.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640-649 Requirements as to Manufacture, Presentation and Sale

SI 2002/3041 amended: SI 2007/2473.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(b) Requirements as to Manufacture, Presentation and Sale/648. Product descriptions.

648. Product descriptions.

Except where a tobacco product¹ is or is to be supplied for consumption outside the United Kingdom², no person is to supply a tobacco product the packaging of which carries any name, brand name, text, trademark or pictorial or any other representation or sign which suggests that that tobacco product is less harmful to health than other tobacco products³.

1 For the meaning of 'tobacco product' see PARA 640 note 1 ante.

2 Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 11(2).

3 Ibid reg 11(1).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640-649 Requirements as to Manufacture, Presentation and Sale

SI 2002/3041 amended: SI 2007/2473.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(Q) Tobacco Products/(b) Requirements as to Manufacture, Presentation and Sale/649. Provision of further product information.

649. Provision of further product information.

A producer¹ of tobacco products² must, before 1 October in each year, provide to the Secretary of State for each tobacco product he produces by brand name:

- 1306 (1) a list of all the ingredients of that product, which must include the quantities of those ingredients and be drawn up in descending order of the weight of those ingredients;
- 1307 (2) a statement of the reasons for the inclusion of those ingredients, which must indicate for each ingredient its function and its category;
- 1308 (3) all toxicological data available to him concerning the ingredients of that tobacco product, in the case of products intended to be burnt, burnt and unburnt and in the case of products not intended to be burnt, unburnt, which must for each ingredient refer in particular to their effects on health, include any effects produced in combination with any of the other ingredients of that product that are not produced by that ingredient alone, and take into account any addictive effects;
- 1309 (4) information concerning the renaming or discontinuation of any brand produced by him within the 12 months preceding that 1 October³.

1 For the meaning of 'producer', in relation to a tobacco product, see PARA 640 note 2 ante.

2 For the meaning of 'tobacco product' see PARA 640 note 1 ante.

3 Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, SI 2002/3041, reg 12.

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(c) *Tobacco for Oral Use*

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

640-649 Requirements as to Manufacture, Presentation and Sale

SI 2002/3041 amended: SI 2007/2473.

650. Tobacco for oral use.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any tobacco for oral use, that is to say, any product made wholly or partly of tobacco which is:

- 1310 (1) intended for oral use, unless it is intended to be smoked or chewed; and
- 1311 (2) either in powder or particulate form or any combination of these forms, whether presented in sachet portions or porous sachets or in any other way or is presented in a form resembling a food product¹.

¹ Tobacco for Oral Use (Safety) Regulations 1992, SI 1992/3134, regs 1(2), 2. The Oral Snuff (Safety) Regulations 1989, SI 1989/2347, which prohibited the supply of oral snuff, were quashed: see *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB 353, [1991] 1 All ER 212, DC (defects in consultation procedure). The Tobacco for Oral Use (Safety) Regulations 1992, SI 1992/3134, implement in part EC Council Directive 89/622 (OJ L359, 8.12.89, p 1) (amended by EC Council Directive 92/41 (OJ L158, 11.6.92, p 30) and repealed by European Parliament and EC Council Directive 2001/37 (OJ L 194, 18.7.2001, p 26)) (see PARA 393 ante).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(R) Transport/651. All-terrain motor vehicles.

(R) TRANSPORT

651. All-terrain motor vehicles.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any regulated vehicle which:

- 1312 (1) has three wheels¹;

1313 (2) has four wheels and which is designed or intended for use by a person under the age of 12, whether or not it is designed or intended for use also by older persons, if any of the following requirements is not satisfied in respect of the vehicle²:

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169. (a) the maximum speed at which the vehicle can travel when tested under the prescribed conditions³ must be 15 miles per hour⁴;

170. (b) the vehicle must be fitted with a regulator⁵ which, when operated, ensures that the maximum speed at which the vehicle can travel, when tested under the prescribed conditions⁶, is ten miles per hour⁷; and

171. (c) the regulator required by head (2)(b) above must be in operation⁸;

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1314 (3) has four wheels and which is designed or intended for use by a person who has attained the age of 12 and is under the age of 16, whether or not it is designed or intended for use also by older persons, if any of the following requirements is not satisfied in respect of the vehicle⁹:

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172. (a) the maximum speed at which the vehicle can travel when tested under the prescribed conditions¹⁰ is 30 miles per hour¹¹;

173. (b) the vehicle must be fitted with a regulator which, when operated, ensures that the maximum speed at which the vehicle can travel when tested under the prescribed conditions is 15 miles per hour¹²;

174. (c) the regulator required by head (3)(b) above must be in operation¹³;

175. (d) the vehicle must have securely attached to it, in a prominent position where it can readily be seen by a driver seated in the driving position on the vehicle, a durable label bearing the prescribed warning¹⁴.

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For these purposes, 'regulated vehicle' means any vehicle which is propelled by an internal combustion engine and is designed or constructed primarily for use in leisure activities, including competitive racing, on either:

1315 (i) all types of land surface; or

1316 (ii) all types of land surface other than any highway or any other road, or bridge over which a road passes, to which the public has access,

and not primarily for agricultural or forestry purposes but does not include a vehicle which is specially designed, constructed or adapted for the use of a person suffering from some physical defect or disability or a two-wheeled motor cycle with a side-car attached to it¹⁵.

1 All-Terrain Motor Vehicles (Safety) Regulations 1989, SI 1989/2288, regs 2, 3.

2 Ibid regs 2, 4(1).

3 The conditions prescribed for these purposes, and for the purposes of ibid regs 4(3), 5(2), (3) (see the text and notes 4-12 infra), are: (1) the surface on which the vehicle is tested must be dry asphalt or concrete; (2) the rider must be a person not exceeding 75 kilograms in weight; (3) no passenger or load must be carried; (4) the test route must be so located that acceleration to, and deceleration from, maximum speed can take place elsewhere than on the test route itself; (5) the test route must not have a gradient exceeding 5%; (6) the tyres of the vehicle must be inflated to the pressure recommended by the vehicle manufacturer for the weight of the vehicle and the conditions under which the test is carried out, where such recommendations have been made and not withdrawn; (7) the vehicle must be ridden in opposite directions along the test route and the speed recorded for the purpose of the test must be the average of speeds measured for each direction; (8) when being driven along the test route, the vehicle must be driven in such manner and in such gear as to achieve the maximum speed of which it is capable when the regulator is not in operation (for the purposes of the test in

regs 4(2), 5(2)) and when the regulator is in operation (for the purposes of the test in regs 4(3), 5(3)): reg 6. For the meaning of 'regulator' see note 5 infra.

4 Ibid regs 2, 4(2).

5 For these purposes, 'regulator' means a device which is fitted in a regulated vehicle and which is not capable of being adjusted or removed from the vehicle without the use of tools or equipment and which, when operated, regulates the speed at which the vehicle can travel: ibid reg 2.

6 See note 3 supra.

7 All-Terrain Motor Vehicles (Safety) Regulations 1989, SI 1989/2288, reg 4(3).

8 Ibid reg 4(4).

9 Ibid regs 2, 5(1).

10 See note 3 supra.

11 All-Terrain Motor Vehicles (Safety) Regulations 1989, SI 1989/2288, reg 5(2).

12 Ibid reg 5(3).

13 Ibid reg 5(4).

14 Ibid reg 5(5). The warning so prescribed is 'THIS ATV IS NOT SUITABLE FOR A CHILD UNDER 12 YEARS' and must be in red letters and numerals of at least ten point in upper case in a bold typeface and in legible and durable form on a background of a sufficiently different colour from red to enable the words readily to be seen: reg 5(5). If the label bearing the warning bears other information, the warning must appear before such other information: reg 5(5).

15 Ibid reg 2.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

651 All-terrain motor vehicles

TEXT AND NOTES 1-14--SI 1989/2288 regs 4, 5 revoked: SI 2008/1597.

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652. Pedal cycles.

No person is to supply¹ on or after 1 May 2004:

1317 (1) any bicycle² unless:

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176. (a) in the case of a bicycle: (i) within the field of application of the British Standard³, it complies with all the requirements specified in that standard (including marking requirements) other than that relating to warning devices⁴; or (ii) outside the field of application of the British Standard, it complies with standards no less

- than those specified in the British Standard other than those relating to warning devices and marking⁵;
177. (b) it has been fitted with a bell which is of a category intended for use on bicycles and complies with the requirements of the ISO Standard⁶ in relation to bells of that category; and
178. (c) its brakes have been correctly adjusted in accordance with the manufacturer's instructions⁷;
- 116
- 1318 (2) a bicycle with unassembled parts unless those parts:
- 117
179. (a) are capable of being assembled to form a bicycle which in all respects complies with: (i) in a case where the bicycle so formed would be within the field of application of the British Standard, with all the requirements specified in that standard (including marking requirements) other than that relating to warning devices; or (ii) in a case where the bicycle so formed would be outside the field of application of the British Standard, with standards no less than those specified in the British Standard other than those relating to warning devices and marking⁸;
180. (b) include a bell which: (i) is of a category intended for use on bicycles; and (ii) complies with the requirements of the ISO Standard in relation to bells of that category;
181. (c) are supplied with a list of readily available standard tools and the special or non-standard tools, required to assemble the parts correctly; and
182. (d) are accompanied by a set of instructions containing information on the correct assembly and subsequent adjustment of any parts supplied unassembled⁹.
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A magistrates' court may try an information in respect of an offence committed under the Consumer Protection Act 1987¹⁰ in relation to a contravention of these provisions if the information is laid is made within 12 months from the time when the offence is committed¹¹.

1 Save as provided in the Pedal Bicycles (Safety) Regulations 2003, SI 2003/1101, reg 4(2) (see note 7 infra), a reference in those regulations to 'supply' includes offering to supply, agreeing to supply, exposing for supply and possessing for supply; and 'supplied' and 'supplying' are to be construed accordingly: reg 3(2).

2 'Bicycle' means a two-wheeled vehicle that is propelled solely by the muscular energy of the person on that vehicle by means of pedals and has not been constructed or adapted for propulsion by mechanical power: *ibid* reg 3(1).

3 For these purposes, 'the British Standard' means the specification for safety requirements for bicycles issued by the British Standards Institution under reference BS 6102: Pt 1: 1992, and the specification for photometric and physical requirements of reflective devices for cycles issued by the British Standards Institution under reference BS 6102: Pt 2: 1982 as amended by Amendment No 1 published on 31 December 1984 under reference AMD 4752: Pedal Bicycles (Safety) Regulations 2003, SI 2003/1101, reg 3(1). As to the British Standards Institution see *PARA 446 ante*.

4 *le* other than the requirement in the British Standard cl 16 (warning devices).

5 *le* other the requirements in the British Standard cl 16 (warning devices) and cl 20(a) (marking). As to equivalent standards see the Pedal Bicycles (Safety) Regulations 2003, SI 2003/1101, reg 8. The provisions of reg 4(1)(a) (see head (1)(a) in the text) do not apply in respect of a tradesman's delivery bicycle or a tandem bicycle: reg 6(1). 'Tradesman's delivery bicycle' means a bicycle which is designed primarily or entirely for the carriage of goods in the course of a trade; and 'tandem bicycle' means a bicycle which is designed to carry two or more persons at least two of whom can propel the vehicle at the same time: reg 3(1).

6 'The ISO Standard' means the technical specifications for bells for bicycles and mopeds published by the International Organisation for Standardisation under reference ISO 7636-1984 (E): Pedal Bicycles (Safety) Regulations 2003, SI 2003/1101, reg 3(1). The relevant requirements are those in the ISO Standard cl 6.3.

7 Pedal Bicycles (Safety) Regulations 2003, SI 2003/1101, reg 4(1). In relation to reg 4(1)(c) (see head (1)(c) in the text), 'supply' does not include offering to supply, exposing for supply and possessing for supply: reg 4(2).

The provisions of reg 4 do not apply in respect of: (1) a bicycle which has previously been supplied and used (other than for the purpose of testing) on or off a road; (2) a bicycle the height of the saddle of which is less than 635 millimetres; (3) a competition bicycle; or (4) a bicycle which has been constructed to the design of an individual person for use by that person in competitive events: reg 6(2). Nor do the provisions of reg 4 apply in a case where the person supplying the bicycle reasonably believes that it will not be used in the United Kingdom: reg 6(3). 'Competition bicycle' means a bicycle which has no brakes and is specifically designed for off-road racing on enclosed tracks: reg 3(1). In the Pedal Bicycles (Safety) Regulations 2003, SI 2003/1101, a reference to the height of the saddle of a bicycle is a reference to the height above the ground of the part of the seating area of the saddle which is furthest from the ground when the vehicle to which the saddle is attached is vertical and the saddle is raised to the fullest extent compatible with safety and any pneumatic tyres on the wheels of the vehicle are fully inflated: reg 3(3).

8 The provisions of *ibid* reg 5(a) (see head (2)(a) in the text) do not apply to the supply of any parts if they are capable of being assembled so as to form a tradesman's delivery bicycle or a tandem bicycle: reg 7(1).

9 *Ibid* reg 5. The provisions of reg 5 do not apply to the supply of any parts if they: (1) have previously been supplied and used (other than for the purpose of testing) on or off a road as parts of a bicycle; or (2) are capable of being assembled so as to form a bicycle of a kind specified in reg 6(2)(b)-(d) (see note 7 heads (2)-(4) *supra*): reg 7(2). Nor do the provisions of reg 5 apply in a case where the person supplying the parts reasonably believes that they will not be used in the United Kingdom: reg 7(3).

10 *Ie* the Consumer Protection Act 1987 s 12: see PARA 540 *ante*.

11 Pedal Bicycles (Safety) Regulations 2003, SI 2003/1101, reg 9.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(R) Transport/653. Filament lamps for vehicles.

653. Filament lamps for vehicles.

No person is to supply, offer to supply, agree to supply, expose for supply or possess for supply any filament lamp, being a filament lamp as an entity separate from, and not as part of, a lamp unit or a vehicle, of a prescribed type¹ unless it is marked with the marking designated² as an approval mark³.

1 *Ie* of a type to which an ECE Regulation or Community instrument mentioned in an item in the Filament Lamps for Vehicles (Safety) Regulations 1982, SI 1982/444, reg 2(1), Table col 2 applies. For these purposes, 'ECE Regulation' has the meaning given in the Motor Vehicles (Designation of Approval Marks) Regulations 1979, SI 1979/1088, reg 3(1): Filament Lamps for Vehicles (Safety) Regulations 1982, SI 1982/444, reg 2(2).

2 *Ie* by the provisions in the Motor Vehicles (Designation of Approval Marks) Regulations 1979, SI 1979/1088 (as amended) (see ROAD TRAFFIC), mentioned in relation to that item in the Filament Lamps for Vehicles (Safety) Regulations 1982, SI 1982/444, reg 2(1), Table col 3.

3 *Ibid* regs 2(1), 3. As to filament lamps see also see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 381.

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528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iii) Consumer Safety/K. SAFETY OF PARTICULAR PRODUCTS/(R) Transport/654. Motor vehicle tyres.

654. Motor vehicle tyres.

Except in the case of an exempt tyre, that is to say a tyre¹ which falls within any of the following descriptions:

- 1319 (1) a bias-belted tyre or a diagonal-ply tyre², being a tyre designed for fitting to a wheel of a motor vehicle³ or trailer⁴ manufactured before 1 January 1949;
- 1320 (2) a tyre constructed solely for use off roads and bearing words or letters which indicate that use and which were moulded on to or into the tyre at the time of manufacture;
- 1321 (3) a tyre constructed solely for use on vehicles in competitions and bearing words or letters which indicate that use and which were moulded on to or into the tyre at the time of manufacture;
- 1322 (4) a tyre bearing one of the specified tyre-size designations, being a mark that was moulded on to or into the tyre at the time of manufacture;
- 1323 (5) a tyre designed primarily for fitting to a wheel of a vehicle manufactured before 1 January 1933⁵,

or the supply⁶ of a tyre in exempt circumstances, that is to say if:

- 1324 (a) the tyre is constructed solely for use on a vehicle for the purposes of tests or trials of the tyre and the supply is other than in the course of a retail trade or business; or
- 1325 (b) the supply of the tyre is by a person who reasonably believes that the tyre will not be used in the United Kingdom⁷,

no person is to supply:

- 1326 (i) any tyre, not being a retreaded or part-worn tyre, designed so as to be capable of being fitted to a wheel of a passenger car⁸, a light trailer⁹, a moped¹⁰ (not being a low performance moped¹¹), a motor cycle¹², a motor tricycle¹³, a three-wheel moped¹⁴, or a quadricycle¹⁵, unless the tyre is marked with an approval mark¹⁶;
- 1327 (ii) any retreaded tyre, not being a part-worn tyre, designed so as to be capable of being fitted to a wheel of a passenger car, commercial vehicle¹⁷ or trailer unless the following requirements are met in respect of the tyre, that is to say, the tyre must not bear any mark indicating that it complies with the relevant EC requirements¹⁸ and the tyre must conform to a type in respect of which approval has been granted¹⁹ pursuant to the relevant EC legislation²⁰;
- 1328 (iii) any retreaded tyre (not being a part-worn tyre) designed so as to be capable of being fitted to the wheel of a moped (not being a low performance moped), a motor cycle, a motor tricycle, a three-wheel moped or a quadricycle, on

or after 1 January 2004 unless either the tyre complies with the requirements set out in head (ii) above, or other specific requirements are met with respect to it²¹.

No person is to supply any part-worn tyre or any part-worn retreaded tyre designed so as to be capable of being fitted to a wheel of a passenger car, a commercial vehicle, a light trailer, a moped (not being a low performance moped), a motor cycle, a motor tricycle, a three-wheel moped, or a quadricycle unless the specified requirements are met²², except that where a complete vehicle is supplied by any person, these requirements do not apply to any tyre on a wheel of the vehicle or on any spare wheel supplied with the vehicle²³.

1 'Tyre' means a pneumatic tyre as defined in the Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078, reg 3(2) (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 271): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 2(1).

2 'Bias-belted tyre' and 'diagonal-ply tyre' have the meanings given by the Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078, reg 26: Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 2(5).

3 'Motor vehicle' has the same meaning as in the Road Traffic Act 1988 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 210): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 2(2).

4 'Trailer' (except where it appears in the expression 'light trailer') has the same meaning as in the Road Traffic Act 1988 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 210): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 2(2).

5 See *ibid* regs 8(1), 9 (reg 9 amended by SI 2003/1316).

6 A reference in the Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117 (as amended) to the supply of a tyre includes offering to supply, agreeing to supply, exposing for supply or possessing for supply; and cognate expressions are to be construed accordingly: reg 2(6).

7 See *ibid* regs 8(2), 9 (reg 9 as amended: see note 5 *supra*).

8 'Passenger car' means a motor vehicle which is a passenger vehicle or dual-purpose vehicle, has no more than eight seats in addition to the driver's seat, and has four or more wheels: *ibid* reg 2(1). 'Passenger vehicle' and 'dual-purpose vehicle' have the meanings given by the Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078, reg 3 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARAS 271, 287): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 2(5).

9 'Light trailer' has the meaning given by the Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078, reg 3: Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 2(5).

10 'Moped' has the same meaning as in European Parliament and EC Council Directive 2002/24 (OJ L124, 9.5.2002, p 1): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, regs 2(1), 4 (substituted by SI 2003/1316).

11 'Low performance moped' has the same meaning as in European Parliament and EC Council Directive 2002/24 (OJ L124, 9.5.2002, p 1): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 4 (as substituted: see note 10 *supra*).

12 'Motor cycle' has the same meaning as in European Parliament and EC Council Directive 2002/24 (OJ L124, 9.5.2002, p 1): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 4 (as substituted: see note 10 *supra*).

13 'Motor tricycle' has the same meaning as in European Parliament and EC Council Directive 2002/24 (OJ L124, 9.5.2002, p 1): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 4 (as substituted: see note 10 *supra*).

14 'Three-wheel moped' has the same meaning as in European Parliament and EC Council Directive 2002/24 (OJ L124, 9.5.2002, p 1): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 4 (as substituted: see note 10 *supra*).

15 'Quadricycle' has the same meaning as in European Parliament and European Parliament and EC Council Directive 2002/24 (OJ L124, 9.5.2002, p 1): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 4 (as substituted: see note 10 supra).

16 Ibid reg 5 (substituted by SI 2003/1316). 'Approval mark' means a mark of a description specified in ECE Regulation 30, 30.01, 30.02, 54 or 75 or in EC Council Directive 92/23 (OJ L129, 14.5.92, p 95) which, when applied to a tyre, indicates that the tyre conforms with a type in respect of which approval has been granted pursuant to that instrument: Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 2(1). A reference to an ECE Regulation is to be construed in accordance with the Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, Sch 1: reg 2(8).

17 'Commercial vehicle' means a motor vehicle which is a goods vehicle with four or more wheels, or a passenger vehicle with more than eight seats in addition to the driver's seat: ibid reg 2(1). 'Goods vehicle' has the same meaning as in the Road Traffic Act 1988 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 220): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 2(2).

18 Ie the requirements of ECE Regulation 30, 30.01, 30.02 or 54 or EC Council Directive 92/23 (OJ L129, 14.5.92, p 95).

19 Ie under ECE Regulation 108 or 109.

20 Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 6(1) (substituted by SI 2003/1316).

21 Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 6(2) (substituted by SI 2003/1316). The requirements with respect to the tyre are that:

- 9 (1) it must not bear any mark indicating that it complies with the requirements of ECE Regulation 75 or of European Parliament and EC Council Directive 97/24 (OJ L226, 18.8.97, p 1) (as amended) (Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 6(2)(i) (as so substituted));
- 10 (2) prior to being retreaded, the carcass conformed to a type of tyre in respect of which approval had been granted pursuant to ECE Regulation 75 or of EC Directive 97/24 (OJ L226, 18.8.97, p 1) (as amended) and it bore an 'E' or 'e' mark (Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 6(2)(ii) (as so substituted));
- 11 (3) it must not previously have been retreaded (reg 6(2)(iii) (as so substituted));
- 12 (4) the carcass which has been retreaded must be no more than seven years old, the age being determined on the basis of the digits of the date of manufacture code which is marked on the sidewall (reg 6(2)(iv) (as so substituted));
- 13 (5) it is permanently marked to enable the identification (whether through the use of a code or otherwise) of the name, and either the type or trade description or model reference, of the original manufacturer of the carcass which has been retreaded (reg 6(2)(v) (as so substituted));
- 14 (6) it complies, as regards dimensions and performance, with the requirements set out either in ECE Regulation 75 or in EC Directive 97/24 (OJ L226, 18.8.97, p 1) (as amended) (Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 6(2)(vi) (as so substituted));
- 15 (7) it has moulded on to, or into, at least one of its sidewalls and in letters not less than 4 millimetres high, the word 'RETREAD' (reg 6(2)(vii) (as so substituted));
- 16 (8) it complies, as regards markings, with ECE Regulation 75 para 3 (except para 3(2)) or with EC Directive 97/24 (OJ L226, 18.8.97, p 1) Annex II para 2 (Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 6(2)(viii) (as so substituted));
- 17 (9) if it has been repaired during the course of retreading, it must have been properly repaired (reg 6(2)(ix) (as so substituted)); and
- 18 (10) it must not show either a higher speed symbol or a higher load index than that originally borne by the carcass which has been retreaded (reg 6(2)(x) (as so substituted)).

'Carcass' and 'sidewall' have the same meanings as in EC Council Directive 92/23 (OJ L129, 14.5.92, p 95): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 4 (as substituted: see note 10 supra).

22 Ibid reg 7(1) (reg 7 substituted by SI 2003/1316). The requirements are that:

- 19 (1) the tyre must not have: (a) any cut in excess of 25 millimetres or 10 per cent of the section width of the tyre (whichever is the greater) measured in any direction on the outside of the tyre and deep enough to reach the ply or cord; (b) any internal or external lump, bulge or tear caused by the separation or partial failure of its structure; (c) any of the ply or cord exposed internally or externally; or (d) any penetration damage which has not been repaired (Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 7(2) (as so substituted));
- 20 (2) when inflated to the highest pressure at which it is designed to operate, the tyre must not exhibit any of the external defects described in head (1) supra (reg 7(3) (as so substituted));
- 21 (3) the grooves of the original tread pattern of the tyre must be of a depth of at least 2 millimetres across the full breadth of tread and round the entire outer circumference of the tyre (reg 7(4) (as so substituted));
- 22 (4) if the tyre has not been retreaded and is designed so as to be capable of being fitted to a wheel of any of the vehicles described in reg 7(1) (as substituted), it must bear: (a) immediately adjacent to every approval mark borne by the tyre, a mark that meets the requirements of reg 7(10) (as substituted); and (b) an approval mark, a speed category symbol and load capacity index, being marks that were moulded on to, or into, the tyre at the time that it was manufactured and that are in accordance with the requirements of ECE Regulation 30, 30.01, 30.02, 54 or 75 or of EC Council Directive 92/23 (OJ L129, 14.5.92, p 95) or EC Directive 97/24 (OJ L226, 18.8.97, p 1) (as amended) (Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 7(5) (as so substituted; and amended by SI 2003/2762));
- 23 (5) if the tyre has been retreaded and is designed so as to be capable of being fitted to a wheel of any of the vehicles described in reg 7(1) (as substituted): (a) it must bear the mark 'BS AU 144b', 'BS AU 144c', 'BS AU 144d' or 'BS AU 144e', or an approval mark indicating that the tyre complies with the requirements of ECE Regulation 108 or 109, or comply, as regards markings, with the requirements set out in the Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 6(2)(b)(v), (vii) and (viii) (as substituted) (see note 21 heads (5), (7), (8) supra); (b) the mark must have been permanently and legibly applied to the tyre at the time it was retreaded; and (c) it must bear in the case of a tyre bearing a BS mark or an approval mark, immediately adjacent to such mark, or in the case of a tyre marked in accordance with reg 6(2)(b)(v), (vii), (viii) (as substituted), immediately adjacent to the word 'RETREAD', a mark that meets the requirements of reg 7(10) (as substituted) (reg 7(6) (as so substituted));
- 24 (6) if a tyre has been retreaded and bears the mark 'BS AU 144e', it must bear a speed category symbol and load-capacity index, being marks that were permanently and legibly applied to the tyre at the time it was manufactured or retreaded and that are in accordance with BS AU 144e: 1988 (Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 7(7) (as so substituted));
- 25 (7) if the tyre has been repaired, it must have been properly repaired (reg 7(8) (as so substituted));
- 26 (8) without prejudice to head (7) supra, if the tyre has been repaired, it must meet the requirements of BS AU 159f: 1997 para 8 (which include marking requirements) and the requirements of BS AU 159f: 1997 paras 5, 6 and 7 must have been met in relation to that repair (Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 7(9) (as so substituted));
- 27 (9) in order for a mark to meet the requirements of this head, it must consist of the word 'PART-WORN' in uppercase letters at least 4 millimetres high and must have been permanently and legibly applied to the tyre other than by hot branding or otherwise cutting into the tyre (reg 7(10) (as so substituted)).

'Breadth of tread' and 'original tread pattern' have the meanings given by the Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078, reg 3: Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 2(5).

23 Ibid reg 10(1). In addition, the provisions of reg 7(5)-(7) (as substituted) (see note 22 heads (4)-(6) supra) do not apply to the supply of an exempt tyre or to the supply of a tyre in exempt circumstances (reg 10(2) (amended by SI 2003/1316)), and the Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 7(9) (as substituted) (see note 22 head (8) supra) does not apply to: (1) a tyre designed primarily for fitting to a wheel of a vehicle manufactured before 1 January 1933; (2) a tyre of the limited run-flat type; or (3) a tyre designed primarily for fitting to a wheel of an agricultural motor vehicle, agricultural trailer or agricultural trailed appliance (reg 10(3) (amended by SI 2003/1316)). 'Agricultural motor vehicle', 'agricultural trailer' and 'agricultural trailed appliance' have the meanings given by the Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078, reg 3 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 271): Motor Vehicle Tyres (Safety) Regulations 1994, SI 1994/3117, reg 2(5).

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

654 Motor vehicle tyres

NOTES 16, 18, 21, 22--Directive 92/23 replaced with effect from 1 November 2017: European Parliament and EC Council Regulation 661/2009 (OJ L200, 31.7.2009, p 1).

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655. Brake linings.

On and after 24 November 1999 no person is to supply or offer or agree to supply for fitting to a vehicle¹, expose or possess for supply for fitting to a vehicle, or fit to a vehicle, brake linings² which contain asbestos³; but nothing in that prohibition applies in relation to replacement brake linings for fitting to any vehicle owned by the Secretary of State for Defence and used for naval, military or air force purposes or owned by, and used for the purposes of, any visiting force⁴.

On and after 31 March 2001 no person:

1329 (1) is to supply or offer or agree to supply for fitting to a relevant vehicle⁵, expose or possess for supply for fitting to a relevant vehicle, or fit to a relevant vehicle, brake linings which do not meet the specified requirements⁶, but nothing in that prohibition is⁷ to be taken to apply in relation to replacement brake linings: (a) for fitting, or fitted, to a relevant vehicle which was first used before 1 September 1999, if the replacement brake linings are not such as to cause the vehicle to contravene the version of the relevant EC Council Directive⁸ that was applicable to it when it was first used⁹; or (b) if they are intended for fitting, or fitted, on or after 1 August 2004 to a relevant vehicle falling within any of the specified descriptions¹⁰ and if the linings are packaged in accordance with the specified requirements¹¹; or (c) supplied by a vehicle manufacturer, provided that the manufacturer complies with specified requirements¹²;

1330 (2) is¹³ to supply or offer or agree to supply for fitting to a vehicle which is not a relevant vehicle, expose or possess for supply for fitting to a vehicle which is not a relevant vehicle, or fit to a vehicle which is not a relevant vehicle, brake linings which are such as to cause the vehicle to contravene the version of the relevant EC Council Directive¹⁴ that was applicable to it when it was first used¹⁵.

1 For these purposes, 'vehicle' means a vehicle which is to be treated as a motor vehicle or trailer for the purposes of the Road Traffic Act 1988 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 210): Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 2(1).

2 For these purposes, 'brake lining' means the friction material component of a brake lining assembly; and 'brake lining assembly' means a component of a friction brake which is pressed against a drum or disc to produce the friction force: *ibid* reg 2(1).

3 Ibid regs 1(2), 3(1). A magistrates' court may try an information in respect of an offence committed under the Consumer Protection Act 1987 s 12 (see PARA 540 ante) in relation to a contravention of the Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, if the information is laid within 12 months from the time when the offence is committed: regs 1(2), 2(1), 7.

4 Ibid regs 1(2), 3(2)(b). See also note 3 supra. For these purposes, 'visiting force' means any body, contingent or detachment which is, in accordance with the Visiting Forces Act 1952 s 12(1), a visiting force for the purposes of any provision of Pt I (ss 1-12 (as amended): see ARMED FORCES vol 2(2) (Reissue) PARA 138 et seq): Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 3(4). As to the Secretary of State for Defence see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 438 et seq; and see also ARMED FORCES vol 2(2) (Reissue) PARA 2.

5 For these purposes, 'relevant vehicle' means a vehicle which falls within vehicle category M1, M2 or N1 of the categories specified in EC Council Directive 70/156 (OJ L42, 23.2.70, p 1) Annex II (as amended) and has a maximum mass not exceeding 3.5 tonnes: Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 2(1).

6 Ibid regs 1(2), 4(1). See also note 3 supra. Regulation 4 is subject to reg 5 (as substituted) (see the text to note 10 infra): reg 4(1). The requirements specified are: (1) that the brake linings: (a) have been type-approved in accordance with the requirements of EC Council Directive 71/320 (OJ L202, 6.9.71, p 37) (as amended); (b) have been marked by the manufacturer in accordance with the requirements of EC Council Directive 70/156 (OJ L42, 23.2.70, p 1) art 6(3); and (c) are marked and packaged in accordance with the requirements of EC Council Directive 71/320 (OJ L202, 6.9.71, p 37) Annex XV points 4, 6; or (2) that the brake linings have been approved in accordance with ECE Regulation 90.01 para 4 and are marked and packaged in accordance with ECE Regulation 90.01 para 6: Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 4(2). 'ECE Regulation 90' means Regulation 90 containing uniform provisions concerning the approval of replacement brake lining assemblies for power-driven vehicles and their trailers which came into force on 1 November 1992 as an Annex to the UNECE Agreement; and 'ECE Regulation 90.01' means ECE Regulation 90 as amended by the 01 series of amendments on 18 September 1994: Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 2(1). 'The UNECE Agreement' means the Agreement of the United Nations Economic Commission for Europe (Geneva, 20 March 1958; TS 7 (1965); Cmnd 2535, 3562) (as amended) concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted to and/or used on wheeled vehicles and the conditions for the reciprocal recognition of approvals granted on the basis of these prescriptions, to which the United Kingdom is a party by virtue of an instrument of accession dated 14 January 1963 deposited with the Secretary General of the United Nations on 15 January 1963: Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 2(1).

7 Ie without prejudice to ibid reg 3 (see the text and notes 1-4 supra): reg 5(5) (substituted by SI 2003/3314).

8 Ie EC Council Directive 71/320 (OJ L202, 6.9.71, p 37) (as amended) (see note 6 supra).

9 Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 5(1) (substituted by SI 2003/3314).

10 Ie (1) a vehicle for which there has been granted a certificate of conformity (as defined by the Road Traffic Act 1988 s 57: see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 705) or a minister's approval certificate (as defined by s 58: see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 706), under the Motor Vehicles (Type Approval for Goods Vehicles) (Great Britain) Regulations 1982, SI 1982/1271, the Motor Vehicles (Type Approval) (Great Britain) Regulations 1984, SI 1984/981, or the Motor Vehicles (Approval) Regulations 2001, SI 2001/25 (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 700); (2) a vehicle for which there has been granted an equivalent approval in another member state; or (3) a vehicle in respect of which the design of the braking system has been modified to enhance the brake performance beyond that required to secure EC type approval: Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 5(2) (substituted by SI 2003/3314). 'EC type approval' means vehicle type approval for a light passenger vehicle (as defined by the Road Traffic Act 1988 s 85) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 708) granted pursuant to EC Council Directive 70/156 (OJ L42, 23.2.70, p 1), or system, component or separate technical unit type approval granted pursuant to an EC or EEC Directive: Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 2(1) (definition added by SI 2003/3314).

11 Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 5(2) (substituted by SI 2003/3314). The requirements are that: (1) the replacement brake linings are packaged in axle sets; and (2) the packaging: (a) is of such a nature that any opening or re-sealing of it will be apparent; and (b) is marked with the words 'The contents of this package are components for which approval cannot be obtained under Annex XV to Council Directive 71/320/EEC (as inserted by Commission Directive 98/12/EC) or UN ECE Regulation 90.01 as required by the Road Vehicles (Brake Linings Safety) Regulations 1999 (as amended)': Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 5(3) (substituted by SI 2003/3314).

12 Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 5(4) (substituted by SI 2003/3314). The requirements are those of EC Council Directive 71/320 (OJ L202, 6.9.71, p 37) Annex 1 points 2.3-2.3.4 in relation to a relevant vehicle which was first used on or after 1 September 1999: Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 5 (substituted by SI 2003/3314).

13 le without prejudice to ibid reg 3 (see the text and notes 1-4 supra).

14 See note 8 supra.

15 Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/2978, reg 6. See also note 3 supra.

UPDATE

528-655 Consumer Safety

For consumer protection from unfair trading see PARA 725A.

655 Brake linings

NOTES 6, 8, 11, 12--Directive 71/320 replaced with effect from 1 November 2014: European Parliament and EC Council Regulation 661/2009 (OJ L200, 31.7.2009, p 1).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(iv) Restrictions on Statements/656. In general.

(iv) Restrictions on Statements

656. In general.

A person must not in the course of a business:

1331 (1) display at any place where consumer transactions¹ are effected, whether wholly or partly, a notice containing a statement which purports to apply, in relation to consumer transactions effected there, a term which would:

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183. (a) be void by virtue of the Unfair Contract Terms Act 1977²; or

184. (b) be inconsistent with a term as to quality or fitness implied by the Supply of Goods and Services Act 1982³,

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1332 if applied to some or all such consumer transactions;

1333 (2) publish or cause to be published any advertisement⁴ which is intended to induce persons to enter into consumer transactions and which contains a statement purporting to apply in relation to such consumer transactions such a term as is mentioned in heads (1)(a) or (1)(b) above, being a term which would be void by virtue of or, as the case may be, inconsistent with, the provisions so mentioned if applied to some or all of those transactions;

1334 (3) supply to a consumer pursuant to a consumer transaction goods bearing, or goods in a container⁵ bearing, a statement which is a term of that consumer transaction and which is void by virtue of, or inconsistent with, such provisions or, if it were a term of that transaction, would be so void or inconsistent;

- 1335 (4) furnish to a consumer in connection with the carrying out of a consumer transaction or to a person likely, as a consumer, to enter into such a transaction, a document which includes a statement which is a term of that transaction and is so void or inconsistent or, if it were a term of that transaction or were to become a term of a prospective transaction, would be so void or inconsistent⁶.

A person must not in the course of a business:

- 1336 (i) supply to a consumer pursuant to a consumer transaction goods bearing, or goods in a container bearing, a statement about the rights that the consumer has against that person or about the obligations to the consumer accepted by that person in relation to the goods, whether legally enforceable or not, being rights or obligations that arise if the goods are defective or are not fit for a purpose or do not correspond with a description;
- 1337 (ii) furnish to a consumer in connection with the carrying out of a consumer transaction or to a person likely, as a consumer, to enter into such a transaction with him or through his agency a document containing a statement about such rights and obligations,

unless there is in close proximity to any such statement another statement which is clear and conspicuous and to the effect that the first-mentioned statement does not or will not affect the statutory rights⁷ of a consumer⁸.

In the case of goods which are supplied in the course of a business by one person ('the supplier') to another where, at the time of the supply, the goods were intended by the supplier to be, or might reasonably be expected by him to be, the subject of a subsequent consumer transaction, a supplier must not:

- 1338 (A) supply such goods if the goods bear, or are in a container bearing, a statement which sets out or describes or limits obligations, whether legally enforceable or not, accepted or to be accepted by him in relation to the goods; or
- 1339 (B) furnish a document in relation to the goods which contains such a statement,

unless there is in close proximity to any such statement another statement which is clear and conspicuous and to the effect that the first-mentioned statement does not or will not affect the statutory rights of a consumer⁹.

1 For these purposes, 'consumer transaction' means: (1) a consumer sale, ie a sale of goods (other than an excepted sale) by a seller where the goods are of a type ordinarily bought for private use or consumption and are sold to a person who does not buy or hold himself out as buying them in the course of a business; (2) a hire-purchase agreement, within the meaning of the Consumer Credit Act 1974 s 189(1) (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 95) where the owner makes the agreement in the course of a business and the goods to which the agreement relates are of a type ordinarily supplied for private use or consumption and are hired to a person who does not hire or hold himself out as hiring them in the course of a business: Consumer Transactions (Restrictions on Statements) Order 1976, SI 1976/1813, art 2(1) (amended by SI 1978/127). An excepted sale is a sale by auction, a sale by competitive tender and a sale arising by virtue of a contract for the international sale of goods as originally defined in the Sale of Goods Act 1893 s 62(1) (as amended by the Supply of Goods (Implied Terms) Act 1973 s 7(1)): Consumer Transactions (Restrictions on Statements) Order 1976, SI 1976/1813, art 2(1) (as so amended). The definition of 'contract for the international sale of goods' in the Sale of Goods Act 1893 s 62(1) (as amended) was repealed by the Unfair Contract Terms Act 1977 s 31(4), Sch 4. 'Consumer' means a person acquiring goods otherwise than in the course of a business but does not include a person who holds himself out as acquiring them in the course of a business: Consumer Transactions (Restrictions on Statements) Order 1976, SI 1976/1813, art 2(1).

2 le by virtue of the Unfair Contract Terms Act 1977 s 6 (as amended): see PARA 450 ante; and CONTRACT vol 9(1) (Reissue) PARA 826.

3 le a term implied by the Supply of Goods and Services Act 1982 s 4 (as amended) (see PARAS 83-85 ante), s 9 (as amended) (see PARAS 88-90 ante).

4 For these purposes, 'advertisement' includes a catalogue or circular: Consumer Transactions (Restrictions on Statements) Order 1976, SI 1976/1813, art 2(1).

5 For these purposes, 'container' includes any form of packaging of goods, whether by way of wholly or partly enclosing the goods or by way of attaching the goods to, or winding the goods round, some other article, and, in particular, includes a wrapper or confining band: *ibid* art 2(1).

6 *Ibid* art 3 (amended by SI 1978/127; SI 2005/871).

7 For these purposes, 'statutory rights' means the rights arising by virtue of the Sale of Goods Act 1979 ss 13-15 (as amended) (see PARA 72 et seq ante), the Supply of Goods (Implied Terms) Act 1973 ss 9-11 (as substituted) (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 24), or the Supply of Goods and Services Act 1982 ss 4, 9 (both as amended) (see PARA 83 et seq ante): Consumer Transactions (Restrictions on Statements) Order 1976, SI 1976/1813, art 2(1), (2) (definition amended by SI 2005/871); Interpretation Act 1978 s 17(2)(b). The Trading Stamps Act 1964 s 10(1) (repealed) continues to have effect for the purposes of the Consumer Transactions (Restrictions on Statements) Order 1976, SI 1976/1813 (as amended): Statutory Reform (Trading Stamps) Order 2005, SI 2005/871, art 3(2).

8 Consumer Transactions (Restrictions on Statements) Order 1976, SI 1976/1813, art 4.

9 *Ibid* art 5(1), (2). A person does not contravene art 5(2): (1) in a case to which reg 5(2)(a) (see head (A) in the text) applies, unless the goods have become the subject of a consumer transaction; (2) in a case to which art 5(2)(b) (see head (B) in the text) applies, unless the document has been furnished to a consumer in relation to goods which were the subject of a consumer transaction, or to a person likely to become a consumer pursuant to such a transaction; or (3) by virtue of any statement if before 1 November 1978 the document containing, or the goods or container bearing, the statement has or have ceased to be in his possession: art 5(3).

UPDATE

656 In general

TEXT AND NOTES--For consumer protection from unfair trading see PARA 725A.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(v) Unsolicited Goods and Services/657. Rights of recipient.

(v) Unsolicited Goods and Services

657. Rights of recipient.

In certain circumstances a person who receives unsolicited¹ goods may, as between himself and the sender², use, deal with or dispose of them as if they were an unconditional gift to him, and the rights of the sender to the goods are extinguished³.

Those circumstances are that unsolicited goods are sent to a person ('the recipient') with a view to his acquiring them, that the recipient has no reasonable cause to believe that they

were sent with a view to their being acquired⁴ for the purposes of a business and that the recipient has neither agreed to acquire nor agreed to return them⁵.

1 For these purposes, 'unsolicited' means, in relation to goods sent or services supplied to any person, that they are sent or supplied without any prior request made by or on behalf of the recipient: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24(6).

2 For these purposes, 'sender', in relation to any goods, includes any person on whose behalf or with whose consent the goods are sent, any other person claiming through or under the sender or any such person, and any person who delivers the goods: *ibid* reg 24(6). 'Send' includes deliver: reg 24(6).

3 *Ibid* reg 24(2), (3). As to contracts concluded away from business premises following an unsolicited visit by a trader see PARA 663 *et seq post*.

4 For these purposes, 'acquire' includes hire: *ibid* reg 24(6).

5 *Ibid* reg 24(1). The provisions of reg 24 apply only to goods sent and services supplied after the date on which reg 24 came into force (ie 31 October 2000): reg 24(10).

UPDATE

657-662 Unsolicited Goods and Services

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(v) Unsolicited Goods and Services/658. Demands and threats regarding payment.

658. Demands and threats regarding payment.

A person who, not having reasonable cause to believe that there is a right to payment, in the course of any trade or business makes a demand for payment, or asserts a present or prospective right to payment¹, for what he knows are unsolicited² goods sent³ to another person with a view to his acquiring⁴ them for the purposes of his trade or business is guilty of an offence⁵. A person who, not having reasonable cause to believe there is a right to payment, in the course of any business makes a demand for payment, or asserts a present or prospective right to payment, for what he knows are unsolicited⁶ goods sent⁷ to another person with a view to his acquiring⁸ them for purposes other than those of his business, or unsolicited services supplied to another person for purposes other than those of his business, is guilty of an offence⁹.

Further, a person who, not having reasonable cause to believe there is a right to payment, in the course of any trade or business and with a view to obtaining any payment for what he knows are unsolicited goods sent to another person with a view to his acquiring them as mentioned above:

- 1340 (1) threatens to bring any legal proceedings; or
- 1341 (2) places or causes to be placed the name of any person on a list of defaulters or debtors or threatens to do so; or
- 1342 (3) invokes or causes to be invoked any other collection procedure or threatens to do so,

is guilty of an offence¹⁰.

1 For these purposes, any invoice or similar document stating the amount of any payment is to be regarded as asserting a right to the payment unless it complies with the conditions set out in the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, art 3, Schedule Pt 2: Unsolicited Goods and Services Act 1971 s 6(2) (substituted by the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, art 2(1), (8)(a)).

The conditions applying to an invoice or similar document which does not assert right to payment are that the invoice or similar document must: (1) be clear, legible and comprehensible; and (2) contain the following statement, displayed in uppercase lettering and in a manner that makes that statement readily apparent to a reasonable person reading that invoice or similar document: 'This is not a demand for payment. There is no obligation to pay. This is not a bill.': Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, Schedule Pt 2.

The subject matter of the Unsolicited Goods and Services Acts 1971 and 1975 is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2)(b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II Head C para C7, Pt III para 5. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

2 For these purposes, unless the context or subject matter otherwise requires, 'unsolicited' means, in relation to goods sent to any person, that they are sent without any prior request made by him or on his behalf: Unsolicited Goods and Services Act 1971 s 6(1).

3 For these purposes, unless the context or subject matter otherwise requires, 'send' includes deliver; and 'sender' is to be construed accordingly: *ibid* s 6(1).

4 For these purposes, unless the context or subject matter otherwise requires, 'acquire' includes hire: *ibid* s 6(1).

5 *Ibid* s 2(1) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46; and by the Consumer Protection (Distance Selling) Regulations, SI 2000/2334, reg 22(1), (3)). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: see the Unsolicited Goods and Services Act 1971 s 2(1) (as so amended). As to the standard scale see *PARA 498* note 3 ante. See *Readers Digest Association Ltd v Pirie* 1973 SLT 170 (where a magazine and the demand for payment were sent at the direction of the company's computer which had not been informed of the cancellation of the subscription, and it was held that it could not be said that the company did not have reasonable cause to believe that there was a right to payment).

6 For the meaning of 'unsolicited' for these purposes see *PARA 657* note 1 ante.

7 For the meaning of 'send' for these purposes see *PARA 657* note 2 ante.

8 For the meaning of 'acquire' for these purposes see *PARA 657* note 4 ante.

9 Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24(4). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: see reg 24(4).

For these purposes, an invoice or similar document which states the amount of a payment and fails to comply with the conditions set out in the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, Schedule Pt 2 (see note 1 *supra*) is to be regarded as asserting a right to the payment: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24(7) (amended by SI 2005/55). Offences under the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See *PARA 400* ante.

10 Unsolicited Goods and Services Act 1971 s 2(2) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46); Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24(5). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see the Unsolicited Goods and Services Act 1971 s 2(2) (as so amended); and the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24(5).

UPDATE

657-662 Unsolicited Goods and Services

For consumer protection from unfair trading see PARA 725A.

658 Demands and threats regarding payment

NOTES 9, 10--SI 2000/2334 reg 24(4), (5), (7) revoked: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(v) Unsolicited Goods and Services/659. Directory entries.

659. Directory entries.

A person is not liable to make any payment, and is entitled to recover any payment made by him, by way of charge for including or arranging for the inclusion in a directory of an entry relating to that person or his trade or business, unless:

- 1343 (1) there has been signed by him or on his behalf an order complying with these provisions;
- 1344 (2) there has been signed by him or on his behalf a note of his agreement to the charge complying with these provisions and, before the note was signed, a copy of it was supplied, for retention by him, to him or to a person acting on his behalf;
- 1345 (3) there has been transmitted by the purchaser or a person acting on his behalf an electronic communication¹ which includes a statement that the purchaser agrees to the charge and the relevant condition² is satisfied in relation to that communication; or
- 1346 (4) the charge arises under a contract in relation to which the conditions as to renewed and extended contracts³ are met⁴.

For these purposes, an order for an entry in a directory must be made by means of an order form or other stationery belonging to the purchaser, which may be sent electronically but which must bear his name and address (or one or more of his addresses); and the note of a person's agreement to a charge must specify the prescribed particulars⁵, and give reasonable particulars of the entry in respect of which the charge would be payable⁶.

The prescribed particulars are:

- 1347 (a) the amount of the charge;
- 1348 (b) the name of the directory or proposed directory;
- 1349 (c) the name of the person producing the directory;
- 1350 (d) the geographic address at which that person is established;
- 1351 (e) if the directory is to be available in printed form, the proposed date of publication of the directory or of the issue in which the entry is to be included;
- 1352 (f) if the directory or the issue in which the entry is to be included is to be put on sale, the price at which it is to be offered for sale and the minimum number of copies which are to be available for sale;
- 1353 (g) if the directory or the issue of the directory in which the entry is to be included is to be distributed free of charge (whether or not it is also to be put on sale), the minimum numbers of copies which are to be so distributed; and

- 1354 (h) if the directory is or is to be made available in a form other than printed form, adequate details of how it may be accessed⁷.

A person is guilty of an offence liable on summary conviction to a fine not exceeding the prescribed sum if, in a case where a payment in respect of a charge would be recoverable from him in accordance with the terms of these provisions, he demands payment, or asserts a present or prospective right to payment⁸, of the charge or any part of it, without knowing or having reasonable cause to believe that the entry to which the charge relates was ordered in accordance with these provisions or a proper note of agreement has been duly signed or the requirements set out in head (3) or head (4) above have been met⁹.

1 For these purposes, 'electronic communication' has the same meaning as in the Electronic Communications Act 2000 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 616): Unsolicited Goods and Services Act 1971 s 3(3C) (added by the Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001, SI 2001/2778, art 6).

2 In relation to an electronic communication which includes a statement that the purchaser agrees to a charge for including or arranging the inclusion in a directory of any entry, the relevant condition is that: (1) before the electronic communication was transmitted the information referred to in the Unsolicited Goods and Services Act 1971 s 3(3B) (as added) was communicated to the purchaser; and (2) the electronic communication can readily be produced and retained in a visible and legible form: s 3(3A) (added by the Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001, SI 2001/2778, art 6). The information referred to in head (1) supra is: (a) the following particulars: (i) the amount of the charge; (ii) the name of the directory or proposed directory; (iii) the name of the person producing the directory; (iv) the geographic address at which that person is established; (v) if the directory is or is to be available in printed form, the proposed date of publication of the directory or of the issue in which the entry is to be included; (vi) if the directory or the issue in which the entry is to be included is to be put on sale, the price at which it is to be offered for sale and the minimum number of copies which are to be available for sale; (vii) if the directory or the issue in which the entry is to be included is to be distributed free of charge (whether or not it is also to be put on sale), the minimum number of copies which are to be so distributed; (viii) if the directory is or is to be available in a form other than in printed form, adequate details of how it may be accessed; and (b) reasonable particulars of the entry in respect of which the charge would be payable: Unsolicited Goods and Services Act 1971 s 3(3B) (added by the Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001, SI 2001/2778, art 6).

3 I.e. the conditions in the Unsolicited Goods and Services Act 1971 s 3B(1) (as added): see PARA 660 post.

4 Ibid s 3(1) (substituted by the Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001, SI 2001/2778, arts 2, 3).

5 I.e. the particulars set out in the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, art 3, Schedule Pt 1 (see heads (a)-(h) in the text).

6 Unsolicited Goods and Services Act 1971 s 3(3) (amended by the Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001, SI 2001/2778, art 5; the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, art 2(1), (5); and the Unsolicited Goods and Services Act 1971 (Electronic Commerce) (Amendment) Regulations 2005, SI 2005/148, reg 2).

7 Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, Schedule Pt 1.

8 As to when a right to payment is to be regarded as being asserted see PARA 658 note 1 ante.

9 Unsolicited Goods and Services Act 1971 s 3(2) (amended by virtue of the Magistrates' Courts Act 1980 s 32(2); the Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001, SI 2001/2778, art 4; and the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, art 2(1), (4)). A person guilty of such an offence is liable on summary conviction to a fine not exceeding the prescribed sum: see the Unsolicited Goods and Services Act 1971 s 3(2) (as so amended). As to the prescribed sum see PARA 498 note 2 ante. As to offences by corporations see PARA 662 post.

UPDATE

657-662 Unsolicited Goods and Services

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(v) Unsolicited Goods and Services/660. Renewed and extended contracts.

660. Renewed and extended contracts.

A purchaser may be liable to make payment for a directory entry relating to his trade or business if the following conditions as to a renewed or extended contract¹ are met²:

- 1355 (1) a person ('the purchaser') has entered into an earlier contract ('the earlier contract') for including or arranging for the inclusion in a particular issue or version of a directory ('the earlier directory') of an entry ('the earlier entry') relating to him or his trade or business;
- 1356 (2) the purchaser was liable to make a payment by way of a charge arising under the earlier contract for including or arranging for the inclusion of the earlier entry in the earlier directory;
- 1357 (3) the new contract is a contract for including or arranging for the inclusion in a later issue or version of a directory ('the later directory') of an entry ('the later entry') relating to the purchaser or his trade or business;
- 1358 (4) the form, content and distribution³ of the later directory is materially the same as the form, content and distribution of the earlier directory;
- 1359 (5) the form and content⁴ of the later entry is materially the same as the form and content of the earlier entry;
- 1360 (6) if the later directory is published other than in electronic form:
121
- 185. (a) the earlier directory was the last, or the last but one, issue or version of the directory to be published before the later directory, and
- 186. (b) the date of publication of the later directory is not more than 13 months after the date of publication of the earlier directory;
122
- 1361 (7) if the later directory is published in electronic form, the first date on which the new contract requires the later entry to be published is not more than the relevant period⁵ after the last date on which the earlier contract required the earlier entry to be published;
- 1362 (8) if it was a term of the earlier contract that the purchaser renew or extend the contract:
123
- 187. (a) before the start of the new contract the relevant publisher⁶ has given notice in writing to the purchaser containing specified information⁷; and
- 188. (b) the purchaser has not written to the relevant publisher withdrawing his agreement to the renewal or extension of the earlier contract within the period of 21 days starting when he receives the notice referred to in head (8)(a) above; and
124
- 1363 (9) if the parties to the earlier contract and the new contract are different:
125

189. (a) the parties to both contracts have entered into a novation agreement in respect of the earlier contract; or
 190. (b) the relevant publisher has given the purchaser specified information⁸.
 126

1 le in respect of which the conditions referred to in the Unsolicited Goods and Services Act 1971 s 3(1)(d) (as substituted and amended) (see PARA 659 ante) are satisfied.

2 Ibid s 3B(1) (s 3B added by the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, art 2(1), (7)).

3 For this purpose, the form, content or distribution of the later directory is to be taken to be materially the same as that of the earlier directory, if a reasonable person in the position of the purchaser would view the two as being materially the same or view that of the later directory as being an improvement on that of the earlier directory: Unsolicited Goods and Services Act 1971 s 3B(2) (as added: see note 2 supra).

4 For this purpose, the form or content of the later entry is to be taken to be materially the same as that of the earlier entry, if a reasonable person in the position of the purchaser would view the two as being materially the same or view that of the later entry as being an improvement on that of the earlier entry: ibid s 3B(2) (as added: see note 2 supra).

5 For this purpose, 'the relevant period' means the period of 13 months or (if shorter) the period of time between the first and last dates on which the earlier contract required the earlier entry to be published: ibid s 3B(3) (as added: see note 2 supra).

6 For this purpose, 'the relevant publisher' is the person with whom the purchaser has entered into the new contract: ibid s 3B(4) (as added: see note 2 supra).

7 The information specified is: (1) the fact that the earlier contract is to be renewed or extended; (2) the commencement date of the new contract; (3) the cost to the purchaser of the new contract; and (4) the fact that the purchaser may, within 21 days, write to the person by whom the notice is given withdrawing his consent to the renewal or extension of the contract: Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, art 3, Schedule Pt 3.

8 Unsolicited Goods and Services Act 1971 s 3B(1)(a)-(i) (as added: see note 2 supra). The information specified is: (1) the name of the relevant publisher; and (2) the fact that, if the purchaser enters into the new contract, the other party to the new contract will be the relevant publisher and that the parties to the earlier contract and the new contract will be different: Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005, SI 2005/55, Schedule Pt 4. The information must be given to the purchaser prior to the conclusion of the new contract: Unsolicited Goods and Services Act 1971 s 3B(5) (as so added).

UPDATE

657-662 Unsolicited Goods and Services

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(v) Unsolicited Goods and Services/661. Unsolicited publications describing or illustrating human sexual techniques.

661. Unsolicited publications describing or illustrating human sexual techniques.

If a person sends¹ or causes to be sent to another person any book, magazine or leaflet, or advertising material for any such publication², which he knows or ought reasonably to know is

unsolicited³ and which describes or illustrates human sexual techniques, he is guilty of an offence⁴.

A prosecution for such an offence may not be instituted except by, or with the consent of, the Director of Public Prosecutions⁵.

1 As to the meaning of 'send' see PARA 658 note 3 ante.

2 For the meaning of 'unsolicited' see PARA 658 note 2 ante.

3 The offence is committed even though the advertising material does not itself describe or illustrate human sexual techniques: *DPP v Beate Uhse (UK) Ltd* [1974] QB 158, [1974] 1 All ER 753, DC.

4 Unsolicited Goods and Services Act 1971 s 4(1), (2) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see the Unsolicited Goods and Services Act 1971 s 4(1), (2) (as so amended). As to the standard scale see PARA 498 note 3 ante. As to offences by corporations see PARA 662 post.

5 Ibid s 4(3). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq; and as to consents by the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1071.

UPDATE

657-662 Unsolicited Goods and Services

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(v) Unsolicited Goods and Services/662. Offences by corporations.

662. Offences by corporations.

Where an offence under the Unsolicited Goods and Services Act 1971 which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager¹, secretary or other similar officer of the body corporate, or of any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly².

1 As to the meaning of 'manager' see PARA 500 note 3 ante.

2 Unsolicited Goods and Services Act 1971 s 5(1). Where the affairs of a body corporate are managed by its members s 5 applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 5(2).

UPDATE

657-662 Unsolicited Goods and Services

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/663. In general.

(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders

663. In general.

Protection is afforded¹ to consumers² in respect of contracts concluded away from business premises following an unsolicited visit by a trader³, that is to say a visit by a trader, whether or not he is the trader who supplies the goods⁴ or services, which does not take place at the express request of the consumer and includes:

- 1364 (1) a visit by a trader which takes place after he, or a person acting in his name or on his behalf, telephones the consumer, otherwise than at the consumer's express request, and indicates during the course of the telephone call, either expressly or by implication, that he, or the trader in whose name or on whose behalf he is acting, is willing to visit the consumer; and
- 1365 (2) a visit by a trader which takes place after he, or a person acting in his name or on his behalf, visits the consumer, otherwise than at the consumer's express request, and indicates during the course of that visit, either expressly or by implication, that he, or the trader in whose name or on whose behalf he is acting, is willing to make a subsequent visit to the consumer⁵.

A term contained in such a contract⁶ is void if, and to the extent that, it is inconsistent with a provision⁷ for the protection of the consumer⁸.

Where a provision⁹ specifies the duty or liability of the consumer in certain circumstances, a term contained in a contract concluded away from business premises following an unsolicited visit by a trader is inconsistent with that provision if it purports to impose, directly or indirectly, an additional duty or liability on him in those circumstances¹⁰.

1 Ibid by the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended) (see PARA 664 et seq post), implementing EC Council Directive 85/577 (OJ L372, 31.12.85, p 31) (see PARA 393 ante).

As to enforcement of the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended) see the Enterprise Act 2002 Pt 8 (ss 210-236) (as amended); and COMPETITION vol 18 (2009) PARAS 339-360.

2 For these purposes, 'consumer' means a person, other than a body corporate, who, in making a contract to which the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended) apply, is acting for purposes which can be regarded as outside his business: reg 2(1). 'Business' includes a trade or profession: reg 2(1).

3 For these purposes, 'trader' means a person who, in making a contract to which the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended) apply, is acting for the purposes of his business, and anyone acting in the name or on behalf of such a person: reg 2(1).

4 For these purposes, 'goods' has the meaning given by the Sale of Goods Act 1979 s 61(1) (as amended) (see PARA 30 ante): Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 2(1).

5 Ibid reg 3(3) (substituted by SI 1998/3050).

6 le a contract to which the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended) apply: see PARA 664 post.

7 le a provision contained in the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended).

8 Ibid reg 10(1).

9 le a provision of the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended).

10 Ibid reg 10(2).

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

663 In general

TEXT AND NOTES--SI 1987/2117 replaced: see now Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, regs 6(3), 15.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 4--See Case C-350/03 *Schulte v Deutsche Bausparkasse Badenia AG* [2006] All ER (EC) 420, ECJ.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/663A. Contracts concluded away from business premises following solicited visits by traders.

663A. Contracts concluded away from business premises following solicited visits by traders.

The Secretary of State may make regulations entitling a consumer who is a party to a protected contract to cancel the contract: Consumers, Estate Agents and Redress Act 2007 s 59(1). A protected contract is a contract between a consumer and a trader which is for the supply of goods or services to the consumer by a trader and is made during a solicited visit by a trader to the consumer's home or place of work, or to the home of another individual, or after an offer made by the consumer during such a visit: s 59(2). A visit is solicited if it is made at the express request of the consumer: s 59(3). For these purposes, 'consumer' and 'trader' in relation to a contract have the same meaning as they have for the purposes of EC Council Directive 85/577 (see PARA 393) in relation to transactions within that directive (or, if repealed

and re-anacted, that directive as re-anacted): Consumers, Estate Agents and Redress Act 2007 s 59(6), (7).

The regulations may in particular make provision (1) as to the circumstances in which the consumer may cancel the contract and the effect of such a cancellation, (2) requiring the trader to inform the consumer of the matters within head (1), and (3) for the enforcement of any requirement imposed by virtue of head (2): s 59(5).

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/664. Contracts to which the regulations relating to contracts concluded away from business premises following an unsolicited visit by a trader apply.

664. Contracts to which the regulations relating to contracts concluded away from business premises following an unsolicited visit by a trader apply.

The provisions relating to contracts concluded away from business premises following an unsolicited visit by a trader¹ apply to a contract, other than an excepted contract, for the supply by a trader² of goods³ or services to a consumer⁴ which is made:

- 1366 (1) during an unsolicited visit⁵ by a trader to the consumer's home or to the home of another person or to the consumer's place of work;
- 1367 (2) during a visit by a trader as mentioned in head (1) above at the express request of the consumer where the goods or services to which the contract relates are other than those concerning which the consumer requested the visit of the trader, provided that, when the visit was requested, the consumer did not know, or could not reasonably have known, that the supply of those other goods or services formed part of the trader's business⁶ activities;
- 1368 (3) after an offer was made by the consumer in respect of the supply by a trader of the goods or services in the circumstances mentioned in head (1) or head (2) above or head (4) below; or
- 1369 (4) during an excursion organised by the trader away from premises on which he is carrying on any business, whether on a permanent or temporary basis⁷.

For these purposes, an 'excepted contract' means:

- 1370 (a) any contract for the sale or other disposition of land or for a lease or land mortgage⁸, to finance the purchase of land, for a bridging loan in connection with the purchase of land or for the construction or extension of a building or other erection on land⁹;

- 1371 (b) any contract for the supply of food, drink or other goods intended for
current consumption by use in the household and supplied by regular roundsmen;
1372 (c) any contract for the supply of goods or services which satisfies all the
following conditions:
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191. (i) terms of the contract are contained in a trader's catalogue which is readily
available to the consumer to read in the absence of the trader or his representative
before the conclusion of the contract;
192. (ii) the parties to the contract intend that continuity of contact is to be
maintained between the trader or his representative and the consumer in relation to
the transaction in question or any subsequent transaction; and
193. (iii) both the catalogue and the contract contain or are accompanied by a
prominent notice indicating that the consumer has a right to return the goods
supplied to him within the period of not less than seven days from the day on which
the goods are received by the consumer and otherwise to cancel the contract within
that period without the consumer incurring any liability, other than any liability
which may arise from the failure of the consumer to take reasonable care of goods
while they are in his possession;
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1373 (d) contracts of insurance¹⁰;
1374 (e) any agreement the making or performance of which by either party
constitutes a relevant regulated activity¹¹;
1375 (f) any contract not falling within head (g) below under which the total
payments to be made by the consumer do not exceed £35; and
1376 (g) any contract under which credit¹² is provided not exceeding £35, other than
a hire-purchase or conditional sale agreement¹³.

1 le the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended).

2 For the meaning of 'trader' see PARA 663 note 3 ante.

3 For the meaning of 'goods' see PARA 663 note 4 ante.

4 For the meaning of 'consumer' see PARA 663 note 2 ante.

5 For the meaning of 'unsolicited visit' see PARA 663 ante.

6 As to the meaning of 'business' see PARA 663 note 2 ante.

7 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 3(1); and see Case C-423/97 *Travel-Vac SL v Antelm Sanchis* [1999] All ER (EC) 656, [1999] ECR I-2195, ECJ (cited in PARA 393 note 8 ante).

8 For these purposes, 'land mortgage' includes any security charged on land: Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 2(1).

9 The Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended) apply, however, to a contract for the supply of goods and their incorporation in any land or a contract for the repair or improvement of a building or other erection on land, where the contract is not financed by a loan secured by a land mortgage: reg 3(2)(a) proviso.

10 As to such contracts see INSURANCE vol 25 (2003 Reissue) PARA 20 et seq. This must be read with the Financial Services and Markets Act 2000 s 22, Sch 22 and any relevant order under s 22: Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 3(5) (added by SI 2001/3649).

11 For these purposes, a 'relevant regulated activity' means an activity of the following kind: (1) dealing in investments, as principal or as agent; (2) arranging deals in investments; (3) managing investments; (4) safeguarding and administering investments; (5) establishing etc a collective investment scheme: Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117,

reg 3(4)(a) (added by SI 2001/3649). 'Investment' means: (a) shares; (b) instruments creating or acknowledging indebtedness; (c) government and public securities; (d) instruments giving entitlement to investments; (e) certificates representing securities; (f) units in a collective investment scheme; (g) options; (h) futures; (i) contracts for differences; and (j) rights to or interests in investments: Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 3(4)(b) (added by SI 2001/3649). These definitions must be read with the Financial Services and Markets Act 2000 s 22, Sch 22 and any relevant order under s 22, but any restriction on or exclusion from the meaning of a regulated activity (which is a relevant regulated activity for the purposes of the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 3(2)(e) (see head (e) in the text)) which arises from the identity of the person carrying it on is to be disregarded: reg 3(5) (as added: see note 10 supra).

12 le within the meaning of the Consumer Credit Act 1974: see CONSUMER CREDIT vol 9(1) (Reissue) PARA 83.

13 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 3(2).

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

664 Contracts to which the regulations relating to contracts concluded away from business premises following an unsolicited visit by a trader apply

TEXT AND NOTES--SI 1987/2117 replaced: see now the Cancellation of Contracts made in a Consumer's Home or Place of work etc Regulations 2008, SI 2008/1816, regs 5, 6(1), (2), Sch 3.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/665. Consumer's right to cancel contract.

665. Consumer's right to cancel contract.

No contract concluded away from business premises following an unsolicited visit by a trader¹, other than a cancellable agreement² or an agreement which may be cancelled by the consumer³ in accordance with the terms of the agreement conferring on him similar rights as if the agreement were such a cancellable agreement, is enforceable against the consumer unless the trader⁴ has delivered to the consumer notice in writing⁵ indicating the right of the consumer to cancel the contract within the specified period of seven days⁶ containing both the following information, that is to say:

1377 (1) the name of the trader;

1378 (2) the trader's reference number, code or other details to enable the contract or offer to be identified;

1379 (3) a statement that the consumer has a right to cancel the contract if he wishes and that this right can be exercised by sending or taking a written notice of

- cancellation to the person mentioned in head (4) below within the period of seven days following the making of the contract;
- 1380 (4) the name and address of a person to whom notice of cancellation may be given; and
- 1381 (5) a statement that the consumer can use the cancellation form provided if he wishes,

and a cancellation form in the prescribed form⁷ duly completed⁸.

The information to be contained in such a notice must be easily legible and, if incorporated in the contract or other document, must be afforded no less prominence than that given to any other information in the document apart from the heading to the document and the names of the parties to the contract and any information inserted in handwriting⁹.

If, within the period of seven days following the making of the contract, the consumer serves a notice in writing (a 'notice of cancellation') on the trader or any other person specified in a notice¹⁰ as a person to whom notice of cancellation may be given which, however expressed and whether or not conforming to the prescribed cancellation form, indicates the intention of the consumer to cancel the contract, the notice of cancellation operates to cancel the contract¹¹; and a contract so cancelled is treated¹² as if it had never been entered into by the consumer¹³.

1 Ie no contract to which the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended) apply.

2 Ie within the meaning of the Consumer Credit Act 1974: see CONSUMER CREDIT vol 9(1) (Reissue) PARA 183.

3 For the meaning of 'consumer' see PARA 663 note 2 ante.

4 For the meaning of 'trader' see PARA 663 note 3 ante.

5 Ie in accordance with the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4(3), (4): see the text and notes 8, 9 infra. A document to be served on a person may be so served: (1) by delivering it to him, or by sending it by post to him, or by leaving it with him, at his proper address addressed to him by name; (2) if the person is a body corporate, by serving it in accordance with head (1) supra on the secretary or clerk of that body; or (3) if the person is a partnership, by serving it in accordance with head (1) supra on a partner or on a person having the control or management of the partnership business: reg 11(1). For these purposes, a document sent by post to, or left at, the address last known to the server of the document as the address of a person is to be treated as sent by post to, or left at, his proper address: reg 11(2). As to the meaning of 'business' see PARA 663 note 2 ante.

6 Ie the seven-day period mentioned in *ibid* reg 4(5): see the text to notes 10-11 infra.

7 For the prescribed form of cancellation see *ibid* reg 4(1), Schedule Pt II. The notice must be completed in accordance with the footnotes to the prescribed form: reg 4(1).

8 *Ibid* reg 4(1), (2), Schedule Pt I. The notice must be dated and delivered to the consumer: (1) in the cases mentioned in reg 3(1)(a), (b), (d) (see PARA 664 heads (a), (b), (d) ante), at the time of the making of the contract; and (2) in the case mentioned in reg 3(1)(c) (see PARA 664 head (c) ante), at the time of the making of the offer by the consumer: reg 4(4). As to offences relating to a trader's failure to provide the consumer with a notice of his right to cancel the contract, and as to defences, see PARA 666 post.

9 *Ibid* reg 4(3).

10 Ie a notice referred to in *ibid* reg 4(1): see the text and notes 1-8 supra.

11 *Ibid* regs 2(1), 4(5). Notwithstanding anything in the Interpretation Act 1978 s 7 (service of documents by post: see STATUTES vol 44(1) (Reissue) PARA 1388), a notice of cancellation sent by post by a consumer is deemed to have been served at the time of posting, whether or not it is actually received: Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4(7).

12 Ie except as otherwise provided under the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended).

13 Ibid reg 4(6); and see Case C-423/97 *Travel-Vac SL v Antelm Sanchis* [1999] All ER (EC) 656, [1999] ECR I-2195, ECJ (cited in PARA 393 note 8 ante).

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

665 Consumer's right to cancel contract

TEXT AND NOTES--SI 1987/2117 replaced: see now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, regs 7, 8, 11, 16, Sch 4 Pts I, II.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/666. Offence relating to failure to provide a consumer with notice of his cancellation rights.

666. Offence relating to failure to provide a consumer with notice of his cancellation rights.

A trader¹ who enters into a contract concluded away from business premises following an unsolicited visit by a trader², other than a cancellable agreement³, with a consumer⁴ but fails or, as the case may be, has failed⁵ duly to deliver⁶ to the consumer a notice of the consumer's right to cancel the contract⁷ is guilty of an offence⁸.

In proceedings against any person for such an offence it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence⁹. Where, in proceedings against a person for such an offence, the defence of due diligence¹⁰ involves an allegation that the commission of the offence was due to the act or default of another or to reliance on information given by another, that person is not entitled, without the leave of the court, to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time when he serves it¹¹.

1 For the meaning of 'trader' see PARA 663 note 3 ante.

2 Ie a contract to which the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended) apply.

3 Ie other than an agreement referred to in ibid reg 4(2): see PARA 665 ante.

4 For the meaning of 'consumer' see PARA 663 note 2 ante.

5 Ie in the case mentioned in the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 3(1)(c): see PARA 664 head (3) ante.

6 A notice is duly delivered if it: (1) contains what is required by *ibid* reg 4(1) (see PARA 665 ante); (2) complies with the requirements of reg 4(3) (see PARA 665 ante); and (3) is dated and delivered to the consumer at the time specified in reg 4(4) (see PARA 665 ante); reg 4A(2) (reg 4A added by SI 1998/3050).

7 Ie the notice in writing referred to in the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4(1).

8 *Ibid* reg 4A(1), (3) (as added: see note 6 supra). A trader guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: see reg 4A(1), (3) (as so added). As to the standard scale see PARA 498 note 3 ante. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 667 post. As to enforcement powers see PARA 668 post.

9 *Ibid* reg 4B(1) (reg 4B added by SI 1998/3050).

10 Ie the defence provided for by the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4B(1) (as added): see the text and note 9 supra.

11 *Ibid* reg 4B(2), (3) (as added: see note 9 supra).

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

666 Offence relating to failure to provide a consumer with notice of his cancellation rights

TEXT AND NOTES--SI 1987/2117 replaced: see now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, regs 17, 18.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/667. Liability of persons other than the principal offender; offences by bodies corporate.

667. Liability of persons other than the principal offender; offences by bodies corporate.

Where the commission by a person of an offence relating to a trader's failure to provide the consumer with a notice of his cancellation rights¹ is due to the act or default of some other person, that other person is guilty of the offence and may be proceeded against and punished by virtue of these provisions, whether or not proceedings are taken against the first-mentioned person².

Where a body corporate is guilty of such an offence in respect of any act or default which is shown to have been committed with the consent or connivance of, or to be attributable to any

neglect on the part of, any director, manager³, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly⁴.

1 It is an offence under the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4A (as added): see PARA 666 ante.

2 Ibid reg 4C(1) (reg 4C added by SI 1998/3050).

3 As to the meaning of 'manager' see PARA 500 note 3 ante.

4 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4C(2) (as added: see note 2 supra). Where the affairs of a body corporate are managed by its members, reg 4C(2) (as added) applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate: reg 4C(3) (as so added).

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

667 Liability of persons other than the principal offender; offences by bodies corporate

TEXT AND NOTES--SI 1987/2117 replaced: see now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, regs 19, 20.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/668. Enforcement powers.

668. Enforcement powers.

It is the duty of every weights and measures authority¹ in Great Britain to enforce within its area the provisions² as to offences relating to a trader's failure to provide a consumer with notice of his cancellation rights³.

If a duly authorised officer of an enforcement authority⁴ has reasonable grounds for suspecting that such an offence has been committed, he may:

1382 (1) require a person carrying on or employed in a business⁵ to produce any book, document or record in non-documentary form relating to the business, and take copies of it or any entry in it; or

1383 (2) require such a person to produce in a visible and legible documentary form any information so relating which is contained in a computer, and take copies of it,

for the purposes of ascertaining whether such an offence has been committed⁶.

If such an officer has reasonable grounds for believing that any books, documents or records may be required as evidence in proceedings for such an offence, he may seize and detain them and must, if he does so, inform the person from whom they are seized⁷.

The above powers of an officer may be exercised by him only at a reasonable hour and on production, if required, of his credentials⁸.

Nothing in these provisions requires a person to produce, or authorises the taking from a person of, a book, document or record which he could not be compelled to produce in civil proceedings before the High Court⁹.

A person who:

- 1384 (a) intentionally obstructs an officer of an enforcement authority acting in pursuance of his statutory functions¹⁰;
- 1385 (b) without reasonable cause fails to comply with the requirement made of him under head (1) or head (2) above; or
- 1386 (c) without reasonable excuse fails to give an officer of an enforcement authority acting in pursuance of his statutory functions¹⁰ any other assistance or information which the officer has reasonably required of him for the purpose of the performance of the officer's statutory functions,

is guilty of an offence¹¹.

If a person, in giving information to an officer of an enforcement authority who is acting in pursuance of his statutory functions¹², makes a statement which he knows is false in a material particular or recklessly makes a statement which is false in a material particular, he is guilty of an offence¹³.

Nothing in these provisions¹⁴ requires a person to answer any question or give any information if to do so might incriminate him¹⁵.

1 As to local weights and measures authorities see PARA 398 ante.

2 I.e. the provisions of the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4A (as added): see PARA 666 ante.

3 Ibid reg 4D(1)(a) (reg 4D added by SI 1998/3050). Nothing in the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4D(1)(a) (as added) authorises any weights and measures authority to bring proceedings in Scotland for an offence: reg 4D(2) (as so added).

4 For these purposes, 'enforcement authority' means, in Great Britain, a weights and measures authority: *ibid* reg 2(1) (amended by SI 1998/3050).

5 As to the meaning of 'business' see PARA 663 note 2 ante.

6 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4E(1) (reg 4E added by SI 1998/3050).

7 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4E(2) (as added: see note 6 *supra*).

8 *Ibid* reg 4E(3) (as added: see note 6 *supra*).

9 *Ibid* reg 4E(4) (as added: see note 6 *supra*).

10 I.e. his functions under the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended).

11 Ibid reg 4F(1), (3) (reg 4F added by SI 1998/3050). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: see the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4F(1), (3) (as so added). As to the standard scale see PARA 498 note 3 ante.

12 See note 10 supra.

13 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4F(2), (3) (as added: see note 11 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: see reg 4F(2), (3) (as so added).

14 Ie nothing in ibid reg 4E (as added) or reg 4F (as added).

15 Ibid reg 4H (added by SI 1998/3050).

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

668 Enforcement powers

TEXT AND NOTES--SI 1987/2117 replaced: see now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, regs 21-24.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/669. Recovery of money paid by consumer.

669. Recovery of money paid by consumer.

On the cancellation of a contract concluded away from business premises following an unsolicited visit by a trader¹, any sum paid by or on behalf of the consumer² under or in contemplation of the contract becomes³ repayable⁴. If under the terms of the cancelled contract the consumer or any person on his behalf is in possession of any goods⁵, he has a lien on them for any sum so repayable to him⁶.

Where any security⁷ has been provided in relation to the cancelled contract, the security, so far as it is so provided, is treated as never having had effect and any property lodged with the trader⁸ solely for the purposes of the security as so provided must be returned by him forthwith⁹.

1 Ie under the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4: see PARA 665 ante.

2 For the meaning of 'consumer' see PARA 663 note 2 ante.

3 Ie subject to Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 7(2): see PARA 671 post.

4 Ibid reg 5(1).

5 For the meaning of 'goods' see PARA 663 note 4 ante.

6 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 5(2).

7 For these purposes, 'security', in relation to a contract, means a mortgage, charge, pledge, bond, debenture, indemnity, guarantee, bill, note or other right provided by the consumer, or at his request, express or implied, to secure the carrying out of his obligations under the contract: *ibid* reg 2(1).

8 For the meaning of 'trader' see PARA 663 note 3 ante.

9 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 5(3).

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

669 Recovery of money paid by consumer

TEXT AND NOTES--SI 1987/2117 replaced: see now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, reg 10.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/670. Repayment of credit.

670. Repayment of credit.

Notwithstanding the cancellation of a contract concluded away from business premises following an unsolicited visit by a trader¹ under which credit² is provided, the contract continues in force, so far as it relates to repayment³ of credit and payment of interest⁴. If, following the cancellation of the contract, the consumer repays the whole or a portion of the credit:

1387 (1) before the expiry of one month following service of the notice of cancellation⁵; or

1388 (2) in the case of a credit repayable by instalments, before the date on which the first instalment is due,

no interest is payable on the amount repaid⁶.

If the whole of a credit repayable by instalments is not repaid on or before the due date⁷, the consumer is not liable to repay any of the credit except on receipt of a request in writing signed⁸ by the trader⁹ stating the amounts of the remaining instalments, recalculated by the

trader as nearly as may be in accordance with the contract and without extending the repayment period, but excluding any sum other than principal and interest¹⁰.

Repayment of a credit, or payment of interest, under a cancelled contract, is to be treated as duly made if it is made to any person on whom a notice of cancellation could¹¹ have been served¹².

Where any security¹³ has been provided in relation to the contract, the duty imposed on the consumer by these provisions is not enforceable before the trader has discharged any duty imposed on him¹⁴ to return any property lodged with him¹⁵.

1 Ie under the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4: see PARA 665 ante.

2 For these purposes, 'credit' means a cash loan and any facility enabling the consumer to overdraw on a current account: *ibid* reg 6(6) (substituted by SI 1988/958). 'Cash' includes money in any form: Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 6(6) (as so substituted). 'Current account' means an account under which the customer may, by means of cheques or similar orders payable to himself or to any other person, obtain or have the use of money held or made available by the person with whom the account is kept and which records alterations in the financial relationship between the said person and the customer: reg 6(6) (as so substituted). For the meaning of 'consumer' see PARA 663 note 2 ante.

3 For these purposes, 'repayment', in relation to credit, means the repayment of money: (1) paid to a consumer before the cancellation of the contract; or (2) to the extent that he has overdrawn on his current account before the cancellation: *ibid* reg 6(6) (as substituted: see note 2 *supra*).

4 *Ibid* reg 6(1).

5 For the meaning of 'notice of cancellation' see PARA 665 ante.

6 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 6(2).

7 Ie the date specified in *ibid* reg 6(2)(b): see head (2) in the text.

8 For these purposes, 'signed' has the same meaning as in the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 98): Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 2(1).

9 For the meaning of 'trader' see PARA 663 note 3 ante.

10 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 6(3).

11 Ie under *ibid* reg 4(5): see PARA 665 ante.

12 *Ibid* reg 6(4).

13 For the meaning of 'security' see PARA 669 note 7 ante.

14 Ie by the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 5(3): see PARA 669 ante.

15 *Ibid* reg 6(5).

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

670 Repayment of credit

TEXT AND NOTES--SI 1987/2117 replaced: see now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, reg 12.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/671. Return of goods by consumer after cancellation.

671. Return of goods by consumer after cancellation.

A consumer¹ who has, before cancelling a contract concluded away from business premises following an unsolicited visit by a trader², acquired possession of any goods³ by virtue of the contract is under a duty, subject to any lien, on the cancellation to restore the goods to the trader⁴ in accordance with the following provisions, and meanwhile to retain possession of the goods and take reasonable care of them⁵. The consumer is, however, not under a duty to restore:

- 1389 (1) perishable goods;
- 1390 (2) goods which by their nature are consumed by use and which, before the cancellation, were so consumed;
- 1391 (3) goods supplied to meet an emergency; or
- 1392 (4) goods which, before the cancellation, had become incorporated in any land or thing not comprised in the cancelled contract,

but he is under a duty to pay, in accordance with the cancelled contract, for the supply of the goods and for the provision of any services in connection with the supply of the goods before the cancellation⁶.

The consumer is not under any duty to deliver the goods except at his own premises and in pursuance of a request in writing signed⁷ by the trader and served⁸ on the consumer either before, or at the time when, the goods are collected from those premises⁹.

If the consumer:

- 1393 (a) delivers the goods, whether at his own premises or elsewhere, to any person on whom a notice of cancellation could¹⁰ have been served; or
- 1394 (b) sends the goods at his own expense to such a person,

he is discharged from any duty to retain possession of the goods or restore them to the trader¹¹.

Where the consumer delivers the goods as mentioned in head (a) above, his obligation to take care of the goods ceases; and, if he sends the goods as mentioned in head (b) above, he is under a duty to take reasonable care to see that they are received by the trader and not damaged in transit, but in other respects his duty to take care of the goods ceases¹².

Where, at any time during the period of 21 days following the cancellation, the consumer receives a request to deliver the goods¹³ and unreasonably refuses or unreasonably fails to comply with it, his duty to retain possession and take reasonable care of the goods continues until he delivers or sends the goods as mentioned in head (a) or head (b) above; but if within that period he does not receive such a request, his duty to take reasonable care of the goods ceases at the end of that period¹⁴.

Where any security¹⁵ has been provided in relation to the cancelled contract, the duty imposed by these provisions on the consumer to restore goods is not enforceable before the trader has discharged any duty imposed on him¹⁶ to return any property lodged with him¹⁷.

Breach of a duty imposed by these provisions on a consumer is actionable as a breach of statutory duty¹⁸.

1 For the meaning of 'consumer' see PARA 663 note 2 ante.

2 Ie under the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4: see PARA 665 ante.

3 For the meaning of 'goods' see PARA 663 note 4 ante.

4 For the meaning of 'trader' see PARA 663 note 3 ante.

5 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 7(1).

6 Ibid reg 7(2).

7 For the meaning of 'signed' see PARA 670 note 8 ante.

8 As to service of notices see PARA 665 note 5 ante.

9 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 7(3).

10 Ie under ibid reg 4(5): see PARA 665 ante.

11 Ibid reg 7(4).

12 Ibid reg 7(5).

13 Ie such a request as is mentioned in ibid reg 7(3): see the text and notes 7-9 supra.

14 Ibid reg 7(6).

15 For the meaning of 'security' see PARA 669 note 7 ante.

16 Ie by the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 5(3): see PARA 669 ante.

17 Ibid reg 7(7).

18 Ibid reg 7(8). As to the sanctions and remedies for breach of statutory duty see STATUTES vol 44(1) (Reissue) PARA 1353 et seq; and as to claims for damages for breach of statutory duty see TORT vol 45(2) (Reissue) PARA 395 et seq.

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

671 Return of goods by consumer after cancellation

TEXT AND NOTES--SI 1987/2117 replaced: see now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, reg 13.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vi) Contracts concluded away from Business Premises following Unsolicited Visits by Traders/672. Goods given in part-exchange.

672. Goods given in part-exchange.

On the cancellation of a contract concluded away from business premises following an unsolicited visit by a trader¹ where the trader² agreed to take goods³ in part-exchange (the 'part-exchange goods') and those goods have been delivered to him, unless, before the end of the period of ten days beginning with the date of cancellation, the part-exchange goods are returned to the consumer⁴ in a condition substantially as good as when they were delivered to the trader, the consumer is entitled to recover from the trader a sum equal to the part-exchange allowance⁵.

During the period of ten days beginning with the date of cancellation, the consumer, if he is in possession of goods to which the cancelled contract relates, has a lien on them for delivery of the part-exchange goods in a condition substantially as good as when they were delivered to the trader or a sum equal to the part-exchange allowance; and if the lien continues to the end of that period, it thereafter subsists only as a lien for a sum equal to the part-exchange allowance⁶.

1 le under the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 4: see PARA 665 ante.

2 For the meaning of 'trader' see PARA 663 note 3 ante.

3 For the meaning of 'goods' see PARA 663 note 4 ante.

4 For the meaning of 'consumer' see PARA 663 note 2 ante.

5 Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, reg 8(1), (2). For these purposes, 'the part-exchange allowance' means the sum agreed as such in the cancelled contract or, if no such sum was agreed, such sum as it would have been reasonable to allow in respect of the part-exchange goods if no notice of cancellation had been served: reg 8(4).

6 Ibid reg 8(1), (3).

UPDATE

663-672 Contracts concluded away from Business Premises following Unsolicited Visits by Traders

For consumer protection from unfair trading see PARA 725A.

Provision is now made to give a consumer the right to cancel a contract concluded away from business premises following a solicited visit by a trader: see Consumers, Estate Agents and Redress Act 2007 s 59; and PARA 663A.

672 Goods given in part-exchange

TEXT AND NOTES--SI 1987/2117 replaced: see now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, reg 14.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vii) Distance Selling Contracts/673. Contracts to which the regulations relating to contracts negotiated at a distance apply.

(vii) Distance Selling Contracts

673. Contracts to which the regulations relating to contracts negotiated at a distance apply.

Regulations¹ relating to contracts negotiated at a distance apply to distance contracts² other than excepted contracts³. The following are excepted contracts: (1) any contract for the sale or other disposition of an interest in land except for a rental agreement⁴; (2) any contract for the construction of a building where the contract also provides for a sale or other disposition of an interest in land on which the building is constructed, except for a rental agreement; (3) any contract relating to financial services⁵; (4) any contract concluded by means of an automated vending machine or automated commercial premises; (5) any contract concluded with a telecommunications operator through the use of a public pay-phone; (6) any contract concluded at an auction⁶. Certain provisions do not apply to: (a) a contract which is a timeshare agreement⁷; (b) contracts for the supply of food, beverages or other goods intended for everyday consumption supplied to the consumer's residence or to his workplace by regular roundsmen; (c) contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period⁸; (d) a contract for a package⁹ which is sold or offered for sale in the territory of the member states¹⁰; (e) any contract which is made by an authorised person¹¹ where the making or performance of that contract constitutes or is part of a regulated activity¹² carried on by him¹³; (f) any unsolicited services which are supplied by an authorised person where the supply of those services constitutes or is part of a regulated activity carried on by him¹⁴; (g) any contract which is made by an appointed representative¹⁵ where the making or performance of that contract constitutes or is part of a regulated activity carried on by him¹⁶; and (h) any unsolicited services which are supplied by an appointed representative where the supply of those services constitutes or is part of a regulated activity carried on by him¹⁷.

1 Ie the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (as amended).

2 'Distance contract' means any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service provision scheme run by the supplier who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded: *ibid* reg 3(1). 'Supplier' means any person who, in contracts to which the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, apply, is acting in his commercial or professional capacity: reg 3(1). 'Consumer' means any natural person who, in contracts to which the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, apply, is acting for purposes

which are outside his business: reg 3(1). 'Business' includes a trade or profession: reg 3(1). 'Means of distance communication' means any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties; and an indicative list of such means is contained in Sch 1: reg 3(1).

3 Ibid reg 4.

4 References to a rental agreement, if the land is situated in England and Wales, are references to any agreement which does not have to be made in writing (whether or not in fact made in writing) because of the Law of Property (Miscellaneous Provisions) Act 1989 s 2(5)(a) (see SALE OF LAND vol 42 (Reissue) PARA 29): Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 5(2). Regulation 5(2) is not to be taken to mean that a rental agreement in respect of land situated outside the United Kingdom is not capable of being a distance contract to which the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, apply: reg 5(3).

5 See FINANCIAL SERVICES AND INSTITUTIONS.

6 Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 5(1) (amended by SI 2004/2095).

7 The regulations that do not apply are the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, regs 7-20 (as amended). As to the meaning of 'timeshare agreement' see the Timeshare Act 1992 s 1(4); and PARA 868 post.

8 The regulations that do not apply are the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, regs 7-19(1) (as amended).

9 Ie within the meaning of the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended): see PARA 817 post.

10 The regulations that do not apply are the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, regs 19(2)-(8), 20. 'Member state' means a state which is a contracting party to the EEA Agreement: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 3(2). 'EEA Agreement' means the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)): Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 3(2). As to the European Economic Area and the EEA Agreement see PARA 386 note 1 ante.

11 'Authorised person' has the same meaning as in the Financial Services and Markets Act 2000 s 31(2) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 314): Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 3(1) (definition added by SI 2004/2095).

12 'Regulated activity' has the same meaning as in the Financial Services and Markets Act 2000 s 22 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 84): Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 3(1) (definition added by SI 2004/2095).

13 The regulations that do not apply are the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, regs 7-14, 17-20, 25 (as amended).

14 The regulation that does not apply is ibid reg 24 (as amended).

15 'Appointed representative' has the same meaning as in the Financial Services and Markets Act 2000 s 39(2) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 346): Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 3(1) (definition added by SI 2004/2095).

16 The regulations that do not apply are the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, regs 7-9, 17-20, 25 (as amended).

17 Ibid reg 6 (amended by SI 2004/2095). The regulation that does not apply in this instance is the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24 (as amended).

UPDATE

673-678 Distance Selling Contracts

For consumer protection from unfair trading see PARA 725A.

673 Contracts to which the regulations relating to contracts negotiated at a distance apply

NOTE 8--See Case C-336/03 *easyCar (UK) v Office of Fair Trading* [2005] All ER (EC) 834, ECJ (contracts for the provision of car hire services included in contracts for the provision of transport services).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vii) Distance Selling Contracts/674. Information required prior to the conclusion of the contract.

674. Information required prior to the conclusion of the contract.

In good time prior to the conclusion of the contract the supplier¹ must: (1) provide to the consumer²: (a) the identity of the supplier and, where the contract requires payment in advance, the supplier's address; (b) a description of the main characteristics of the goods or services; (c) the price of the goods or services including all taxes; (d) delivery costs where appropriate; (e) the arrangements for payment, delivery or performance; (f) the existence of a right of cancellation³; (g) the cost of using the means of distance communication⁴ where it is calculated other than at the basic rate; (h) the period for which the offer or the price remains valid; and (i) where appropriate, the minimum duration of the contract, in the case of contracts for the supply of goods or services to be performed permanently or recurrently; (2) inform the consumer if he proposes, in the event of the goods or services ordered by the consumer being unavailable, to provide substitute goods or services (as the case may be) of equivalent quality and price; and (3) inform the consumer that the cost of returning any such substitute goods to the supplier in the event of cancellation by the consumer would be met by the supplier⁵. The supplier must ensure that the information is provided in a clear and comprehensible manner appropriate to the means of distance communication used, with due regard in particular to the principles of good faith in commercial transactions and the principles governing the protection of those who are unable to give their consent such as minors⁶. The supplier must ensure that his commercial purpose is made clear when providing the information⁷. In the case of a telephone communication, the identity of the supplier and the commercial purpose of the call must be made clear at the beginning of the conversation with the consumer⁸. The supplier must provide to the consumer in writing, or in another durable medium which is available and accessible to the consumer, certain information⁹, either prior to the conclusion of the contract, or thereafter, in good time and in any event during the performance of the contract, in the case of services, and at the latest at the time of delivery where goods not for delivery to third parties are concerned¹⁰.

1 For the meaning of 'supplier' see PARA 673 note 2 ante.

2 For the meaning of 'consumer' see PARA 673 note 2 ante.

3 I.e. except in the cases referred to in the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 13 (as amended): see PARA 675 post.

4 For the meaning of 'means of distance communication' see PARA 673 note 2 ante.

5 Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 7(1).

6 Ibid reg 7(2).

7 Ibid reg 7(3).

8 Ibid reg 7(4).

9 ie (1) the information set out in ibid reg 7(1)(a)(i)-(vi) (see heads (a)-(f) in the text); (2) information about the conditions and procedures for exercising the right to cancel under reg 10 (see PARA 675 post) including: (a) where a term of the contract requires (or the supplier intends that it will require) that the consumer must return the goods to the supplier in the event of cancellation, notification of that requirement; (b) information as to whether the consumer or the supplier would be responsible for the cost of returning any goods to the supplier, or the cost of his recovering them, if the consumer cancels the contract; (c) in the case of a contract for the supply of services, information as to how the right to cancel may be affected by the consumer agreeing to performance of the services beginning before the end of the seven day working period referred to in reg 12 (as amended) (see PARA 675 post); (3) the geographical address of the place of business of the supplier to which the consumer may address any complaints; (4) information about any after-sales services and guarantees; and (5) the conditions for exercising any contractual right to cancel the contract, where the contract is of an unspecified duration or a duration exceeding one year: reg 8(2) (amended by SI 2005/689).

10 Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 8(1). Regulation 8 does not apply to a contract for the supply of services which are performed through the use of a means of distance communication, where those services are supplied on only one occasion and are invoiced by the operator of the means of distance communication: reg 9(1). The supplier must take all necessary steps to ensure that a consumer who is a party to a contract to which reg 9(1) applies is able to obtain the supplier's geographical address and the place of business to which the consumer may address any complaints: reg 9(2). 'Operator of a means of communication' means any public or private person whose business involves making one or more means of distance communication available to suppliers: reg 3(1). For the meaning of 'business' see PARA 673 note 2 ante.

UPDATE

673-678 Distance Selling Contracts

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vii) Distance Selling Contracts/675. Consumer's right to cancel the contract.

675. Consumer's right to cancel the contract.

If within the cancellation period¹ the consumer² gives a notice of cancellation³ to the supplier⁴, or any other person previously notified by the supplier to the consumer as a person to whom notice of cancellation may be given, the notice of cancellation operates to cancel the contract⁵. A notice of cancellation given by a consumer to a supplier or other person is to be treated as having been properly given if the consumer: (1) leaves it at the address last known to the consumer and addressed to the supplier or other person by name (in which case it is to be taken to have been given on the day on which it was left); (2) sends it by post to the address last known to the consumer and addressed to the supplier or other person by name (in which case, it is to be taken to have been given on the day on which it was posted); (3) sends it by facsimile to the business⁶ facsimile number last known to the consumer (in which case it is to be taken to have been given on the day on which it is sent); or (4) sends it by electronic mail to the business electronic mail address last known to the consumer (in which case it is to be taken to have been given on the day on which it is sent)⁷. Where a consumer gives a notice in accordance with head (1) or head (2) above to a supplier who is a body corporate or a partnership, the notice is to be treated as having been properly given if, in the case of a body corporate, it is left at the address of, or sent to, the secretary or clerk of that body, or, in the case of a partnership, it is left with or sent to a partner or a person having control or management of the partnership business⁸.

Unless the parties have agreed otherwise, the consumer will not have the right to cancel the contract by giving notice of cancellation in respect of contracts: (a) for the supply of services if the contract has begun with the consumer's agreement before the end of the applicable cancellation period and after the supplier has provided the required information⁹; (b) for the supply of goods or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier; (c) for the supply of goods made to the consumer's specifications or clearly personalised or which by reason of their nature cannot be returned or are liable to deteriorate or expire rapidly; (d) for the supply of audio or video recordings or computer software if they are unsealed by the consumer; (e) for the supply of newspapers, periodicals or magazines; or (f) for gaming, betting or lottery services¹⁰.

The consumer is entitled to cancel a payment where fraudulent use has been made of his payment card¹¹ in connection with a contract by another person not acting, or to be treated as acting, as his agent¹². The consumer is entitled to be recredited, or to have all sums returned by the card issuer¹³, in the event of fraudulent use of his payment card in connection with a contract by another person not acting, or to be treated as acting, as the consumer's agent¹⁴.

1 The 'cancellation period' in the case of contracts for the supply of goods begins with the day on which the contract is concluded and ends as follows: (1) where the supplier complies with the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 8 (as amended) (see PARA 674 ante), the cancellation period ends on the expiry of the period of seven working days beginning with the day after the day on which the consumer receives the goods (reg 11(2)); (2) where a supplier who has not complied with reg 8 (as amended) provides to the consumer the information referred to in reg 8(2) (as amended) (see PARA 674 ante), and does so in writing or in another durable medium available and accessible to the consumer, within the period of three months beginning with the day after the day on which the consumer receives the goods, the cancellation period ends on the expiry of the period of seven working days beginning with the day after the day on which the consumer receives the information (reg 11(3)); (3) where neither reg 11(2) nor reg 11(3) applies, the cancellation period ends on the expiry of the period of three months and seven working days beginning with the day after the day on which the consumer receives the goods (reg 11(4)). In the case of contracts for goods for delivery to third parties, the provisions of reg 11(2)-(4) apply as if the consumer had received the goods on the day on which they were received by the third party: reg 11(5).

The 'cancellation period' in the case of contracts for the supply of services begins with the day on which the contract is concluded and ends as follows:

- 28 (a) where the supplier complies with reg 8 (as amended) on or before the day on which the contract is concluded, the cancellation period ends on the expiry of the period of seven working days beginning with the day after the day on which the contract is concluded (reg 12(2));
- 29 (b) where a supplier who has not complied with reg 8 (as amended) on or before the day on which the contract is concluded provides to the consumer the required information and does so in writing or in another durable medium available and accessible to the consumer, within the period of three months beginning with the day after the day on which the contract is concluded, the cancellation period ends on the expiry of the period of seven working days beginning with the day after the day on which the consumer receives the information (reg 12(3) (amended by SI 2005/689));
- 30 (c) where the performance of the contract has begun with the consumer's agreement before the expiry of the period of seven working days beginning with the day after the day on which the contract was concluded and the supplier has not complied with the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 8 (as amended) on or before the day on which performance began, but provides to the consumer the required information in good time during the performance of the contract, the cancellation period ends: (i) on the expiry of the period of seven working days beginning with the day after the day on which the consumer receives the information; or (ii) if the performance of the contract is completed before the expiry of the period referred to in head (i) supra, on the day when the performance of the contract is completed (reg 12(3A) (added by SI 2005/689));
- 31 (d) where the provisions of the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 12(2), reg 12(3) (as amended), reg 12(3A) (as added) do not apply, the cancellation period ends on the expiry of the period of three months and seven working days beginning with the day after the day on which the contract is concluded (reg 12(4) (amended by SI 2005/689)).

'Working day' means all days other than Saturdays, Sundays and public holidays: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 3(1).

2 For the meaning of 'consumer' see PARA 673 note 2 ante.

3 A 'notice of cancellation' is a notice in writing or in another durable medium available and accessible to the supplier (or to the other person to whom it is given) which, however expressed, indicates the intention of the consumer to cancel the contract Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 10(3).

4 For the meaning of 'supplier' see PARA 673 note 2 ante.

5 Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 10(1).

6 For the meaning of 'business' see PARA 673 note 2 ante.

7 Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 10(4).

8 Ibid reg 10(5).

9 le before the end of the cancellation period applicable under ibid reg 12(2) (as amended) (see note 1 supra) and after the supplier has provided the information referred to in reg 8(2) (as amended) (see PARA 674 ante)

10 Ibid reg 13(1) (amended by SI 2005/689).

11 'Payment card' includes credit cards, charge cards, debit cards and store cards: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 21(6).

12 Ibid reg 21(1).

13 'Card issuer' means owner of the card: ibid reg 21(6).

14 Ibid reg 21(2). In any proceedings, if the consumer alleges that any use made of the payment card was not authorised by him, it is for the card issuer to prove that the use was so authorised: reg 21(3). The provisions of reg 21(1), (2) do not apply to an agreement to which the Consumer Credit Act 1974 s 83(1) (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 85) applies: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 21(4).

UPDATE

673-678 Distance Selling Contracts

For consumer protection from unfair trading see PARA 725A.

675 Consumer's right to cancel the contract

TEXT AND NOTES 11-14--SI 2000/2334 reg 21 revoked: SI 2009/209.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(vii) Distance Selling Contracts/676. Consequences of cancellation.

676. Consequences of cancellation.

Except as otherwise provided¹, the effect of a notice of cancellation² is that the contract falls to be treated as if it had not been made³. On the cancellation of a contract, the supplier⁴ must reimburse any sum paid by or on behalf of the consumer⁵ under or in relation to the contract to the person by whom it was made free of any charge, less any charge made⁶. The supplier must

make the reimbursement as soon as possible and in any case within a period not exceeding 30 days beginning with the day on which the notice of cancellation was given⁷. Where any security has been provided in relation to the contract, the security (so far as it is so provided), on cancellation, is to be treated as never having had effect and any property lodged with the supplier solely for the purposes of the security as so provided must be returned by him forthwith⁸. The supplier may make a charge, not exceeding the direct costs of recovering any goods supplied under the contract, where a term of the contract provides that the consumer must return any goods supplied if he cancels the contract but the consumer does not comply with this provision or returns the goods at the expense of the supplier⁹.

Where a notice of cancellation is given which has the effect of cancelling the contract, the giving of the notice also has the effect of cancelling any related credit agreement¹⁰. Where a related credit agreement is cancelled: (1) the supplier must, if he is not the same person as the creditor¹¹ under that agreement, forthwith on receipt of the notice of cancellation inform the creditor that the notice has been given; (2) any sum paid by or on behalf of the consumer under, or in relation to, the credit agreement which the supplier is not obliged to reimburse must be reimbursed, except for any sum which, if it had not already been paid, would have to be paid under head (3) below; (3) the agreement continues in force so far as it relates to repayment¹² of the credit and payment of interest¹³; and (4) the agreement ceases to be enforceable¹⁴. Where any security has been provided under a related credit agreement, the security, so far as it is so provided, is to be treated as never having had effect and any property lodged with the creditor solely for the purposes of the security as so provided must be returned by him forthwith¹⁵.

Following the cancellation of a related credit agreement, if the consumer repays the whole or a portion of the credit before the expiry of one month following the cancellation of the credit agreement, or in the case of a credit repayable by instalments, before the date on which the first instalment is due, no interest is payable on the amount repaid¹⁶. If the whole of a credit repayable by instalments is not repaid on or before the date on which the first instalment is due, the consumer is not liable to repay any of the credit except on receipt of a request in writing, signed by the creditor, stating the amounts of the remaining instalments (recalculated by the creditor as nearly as may be in accordance with the agreement and without extending the repayment period), but excluding any sum other than principal and interest¹⁷. Where any security has been provided under a related credit agreement, the duty imposed on the consumer to repay credit and to pay interest is not enforceable before the creditor has discharged any duty imposed on him¹⁸ to return any property lodged with him as security on cancellation¹⁹.

Where a contract is cancelled after the consumer has acquired possession of any goods under the contract²⁰, the consumer is treated as having been under a duty throughout the period prior to cancellation to retain possession of the goods, and to take reasonable care of them²¹. On cancellation, the consumer is under a duty to restore the goods to the supplier²², and in the meanwhile to retain possession of the goods and take reasonable care of them²³. The consumer is not under any duty to deliver the goods except at his own premises and in pursuance of a request in writing, or in another durable medium available and accessible to the consumer, from the supplier and given to the consumer either before, or at the time when, the goods are collected from those premises²⁴. Where, at any time during the period of 21 days beginning with the day notice of cancellation was given, the consumer receives such a request, and unreasonably refuses or unreasonably fails to comply with it, his duty to retain possession and take reasonable care of the goods continues until he delivers or sends the goods²⁵, but if within that period he does not receive such a request his duty to take reasonable care of the goods ceases at the end of that period²⁶. If the consumer delivers the goods (whether at his own premises or elsewhere) to any person to whom a notice of cancellation could have been given, or sends the goods at his own expense to such a person, he is discharged from any duty to retain possession of the goods or restore them to the supplier²⁷. Where the consumer delivers the goods his obligation to take care of the goods ceases, and if he sends the goods, he is

under a duty to take reasonable care to see that they are received by the supplier and not damaged in transit, but in other respects his duty to take care of the goods ceases when he sends them²⁸. Where any security has been provided in relation to the cancelled contract, the duty to restore goods imposed on the consumer²⁹ is not enforceable before the supplier has discharged any duty imposed on him³⁰ to return any property lodged with him as security on cancellation³¹. Breach³² of a duty imposed by these provisions³³ on a consumer is actionable as a breach of statutory duty³⁴.

On cancellation of a contract where the supplier agreed to take goods in part-exchange (the 'part-exchange goods') and those goods have been delivered to him, unless, before the end of the period of ten days beginning with the date of cancellation, the part-exchange goods are returned to the consumer in a condition substantially as good as when they were delivered to the supplier, the consumer is entitled to recover from the supplier a sum equal to the part-exchange allowance³⁵. Where the consumer recovers from the supplier a sum equal to the part-exchange allowance, the title of the consumer to the part-exchange goods vests in the supplier (if it has not already done so) on recovery of that sum³⁶.

1 le under the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (as amended).

2 As to the notice of cancellation see PARA 675 ante.

3 Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 10(2).

4 For the meaning of 'supplier' see PARA 673 note 2 ante.

5 For the meaning of 'consumer' see PARA 673 note 2 ante. 'Any sum paid on behalf of the consumer' includes any sum paid by a creditor (see note 11 infra) who is not the same person as the supplier under a personal credit agreement with the consumer: Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 14(2). A personal credit agreement is an agreement between the consumer and any other person ('the creditor') by which the creditor provides the consumer with credit of any amount: reg 14(8). 'Credit' includes a cash loan and any other form of financial accommodation; and, for this purpose, 'cash' includes money in any form: reg 3(1).

6 le in accordance with *ibid* reg 14(5) (see the text and note 9 infra): reg 14(1).

7 *Ibid* reg 14(3).

8 *Ibid* reg 14(4).

9 *Ibid* reg 14(5). Regulation 14(5) does not apply where the consumer cancels in circumstances where he has the right to reject the goods under a term of the contract, including a term implied by virtue of any enactment, or where the term requiring the consumer to return any goods supplied if he cancels the contract is an unfair term within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended) (see *CONTRACT* vol 9(1) (Reissue) PARA 793). The Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 14(5) does not apply to the cost of recovering any goods which were supplied as substitutes for the goods ordered by the consumer: reg 14(7).

10 *Ibid* reg 15(1). Where a supplier is unable to perform the contract within the period for performance, regs 15, 16 apply to any related credit agreement as if the consumer had given a valid notice of cancellation (see PARA 675 ante) on the expiry of the period for performance: reg 20(a). As to the meaning of 'period for performance' see PARA 677 note 5 post. 'Related credit agreement' means an agreement under which fixed sum credit which fully or partly covers the price under a contract cancelled under reg 10 (see PARA 675 ante) is granted by the supplier, or by another person under an arrangement between that person and the supplier: reg 15(5). 'Fixed sum credit' has the same meaning as in the Consumer Credit Act 1974 s 10 (see *CONSUMER CREDIT* vol 9(1) (Reissue) PARA 85): Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 reg 15(6) (b).

11 For these purposes, 'creditor' is a person who grants credit under a related credit agreement: *ibid* reg 15(6)(a).

12 'Repayment' in relation to credit means repayment of money received by the consumer; and cognate expressions are to be construed accordingly: *ibid* reg 15(6)(c).

13 'Interest' means interest on money so received: *ibid* reg 15(6)(d).

- 14 Ibid reg 15(2), (3).
- 15 Ibid reg 15(4).
- 16 Ibid reg 16(1), (2).
- 17 Ibid reg 16(3).
- 18 Ie by ibid reg 15(4): see the text and note 15 supra.
- 19 Ibid reg 16(4).
- 20 Ie other than any goods mentioned in ibid reg 13(1)(b)-(e): see PARA 675 heads (b)-(e) ante.
- 21 Ibid reg 17(1), (2).
- 22 Ie in accordance with ibid reg 17.
- 23 Ibid reg 17(3).
- 24 Ibid reg 17(4).
- 25 Ie as mentioned in ibid reg 17(5): see the text and note 27 infra.
- 26 Ibid reg 17(7). Where a term of the contract provides that, if the consumer cancels the contract, he must return the goods to the supplier, and the consumer is not otherwise entitled to reject the goods under the terms of the contract or by virtue of any enactment, reg 17(7) applies as if for the period of 21 days there were substituted the period of six months: reg 17(8).
- 27 Ibid reg 17(5).
- 28 Ibid reg 17(6).
- 29 Ie by ibid reg 17.
- 30 Ie by ibid reg 14(4): see PARA 676 ante.
- 31 Ibid reg 17(9).
- 32 'Breach' means contravention by a supplier of a prohibition in, or failure to comply with a requirement of the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (as amended): reg 3(1).
- 33 Ie ibid reg 17.
- 34 Ibid reg 17(10).
- 35 Ibid reg 18(1), (2). 'Part-exchange allowance' means the sum agreed as such in the cancelled contract, or if no such sum was agreed, such sum as it would have been reasonable to allow in respect of the part-exchange goods if no notice of cancellation had been served: reg 18(3).
- 36 Ibid reg 18(4).

UPDATE

673-678 Distance Selling Contracts

For consumer protection from unfair trading see PARA 725A.

677. Period for performance.

Unless the parties agree otherwise, the supplier¹ must perform the contract within a maximum of 30 days beginning with the day after the day the consumer² sent his order to the supplier³. Where the supplier is unable to perform the contract, because the goods or services ordered are not available, within that period or such other period as the parties agree ('the period for performance'), he must inform the consumer, and reimburse any sum paid by or on behalf of the consumer⁴ under or in relation to the contract to the person by whom it was made⁵. The supplier must make the reimbursement as soon as possible and in any event within a period of 30 days beginning with the day after the day on which the period for performance expired⁶. A contract which has not been performed within the period for performance is treated as if it had not been made, save for any rights or remedies which the consumer has under it as a result of the non-performance⁷. Where any security has been provided in relation to the contract, and where the supplier is unable to perform the contract within the period for performance, the security (so far as it is so provided) is treated as never having had any effect and any property lodged with the supplier solely for the purposes of the security as so provided must be returned by him forthwith⁸. Where the supplier is unable to supply the goods or services ordered by the consumer, the supplier may perform the contract by providing substitute goods or services (as the case may be) of equivalent quality and price provided that this possibility was provided for in the contract and prior to the conclusion of the contract the supplier gave the consumer the information required⁹ in the manner required¹⁰.

1 For the meaning of 'supplier' see PARA 673 note 2 ante.

2 For the meaning of 'consumer' see PARA 673 note 2 ante.

3 Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 19(1).

4 'Any sum paid by or on behalf of the consumer' includes any sum paid by a creditor who is not the same person as the supplier under a personal credit agreement with the consumer: *ibid* reg 19(3). As to the meaning of 'personal credit agreement' see PARA 676 note 5 ante.

5 *Ibid* reg 19(2). Reimbursement is not required in the case of outdoor leisure events which by their nature cannot be rescheduled, where the consumer and the supplier so agree: reg 19(8).

6 *Ibid* reg 19(4).

7 *Ibid* reg 19(5).

8 *Ibid* reg 19(6).

9 *Ie* by *ibid* reg 7(1)(b), (c): see PARA 674 heads (2), (3) ante.

10 *Ibid* reg 19(7). As to the manner required see reg 7(2); and PARA 674 text and note 6 ante.

UPDATE**673-678 Distance Selling Contracts**

For consumer protection from unfair trading see PARA 725A.

678. Void terms, complaints and remedies.

A term contained in any contract to which the statutory provisions relating to contracts negotiated at a distance¹ apply is void if, and to the extent that, it is inconsistent with a provision for the protection of the consumer contained in those statutory provisions². Where a provision³ specifies a duty or liability of the consumer in certain circumstances, a term⁴ contained in such a contract is inconsistent with that provision if it purports to impose, directly or indirectly, an additional duty or liability on him in those circumstances⁵. The statutory provisions apply notwithstanding any contract term which applies or purports to apply the law of a non-member state if the contract has a close connection with the territory of a member state⁶.

It is the duty of an enforcement authority⁷ to consider any complaint made to it about a breach⁸ unless the complaint appears to the authority to be frivolous or vexatious, or another enforcement authority has notified the Office of Fair Trading (the 'OFT') that it agrees to consider the complaint⁹. If an enforcement authority notifies the OFT that it agrees to consider a complaint made to another enforcement authority, the first mentioned authority is under a duty to consider the complaint¹⁰. An enforcement authority which is under a duty to consider a complaint must give reasons for its decision to apply or not to apply, as the case may be, for an injunction¹¹. In deciding whether or not to apply for an injunction in respect of a breach, an enforcement authority may, if it considers it appropriate to do so, have regard to any undertaking given to it or another enforcement authority by or on behalf of any person as to compliance with the statutory provisions¹².

The OFT or any other enforcement authority may apply for an injunction (including an interim injunction) against any person who appears to the OFT or that authority to be responsible for a breach¹³. An enforcement authority other than the OFT may apply for an injunction only where it has notified the OFT of its intention to apply at least 14 days before the date on which the application is to be made, beginning with the date on which the notification was given, or the OFT consents to the application being made within a shorter period¹⁴. The court¹⁵ may grant an injunction on such terms as it thinks fit to secure compliance with the statutory provisions¹⁶.

An enforcement authority must notify the OFT: (1) of any undertaking given to it by or on behalf of any person who appears to it to be responsible for a breach; (2) of the outcome of any application for an injunction made by it and of the terms of any undertaking given to or order made by the court; and (3) of the outcome of any application made by it to enforce a previous order of the court¹⁷. The OFT must arrange for the publication, in such form and manner as it considers appropriate, of: (a) details of any undertaking or order notified to it; (b) details of any undertaking given to it by or on behalf of any person as to compliance with the statutory provisions; (c) details of any application for an injunction made by it, and of the terms of any undertaking given to, or order made by, the court; and (d) details of any application made by the OFT to enforce a previous order of the court¹⁸. The OFT may arrange for the dissemination in such form and manner as it considers appropriate of such information and advice concerning the operation of the statutory provisions as it may appear to be expedient to give to the public and to all persons likely to be affected by those provisions¹⁹.

1 I.e. a contract to which the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (as amended) apply: see PARA 673 ante.

2 Ibid reg 25(1). The statutory provisions referred to in the text are those contained in the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (as amended). For the meaning of 'consumer' see PARA 673 note 2 ante.

3 I.e. a provision of the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (as amended).

4 le other than a term which requires the consumer to return any goods supplied to him under the contract if he cancels it under *ibid* reg 10 (see PARA 675 ante): reg 25(3). In the event of such cancellation by the consumer, such a term has effect only for the purposes of regs 14(5), 17(8) (see PARA 676 ante): reg 25(4).

5 *Ibid* reg 25(2).

6 *Ibid* reg 25(5). For the meaning of 'member state' for these purposes see PARA 673 note 10 ante.

7 'Enforcement authority' means the Office of Fair Trading, and every weights and measures authority in Great Britain: *ibid* reg 3(1) (amended by virtue of the Enterprise Act 2002 s 2). As to the Office of Fair Trading see PARA 407 ante. As to local weights and measures authorities see PARA 398 ante.

8 For the meaning of 'breach' see PARA 676 note 32 ante.

9 Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 26(1).

10 *Ibid* reg 26(2).

11 *Ibid* reg 26(3).

12 *Ibid* reg 26(4).

13 *Ibid* reg 27(1).

14 *Ibid* reg 27(2).

15 le a county court or the High Court: *ibid* reg 3(1).

16 *Ibid* reg 27(3).

17 *Ibid* reg 28.

18 *Ibid* reg 29(1).

19 *Ibid* reg 29(2).

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673-678 Distance Selling Contracts

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(viii) Harassment of Debtors/679. Unlawful harassment of debtors.

(viii) Harassment of Debtors

679. Unlawful harassment of debtors.

If a person, with the object of coercing another person to pay money claimed from the other as a debt due under a contract:

1395 (1) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject¹ him or members of his family or household to alarm, distress or humiliation;

- 1396 (2) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it;
- 1397 (3) falsely represents himself to be authorised in some official capacity to claim or enforce payment; or
- 1398 (4) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not,

he is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale².

A person may be guilty of an offence by virtue of head (1) above if he conspires with others in the taking of such action as is there described, notwithstanding that his own course of conduct does not by itself amount to harassment³. Head (1) above does not, however, apply to anything done by a person which is reasonable, and otherwise permissible in law, for the purpose of:

- 1399 (a) securing the discharge of an obligation due, or believed by him to be due, to himself or to persons for whom he acts, or protecting himself or them from future loss; or
- 1400 (b) the enforcement of any liability by legal process⁴.

1 The words 'calculated to subject' mean 'likely to subject' and not 'intended to subject': *Norweb plc v Dixon* [1995] 3 All ER 952, [1995] 1 WLR 636, DC (there was no reason to suppose that Parliament intended to restrict the offence under the Administration of Justice Act 1970 s 40 (as amended) to cases where the putative creditor intended to cause alarm, distress or humiliation, leaving immune from prosecution those whose conduct, though not intended to do so, was likely to have such consequences).

2 Administration of Justice Act 1970 s 40(1), (4) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see the Administration of Justice Act 1970 s 40(1), (4) (as so amended). As to the standard scale see PARA 498 note 3 ante. Offences under s 40 (as amended) are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

An offence under the Administration of Justice Act 1970 s 40 (as amended) does not require proof of the existence of a contract between the parties but merely proof that the supplier has made demands for payment of a debt which the supplier claims to be due under a contract which the supplier claims to exist: *Norweb plc v Dixon* [1995] 3 All ER 952, [1995] 1 WLR 636, DC.

3 Administration of Justice Act 1970 s 40(2).

4 Ibid s 40(3).

UPDATE

679 Unlawful harassment of debtors

TEXT AND NOTES--For consumer protection from unfair trading see PARA 725A.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTE 4--The Administration of Justice Act 1970 s 40(1) does not apply to anything done by a person to another in circumstances where what is done is a commercial practice within the meaning of the Consumer Protection from Unfair

Trading Regulations 2008, SI 2008/1277 (see PARA 725A) and the other is a consumer in relation to that practice: Administration of Justice Act 1970 s 40(3A) (added by SI 2008/1277).

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(ix) Prices

A. PRICE CONTROLS ETC

680. Price controls etc.

The Secretary of State¹ may:

- 1401 (1) by order provide for controlling maximum prices to be charged for any medical supplies required for the purposes of the National Health Service Act 1977²;
- 1402 (2) by regulations make a scheme for the provision of welfare food³ and such regulations may control any prices to be charged for any welfare food provided under such a scheme⁴.

Agreements between undertakings, decisions by associations of undertakings or concerted practices which (inter alia):

- 1403 (a) directly or indirectly fix purchase or selling prices;
- 1404 (b) are or are intended to be implemented in the United Kingdom;
- 1405 (c) may affect trade within the United Kingdom; and
- 1406 (d) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited⁵ unless they are exempt⁶. Any such agreement or decision which is so prohibited is void⁷.

Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited⁸ if it may affect trade within the United Kingdom⁹. Conduct may, in particular, constitute such an abuse if it consists in directly or indirectly imposing unfair purchase or selling prices¹⁰.

¹ As to the Secretary of State see PARA 15 ante.

² National Health Service Act 1977 s 57(1). At the date at which this volume states the law no such order had been made. For these purposes, 'medical supplies' includes surgical, dental and optical materials and equipment: s 57(3).

³ For these purposes, 'welfare food' means liquid cows' milk, dried milks, vitamin tablets and vitamin drops: Social Security Act 1988 s 13(1). The Secretary of State may by order add any food to, or remove any food from, the foods referred to in s 13(1): s 13(2). At the date at which this volume states the law no such order had been made. As from a day to be appointed, s 13 is substituted so as to provide for regulations to establish a new scheme or schemes, to provide benefits for prescribed descriptions of pregnant women, mothers and children, with a view to helping and encouraging them to have access to, and to incorporate in their diets, food of a prescribed description: see s 13 (prospectively substituted by the Health and Social Care (Community

Health and Standards) Act 2003 s 185(1)). At the date at which this volume states the law no such day had been appointed.

4 Social Security Act 1988 s 13(3)(a), (4)(b). In exercise of the power so conferred the Secretary of State has made the Welfare Food Regulations 1996, SI 1996/1434 (amended by SI 1997/857; SI 1998/691; SI 2000/694; SI 2004/723; SI 2004/2311).

5 le subject to the Competition Act 1998 s 3 (as amended) (excluded agreements): see COMPETITION vol 18 (2009) PARAS 117-120.

6 See ibid s 2(1), (2)(a), (3); and COMPETITION vol 18 (2009) PARA 116.

7 See ibid s 2(4); and COMPETITION vol 18 (2009) PARA 116.

8 le subject to ibid s 19 (excluded cases): see COMPETITION vol 18 (2009) PARAS 126-128.

9 See ibid s 18(1); and COMPETITION vol 18 (2009) PARA 125.

10 See ibid s 18(2)(a); and COMPETITION vol 18 (2009) PARA 125.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

680 Price controls etc

TEXT AND NOTE 2--1977 Act s 57 now National Health Service Act 2006 s 260.

NOTES 3, 4--See Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005, SI 2005/3262 (amended by SI 2006/589, SI 2006/2818, SI 2007/505, SI 2008/408, SI 2008/1879, SI 2009/295, SI 2010/434); Healthy Start Scheme (Description of Healthy Start Food) (Wales) Regulations 2006, SI 2006/3108.

NOTE 3--Day now appointed for all purposes: SI 2005/2278, SI 2006/2817. For transitional provision, see the Health and Social Care (Community Health and Standards) Act 2003 (Savings) Order 2005, SI 2005/2279.

NOTE 4--SI 1996/1434 further amended: SI 2005/688 (replacing SI 2004/723, SI 2004/2311), SI 2005/3262, SI 2006/589.

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B. PRICE MARKING

(A) IN GENERAL

681. Secretary of State's power to make orders.

The Secretary of State¹ may by order make provision for securing:

- 1407 (1) that prices are indicated on or in relation to goods which a person indicates are or may be for sale by retail, whether or not the goods are in existence when he does so;
- 1408 (2) that charges are indicated for services which a person indicates are or may be provided, except services which he indicates are or may be provided only for the purposes of a business carried on by other persons;
- 1409 (3) that prices of such goods or charges for such services are not indicated in a manner which the Secretary of State considers inappropriate and that no part of a penny except one halfpenny is specified in the amount of an indicated price or charge².

Such an order may³ specify the kinds of goods or services to which, and the circumstances in which, the order applies and may:

- 1410 (a) make provision as to the manner in which any price or charge may be indicated;
- 1411 (b) require that the price or charge to be indicated on or in relation to any goods or service is to be, or is to include, a price or charge expressed by reference to such unit or units of measurement as may be specified in the order;
- 1412 (c) in relation to goods or services subject to VAT, make provision as to the circumstances in which the price or charge to be indicated may or may not be exclusive of the tax and as to the indication to be given of the tax included in, or payable in addition to, the price or charge; and
- 1413 (d) make different provision in relation to different circumstances and may contain such supplementary provision as the Secretary of State thinks necessary or expedient⁴.

Any person who contravenes such an order is guilty of an offence⁵.

1 The power to make such an order is exercisable by statutory instrument and includes power to vary or revoke a previous order; and a statutory instrument containing such an order is subject to amendment in pursuance of a resolution of either House of Parliament: Prices Act 1974 s 4(4). Before making such an order the Secretary of State must consult, in such manner as appears to him to be appropriate having regard to the subject matter and urgency of the order, with such organisations representative of interests substantially affected by the order as appear to him, having regard to those matters, to be appropriate: see s 4(3) (substituted by the Statute Law (Repeals) Act 2004). However, this requirement as to consultation is not to be construed as requiring further consultation where the Secretary of State is satisfied that there was sufficient consultation for that purpose before 9 July 1974 (ie date of the passing of the Prices Act 1974): s 9(4). As to the Secretary of State see PARA 15 ante.

2 Ibid s 4(1) (substituted by the Price Commission Act 1977 s 16(1)). In exercise of the power so conferred the Secretary of State has made the Indication of Prices (Beds) Order 1978, SI 1978/1716 (as amended) (see PARA 688 post); the Price Marking (Food and Drink Services) Order 2003, SI 2003/2253 (see PARA 689 et seq post); and the Price Marking Order 2004, SI 2004/102 (see PARA 682 et seq post).

The regulation of price indications is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2)(b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C7. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

3 Ie without prejudice to the generality of the Prices Act 1974 s 4(1) (as substituted): see the text and notes 1-2 supra.

4 Ibid s 4(2) (amended by the Price Commission Act 1977 s 16(2)(a)).

5 Prices Act 1974 s 7, Schedule para 5(1) (amended by the Magistrates' Courts Act 1980 s 32(2)). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the prescribed sum: see the Prices Act 1974 s 7, Schedule para 5(1) (as so amended). As to the prescribed sum see PARA 498 note 2 ante. As to offences by bodies corporate see PARA 700 post. As to

enforcement see PARA 699 post. The Trade Descriptions Act 1968 s 23 (offences due to fault of other person: see PARA 503 ante) and s 24(1), (2) (defence of mistake, accident etc: see PARA 504 ante) have effect in relation to an offence in respect of an order under the Prices Act 1974 s 4 (as amended) as they have effect in relation to an offence under the Trade Descriptions Act 1968: Prices Act 1974 Schedule para 5(3).

Offences under the Prices Act 1974 Schedule in respect of orders made under s 4 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

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682. Obligation to indicate selling price.

Where a trader¹ indicates that any product is or may be for sale to a consumer², he must³ indicate the selling price⁴ of that product⁵; but that requirement does not apply:

- 1414 (1) to products which are supplied in the course of the provision of a service⁶;
- 1415 (2) to sales by auction or sales of works of art or antiques⁷;
- 1416 (3) in respect of products sold from bulk⁸; or
- 1417 (4) in respect of an advertisement⁹ for a product¹⁰.

In the case of products the selling price of which varies from day to day according to the price of the precious metals¹¹ contained in them, the obligation to indicate the selling price referred to above may be complied with by indicating in a manner which is unambiguous, easily identifiable and clearly legible:

- 1418 (a) the weight, type and standard of fineness of each precious metal contained in the product; and
- 1419 (b) any element of the selling price which is not referable to weight,

accompanied by a clearly legible and prominent notice stating the price per unit of weight for the type and standard of fineness¹² of each precious metal contained in the product¹³.

1 For these purposes, 'trader' means any person who sells or offers or exposes for sale products which fall within his commercial or professional activity: Price Marking Order 2004, SI 2004/102, art 1(2).

2 For these purposes, 'consumer' means any individual who buys a product for purposes that do not fall within the sphere of his commercial or professional activity: *ibid* art 1(2).

3 *le* in accordance with the provisions of the Price Marking Order 2004, SI 2004/102: see PARA 683 *et seq* post.

4 For these purposes, 'selling price' means the final price for a unit of a product, or a given quantity of a product, including VAT and all other taxes: *ibid* art 1(2). As to the effect of changes in VAT or any other tax see PARA 687 post.

5 Ibid art 4(1). As to the manner of indicating the selling price see PARA 685 post. The Price Marking Order 2004, SI 2004/102, implements European Parliament and EC Council Directive 98/6 (OJ L80, 18.3.98, p 27) (see PARA 393 ante); and it is to be enforced under the Prices Act 1974 (see PARA 699 post). The Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013 (as amended) apply, notwithstanding reg 3(2) (as substituted), to the Price Marking Order 2004, SI 2004/102: art 3(2).

6 Ibid art 3(1)(a).

7 Ibid art 3(1)(b).

8 Ibid art 4(2)(a). For these purposes, 'products sold from bulk' means products which are not prepackaged and are weighed or measured at the request of the consumer: art 1(2).

9 For these purposes, 'advertisement' means any form of advertisement which is made in order to promote the sale of a product but does not include any advertisement by means of which the trader intends to encourage a consumer to enter into a distance contract, a catalogue, a price list, a container or a label: ibid art 1(2). 'Distance contract' means any contract concerning products concluded between a trader and a consumer, by any means, without the simultaneous physical presence of the trader and the consumer: art 1(2).

10 Ibid art 4(2)(b).

11 For these purposes, 'precious metal' means gold, silver or platinum, or any other metal to which by an order under the Hallmarking Act 1973 s 17 the provisions of that Act are applied: Price Marking Order 2004, SI 2004/102, art 1(2).

12 For these purposes, 'standard of fineness' means any one of the standards of fineness specified in the Hallmarking Act 1973 Sch 2 para 2 col (2) (see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 468): Price Marking Order 2004, SI 2004/102, art 1(2).

13 Ibid art 10.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

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683. Obligation to indicate unit price.

Where a trader¹ indicates that any product is or may be for sale to a consumer², he must³ indicate the unit price⁴ of that product⁵. This requirement applies:

- 1420 (1) only in respect of any product sold from bulk⁶ or required by or under the Weights and Measures Act 1985⁷ to be marked with an indication of quantity or to be made up in a quantity prescribed by or under that Act⁸;
- 1421 (2) in relation to an advertisement⁹ for a product only where the selling price of the product is indicated in the advertisement¹⁰.

The requirement does not, however, apply:

- 1422 (a) to products which are supplied in the course of the provision of a service¹¹;
- 1423 (b) to sales by auction or sales of works of art or antiques¹²;
- 1424 (c) in relation to:

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- 194. (i) any product which is offered by traders to consumers by means of an advertisement which is purely aural, broadcast on television, or shown at a cinema or inside a small shop¹³; any product the price of which has been reduced from the usual price at which it is sold, on account of its damaged condition or the danger of its deterioration; any product which comprises an assortment of different items sold in a single package; or any product the unit price of which is 0.0p as a result of the requirement¹⁴ as to decimal places and rounding of unit prices¹⁵;
- 195. (ii) any product the unit price of which is identical to its selling price¹⁶;
- 196. (iii) bread made up in a prescribed quantity which is or may be for sale in a small shop, by an itinerant trader¹⁷, or from a vending machine¹⁸; or
- 197. (iv) any product which is prepackaged in a constant quantity and sold in a small shop, by an itinerant trader, or from a vending machine¹⁹.

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1 For the meaning of 'trader' see PARA 682 note 1 ante.

2 For the meaning of 'consumer' see PARA 682 note 2 ante.

3 Ie in accordance with the provisions of the Price Marking Order 2004, SI 2004/102.

4 For the meaning of 'unit price' see PARA 684 post.

5 Price Marking Order 2004, SI 2004/102, art 5(1). As to the manner of indicating the unit price see PARA 685 post. The Price Marking Order 2004, SI 2004/102, implements European Parliament and EC Council Directive 98/6 (OJ L80, 18.3.98, p 27) (see PARA 393 ante); and it is to be enforced under the Prices Act 1974 (see PARA 699 post).

6 For the meaning of 'products sold from bulk' see PARA 682 note 8 ante.

7 Ie by or under the Weights and Measures Act 1985 Pt IV (ss 21-46) (as amended) or Pt V (ss 47-68) (as amended): see WEIGHTS AND MEASURES vol 50 (2003 Reissue) PARA 54 et seq.

8 Price Marking Order 2004, SI 2004/102, art 5(2).

9 For the meaning of 'advertisement' see PARA 682 note 9 ante.

10 Price Marking Order 2004, SI 2004/102, art 5(4).

11 Ibid art 3(1)(a).

12 Ibid art 3(1)(b).

13 For these purposes, 'small shop' means any shop which has a relevant floor area not exceeding 280 square metres; 'shop' includes a store, a kiosk and a franchise or concession within a shop; and 'relevant floor area', in relation to a shop, means the internal floor area of the shop excluding any area not used for the retail sale of products or for the display of such products for retail sale: ibid art 1(2).

14 Ie as a result of ibid art 12: see PARA 684 post.

15 Ibid art 5(3)(a), Sch 2.

16 Ibid art 5(3)(b). For the meaning of 'selling price' see PARA 682 note 4 ante.

17 For these purposes, 'itinerant trader' means any trader who, as a pedestrian, or from a train, aircraft, vessel, vehicle, stall, barrow or other mobile sales unit, offers products to consumers other than by means of preprinted material: ibid art 1(2).

18 Ibid art 5(3)(c). For the purpose of ascertaining whether any trader enjoys exemption from unit pricing under art 5(3)(c) or (d) in respect of a small shop, a local weights and measures authority may require that trader to produce such documentary evidence relating to the shop in question as it considers necessary: ibid art 15. As to local weights and measures authorities see PARA 398 ante.

19 Ibid art 5(3)(d).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

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684. Meaning of 'unit price'.

'Unit price' means the final price¹, including VAT and all other taxes², for one kilogram, one litre, one metre, one square metre or one cubic metre of a product, except: (1) in respect of the products specified below, where unit price means the final price including VAT and all other taxes for the corresponding units of quantity set out there; and (2) in respect of products sold by number, where unit price means the final price including VAT and all other taxes for an individual item of the product³.

The relevant units of quantity for specified products for the purpose of the definition of 'unit price' are as follows:

- 1425 (1) flavouring essences (10 millilitres);
- 1426 (2) food colourings (10 millilitres);
- 1427 (3) herbs (10 grams);
- 1428 (4) make-up products⁴ (10 grams/millilitres) (except where sold by number);
- 1429 (5) seeds other than pea, bean grass and wild bird seeds (10 grams);
- 1430 (6) spices (10 grams);
- 1431 (7) biscuits and shortbread (100 grams) (except where sold by number);
- 1432 (8) bread (100 grams) (except where sold by number);
- 1433 (9) breakfast cereal products (100 grams) (except where required to be quantity marked by number);
- 1434 (10) chocolate confectionery and sugar confectionery (100 grams);
- 1435 (11) coffee (100 grams/millilitres);
- 1436 (12) cooked or ready-to-eat fish, seafoods and crustacea (100 grams);
- 1437 (13) cooked or ready-to-eat meat including game and poultry (100 grams);
- 1438 (14) cosmetic products⁵ other than make-up products (100 grams);
- 1439 (15) cream and non-dairy alternatives to cream (100 grams);
- 1440 (16) dips and spreads excluding edible fats (100 grams);
- 1441 (17) dry sauce mixes (100 grams);
- 1442 (18) fresh processed salad (100 grams);
- 1443 (19) fruit juices and soft drinks (100 millilitres);
- 1444 (20) handrolling and pipe tobacco (100 grams);
- 1445 (21) ice cream and frozen desserts (100 grams/millilitres);
- 1446 (22) lubricating oils other than oils for internal combustion engines (100 millilitres);
- 1447 (23) pickles (100 grams);
- 1448 (24) pies, pasties, sausage rolls, puddings and flans indicating net quantity (100 grams) (except where sold by number);
- 1449 (25) potato crisps and similar products commonly known as snack foods (100 grams);

- 1450 (26) preserves including honey (100 grams);
- 1451 (27) ready-to-eat desserts (100 grams);
- 1452 (28) sauces and edible oils (100 millilitres);
- 1453 (29) soups (100 grams);
- 1454 (30) tea and other beverages prepared with liquid (100 grams);
- 1455 (31) waters, including spa waters and aerated waters (100 millilitres);
- 1456 (32) wines, sparkling wine, liqueur wine and fortified wine (750 millilitres);
- 1457 (33) coal, where sold by the kilogram (50 kilograms);
- 1458 (34) ballast, where sold by the kilogram (1,000 kilograms)⁶.

1 Where the unit price of a product falls below £1, it must be expressed to the nearest 0.1 penny; where the figure denoting one hundredths of one penny in the unit price is five or higher, it must be rounded up; and, where it is four or lower, it must be rounded down: Price Marking Order 2004, SI 2004/102, art 12. Where the unit price of a product falls above £1, it may be expressed: (1) to the nearest one penny, in which case where the figure denoting tenths of one penny in the unit price is five or higher, it must be rounded up and where it is four or lower it must be rounded down; or (2) to the nearest 0.1 penny, in which case, where the figure denoting one hundredths of one penny in the unit price is five or higher it must be rounded up and where it is four or lower it must be rounded down: art 13.

2 As to the effect of changes in VAT or any other tax see PARA 687 post.

3 Price Marking Order 2004, SI 2004/102, art 1(2). As to the manner of indicating the unit price see PARA 685 post.

4 'Make-up products' means cosmetic products (see note 5 infra) solely intended temporarily to change the appearance of the face or nails, including (but not limited to) lipsticks, mascaras, eye shadows, blushers and concealers: *ibid* art 1(2).

5 'Cosmetic products' means any substance or preparation intended to be placed in contact with an external part of the human body, or with the teeth, inside of the mouth or throat with a view exclusively or mainly to one or more of the following purposes: cleaning, perfuming, changing the appearance of, protecting, and keeping in good condition it or them or correcting body odour: *ibid* art 1(2).

6 *Ibid* arts 1(2), 14, Sch 1.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

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685. Manner of indicating selling price and unit price.

The required indication¹ of selling price² and unit price³ must be in sterling⁴. If, however, a trader⁵ indicates his willingness to accept foreign currency⁶ for the purchase of a product, he must, in addition to the price indications in sterling:

- 1459 (1) give an indication of the selling price and any unit price required for the product in the foreign currency in question together with any commission to be charged; or
- 1460 (2) clearly identify the conversion rate on the basis of which the foreign currency price will be calculated together with any commission to be charged,

and indicate that such selling price, unit price or conversion rate as the case may be does not apply to transactions via a payment card to be applied to accounts denominated in currencies other than sterling, the conversion rate for which will be that applied by the relevant payment scheme which processes the transaction⁷.

The indication of selling price, unit price, commission, conversion rate or change in the rate or coverage of VAT must be:

- 1461 (a) unambiguous, easily identifiable and clearly legible;
- 1462 (b) given in proximity to the product⁸ or, in the case of distance contracts⁹ and advertisements, a visual or written description of the product; and
- 1463 (c) so placed as to be available to consumers¹⁰ without the need for them to seek assistance from the trader or someone else on his behalf in order to ascertain it¹¹.

The indication of any charges for postage, package or delivery of a product must be unambiguous, easily identifiable and clearly legible¹².

Where, in addition to a unit price, a price per quantity is indicated in relation to a supplementary indication of quantity¹³ the unit price is to predominate and the price per supplementary indication of quantity must be expressed in characters no larger than the unit price¹⁴.

In the case of a pre-packaged solid food product presented in a liquid medium¹⁵, the unit price must refer to the net drained weight¹⁶ of the product¹⁷. Where a unit price is also given with reference to the net weight of the product, it must be clearly indicated which unit price relates to net drained weight and which to net weight¹⁸.

1 le the indication required by the Price Marking Order 2004, SI 2004/102: see PARAS 682-684 ante.

2 For the meaning of 'selling price' see PARA 682 note 4 ante.

3 For the meaning of 'unit price' see PARA 684 ante.

4 Price Marking Order 2004, SI 2004/102, art 6(1).

5 For the meaning of 'trader' see PARA 682 note 1 ante.

6 For these purposes, 'foreign currency' means any currency other than sterling: Price Marking Order 2004, SI 2004/102, art 1(2).

7 Ibid art 6(2).

8 This does not apply to an indication given in relation to any item of jewellery, item of precious metal, or watch displayed in a window of the premises where it is or may be for sale and the selling price of which is in excess of £3,000: ibid art 7(2). For the meaning of 'precious metal' see PARA 682 note 11 ante.

9 For the meaning of 'distance contract' see PARA 682 note 9 ante.

10 For the meaning of 'consumer' see PARA 682 note 2 ante.

11 Price Marking Order 2004, SI 2004/102, art 7(1).

12 Ibid art 7(3).

13 'Supplementary indication of quantity' refers to an indication of quantity expressed in a unit of measurement other than a metric unit as authorised by the Weights and Measures Act 1985 s 8(5A) (as added) (see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 46): Price Marking Order 2004, SI 2004/102, art 7(5).

14 Ibid art 7(4).

15 For these purposes, 'liquid medium' has the meaning given for the purposes of European Parliament and EC Council Directive 2000/13 (OJ L109, 6.5.2000, p 29) on the approximation of the laws of the member states relating to the labelling, presentation and advertising of foodstuffs art 8 para 4: Price Marking Order 2004, SI 2004/102, art 1(2).

16 For these purposes, 'net drained weight' means the weight of a solid food product when it is presented in a liquid medium: *ibid* art 1(2).

17 *Ibid* art 8.

18 *Ibid* art 8.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

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686. Special provisions relating to general reductions.

Where a trader¹ proposes to sell products to which the provisions relating to the indication of selling prices and unit prices² apply at less than the selling price or the unit price previously applicable and indicated in the required manner³, he may comply with the obligations specified to indicate the selling price⁴ and the unit price⁵ by indicating by a general notice or any other visible means that the products are or may be for sale at a reduction, provided that the details of the reduction are prominently displayed, unambiguous, easily identifiable and clearly legible⁶.

1 For the meaning of 'trader' see PARA 682 note 1 ante.

2 *Ie* the provisions of the Price Marking Order 2004, SI 2004/102: see PARA 682 et seq ante.

3 *Ie* in accordance with *ibid* art 7(1): see PARA 685 ante.

4 *Ie* specified in *ibid* art 4(1): see PARA 682 ante.

5 *Ie* specified in *ibid* art 5(1): see PARA 683 ante.

6 *Ibid* art 9.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

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687. Changes in value added tax and other taxes.

Where there is a change in the rate or coverage of VAT or any other tax, a trader¹ who adjusts his prices in consequence may comply with the provisions relating to the indication of selling prices and unit prices² as follows:

- 1464 (1) by means of a general notice or notices for a period of 14 days from the date any such change takes effect, indicating that any products subject to that change are not for sale at the price indicated and that such price will be adjusted to take account of the change; and
 - 1465 (2) if he continues to distribute any catalogue or sales literature printed or ordered to be printed before a change is announced and there is firmly attached to it a label which prominently states that some or all of the prices printed in it are to be adjusted to reflect the change, and:
- 131
- 198. (a) the label includes sufficient information to enable consumers³ to establish the adjusted price of any product listed; or
 - 199. (b) the label refers to and is accompanied by a supplement which enables them to do so⁴.
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1 For the meaning of 'trader' see PARA 682 note 1 ante.

2 Ie the provisions of the Price Marking Order 2004, SI 2004/102: see PARA 682 et seq ante.

3 For the meaning of 'consumer' see PARA 682 note 2 ante.

4 Price Marking Order 2004, SI 2004/102, art 11. As to value added tax see VALUE ADDED TAX.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

687 Changes in value added tax and other taxes

TEXT AND NOTES 1-4--Head (1), for '14 days' read '28 days': SI 2004/102 art 11 (amended by SI 2009/3231).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/B. PRICE MARKING/(B) Beds/688. Prices of beds.

(B) BEDS

688. Prices of beds.

A person who indicates that a bed¹ is or may be for sale by him is not to indicate a price at which another person buying it may sell it².

1 For these purposes, 'bed' means a bed of any description (other than a camp bed and a bed intended primarily for outdoor use) intended for ultimate sale to private consumers, and includes mattresses and headboards: Indication of Prices (Beds) Order 1978, SI 1978/1716, art 1(2).

2 Ibid art 2. Article 2 is to be enforced in Great Britain by local weights and measures authorities: see art 6. As to local weights and measures authorities see PARA 398 ante.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/B. PRICE MARKING/(C) Food and Drink on Premises/689. Application of provisions.

(C) FOOD AND DRINK ON PREMISES

689. Application of provisions.

The Price Marking (Food and Drink Services) Order 2003¹ has effect where a person indicates that food² is or may be for sale by him by retail for consumption on any premises³ other than in a take-away area⁴ or on premises on which food is ordinarily supplied:

- 1466 (1) only to members of a bona fide club or their guests; or
- 1467 (2) only or mainly to members of a group determined by reference to:
- 133
- 200. (a) their employment, or the employment of a partner, parent or partner of a parent of theirs, in the service of a particular person or of one of a number of particular persons; or
- 201. (b) their membership of, or regular attendance at, an educational establishment; or
- 134
- 1468 (3) only to persons for whom sleeping accommodation on those premises is provided⁵.

1 Ie the Price Marking (Food and Drink Services) Order 2003, SI 2003/2253.

2 'Food' means food and drink for human consumption, but does not include food which is supplied: (1) at the express request of a purchaser in a case where the seller has not indicated that food of the same description is or may be for sale by him; or (2) at a price agreed in advance pursuant to an order made before an intending purchaser enters the eating area, supply area or take-away area (see note 4 infra) in question to obtain or consume the food: ibid art 1(2). 'Eating area' means any part of any premises (see note 3 infra) specifically set aside and equipped for the consumption of food notwithstanding that some other activity may be carried on in the area in question but does not include a supply area; and 'supply area' means any part of any premises specifically set aside and equipped for the supply of food in a case where an intending purchaser pays for food for consumption on the premises where it is sold before it is consumed notwithstanding that some other activity may be carried on in the area in question: art 1(2).

3 For these purposes, 'premises' includes any vehicle or vessel: ibid art 1(2).

4 For these purposes, 'take-away area' means any part of any premises specifically set aside and equipped for the supply of food prepared or heated at the request of a consumer or supplied as heated meals in each case for consumption off the premises where it is sold notwithstanding in any case that some other activity may be carried on in the area in question: *ibid* art 1(2).

5 *Ibid* art 3.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/B. PRICE MARKING/(C) Food and Drink on Premises/690. Obligation to indicate prices for food.

690. Obligation to indicate prices for food.

A person who indicates that food¹ is or may be for sale by him must² give an indication of:

1469 (1) the price for the sale of that food (except where it is sold by reference to quantity or weight);

1470 (2) the price for the sale of each quantity or weight where the food is sold by reference to quantity or weight³;

1471 (3) any charge which is payable in addition to the price of any food (expressed either as an amount or as a percentage of the price); and

1472 (4) any minimum price or charge which is payable in respect of any food sold or service provided relating to the supply of food⁴.

Where foods of different descriptions are or may be for sale together (other than foods supplied as a fixed price meal) and the total price for the foods is the sum of the prices of the individual foods, only an indication of the price of the individual foods is required⁵.

An indication of the price of food or of a charge payable in addition to the price of any food which is subject to value added tax must be inclusive of the tax⁶.

1 For the meaning of 'food' see PARA 689 note 2 ante.

2 *Ie* where the Price Marking (Food and Drink Services) Order 2003, SI 2003/2253, applies (see PARA 689 ante) and subject to the other provisions of that order (see PARAS 691-692 post).

3 A single indication of price is required where a food is sold in more than one quantity or weight if the quantity or weight to which that price applies is indicated and the prices of other quantities or weights are proportionate to the indicated price: *ibid* art 4(2).

4 *Ibid* art 4(1). As to the manner of indicating prices and charges see PARA 692 post.

5 *Ibid* art 4(3).

6 *Ibid* art 4(4).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/B. PRICE MARKING/(C) Food and Drink on Premises/691. General obligations.

691. General obligations.

Indications of the price of food¹ are required to be given in accordance with the following provisions:

- 1473 (1) where not more than 30 descriptions of food, other than wine², are or may be for sale, indications of price must be given for all;
- 1474 (2) where more than 30 descriptions of food, other than wine, are or may be for sale, indications of price must be given for 30, which must, if soft drinks³ are or may be for sale, include five soft drinks or the actual number if less than five;
- 1475 (3) where more than 30 descriptions of food (other than wine) divided in any way into categories are or may be for sale, indications of price are required for a minimum of 30, which must include five per category or the actual number in a category if less than five; and if soft drinks are or may be for sale indications of price must be given for five or the actual number if less than five;
- 1476 (4) where wine for consumption with other foods in an eating or supply area⁴ is or may be for sale, indications of price must be given for five or the actual number if less than five;
- 1477 (5) where foods of different descriptions are or may be for sale together as a fixed price meal, indications of price must be given for each fixed price meal; and the rules in heads (1) to (5) above do not apply to the foods contained in the meal unless they are or may be available separately⁵.

Where an indication is given that food of a particular description is or may be for sale generally (as opposed to only in an indicated period of a day) an indication of the price of that food must be withdrawn as soon as is reasonably practicable if the food ceases to be available⁶. Where an indication is given that food of a particular description is or may be for sale only in an indicated period of a day an indication of the price of that food must be withdrawn before the next such period if the food ceases to be available⁷.

1 For the meaning of 'food' see PARA 689 note 2 ante.

2 For these purposes, 'wine' means any drink obtained from the alcoholic fermentation of fresh grapes or the must of fresh grapes other than drink fortified with spirits or flavoured with aromatic extracts: Price Marking (Food and Drink Services) Order 2003, SI 2003/2253, art 1(2).

3 For these purposes, 'soft drink' means any non-alcoholic drink of a kind which is served cold: *ibid* reg 1(2).

4 For the meaning of 'eating area' see PARA 689 note 2 ante; and for the meaning of 'supply area' see PARA 689 note 2 ante.

5 Price Marking (Food and Drink Services) Order 2003, SI 2003/2253, art 5.

6 *Ibid* art 6(1).

7 Ibid art 6(2).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/B. PRICE MARKING/(C) Food and Drink on Premises/692. Manner of indicating prices and charges.

692. Manner of indicating prices and charges.

An indication of price¹ must be unambiguous, easily identifiable and clearly legible by an intending purchaser and must comply with such of the following provisions as may be applicable².

In the case of an eating area³, the indication must be given at or near the entrance to the eating area so that an intending purchaser can see it before entering that area or, in the case of an eating area in a railway carriage where an intending purchaser requests the supply of food at the place at which it is to be consumed, at that place⁴.

In the case of a supply area⁵, the indication must be given at the place where an intending purchaser chooses the food⁶ and, if that indication cannot be seen by an intending purchaser before entering the supply area, a further indication must be given at or near the entrance to the supply area⁷.

In the case of a take-away area⁸, the indication must be given at the place where an intending purchaser chooses the food⁹.

Any additional charge or minimum charge payable must be indicated at least as prominently as the price of any food to which it relates¹⁰. An indication of price or charge must be in sterling¹¹. If a person indicates his willingness to accept foreign currency in payment for the sale of food, he must, in addition to the price indication in sterling:

- 1478 (1) either give an indication of the price of that food in the foreign currency in question together with any commission to be charged or clearly identify the conversion rate on the basis of which the foreign currency price will be calculated together with any commission to be charged; and
- 1479 (2) indicate that such price or conversion rate does not apply to transactions via a payment card to be applied to accounts denominated in currencies other than sterling, the conversion rate for which will be that applied by the relevant payment scheme which processes the transaction¹².

1 Ie by the Price Marking (Food and Drink Services) Order 2003, SI 2003/2253: see PARA 689 et seq ante.

2 Ibid art 7(1). As to the application of these provisions see PARA 689 ante. Nothing in art 7 requires anything to be done if it would be a contravention by any person of a regulation made under, or having effect as if made under, the Town and Country Planning Act 1990 ss 220, 221 (as amended) (advertisement regulations: see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARAS 769, 771) or s 224 (as amended) (enforcement of controls over advertisements: see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 829 et seq): Price Marking (Food and Drink Services) Order 2003, SI 2003/2253, art 8.

- 3 For the meaning of 'eating area' see PARA 689 note 2 ante.
- 4 Price Marking (Food and Drink Services) Order 2003, SI 2003/2253, art 7(2).
- 5 For the meaning of 'supply area' see PARA 689 note 2 ante.
- 6 For the meaning of 'food' see PARA 689 note 2 ante.
- 7 Price Marking (Food and Drink Services) Order 2003, SI 2003/2253, art 7(3).
- 8 For the meaning of 'take-away area' see PARA 689 note 4 ante.
- 9 Price Marking (Food and Drink Services) Order 2003, SI 2003/2253, art 7(4).
- 10 Ibid art 7(5).
- 11 Ibid art 7(6).
- 12 Ibid art 7(7).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/B. PRICE MARKING/(D) Tourists' Sleeping Accommodation/693. Notification of prices of accommodation.

(D) TOURISTS' SLEEPING ACCOMMODATION

693. Notification of prices of accommodation.

Her Majesty may by Order in Council applying to, or to any class of, hotels and other establishments in Great Britain at which sleeping accommodation is provided by way of trade or business, make provision for requiring the display at the establishments of information with respect to the prices charged there for such accommodation or otherwise for securing that such information is brought to the notice of persons seeking to avail themselves of the accommodation¹.

¹ Development of Tourism Act 1969 s 18. As to the order that has been made see the Tourism (Sleeping Accommodation Price Display) Order 1977, SI 1977/1877; and PARAS 694-696 post). The order came into force on 1 February 1978: art 1(1).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

693-696 Tourists' Sleeping Accommodation

SI 1977/1877 revoked: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/B. PRICE MARKING/(D) Tourists' Sleeping Accommodation/694. Sleeping accommodation.

694. Sleeping accommodation.

At each hotel¹ there must be displayed in a prominent position in the reception area or, if none, at the entrance, where it can easily be read by a person seeking to engage sleeping accommodation at the hotel, a legible notice stating the current prices (which, wherever appropriate, must include, and be stated to include, any service charge) payable per night by any such person for sleeping accommodation at the hotel consisting of:

- 1480 (1) a bedroom for occupation by one adult person;
- 1481 (2) a bedroom for occupation by two adult persons; and
- 1482 (3) a bed, other than as in heads (1) and (2) above, for occupation by an adult person and stating also whether it is situated in a dormitory or room to be shared with other guests².

Where VAT is payable, then either the price must include and be stated to include the amount of tax or the price must be stated to exclude the amount of tax and that amount must be stated with equal prominence in money terms as the amount of tax payable in addition to the price³.

If the accommodation is only provided inclusive of meals, the price of the accommodation must be stated to be inclusive thereof and the meals so provided must be suitably identified⁴.

If the prices in respect of each of the above categories of sleeping accommodation are not standard throughout the hotel, it is sufficient to state the lowest and highest current price for accommodation of each category, disregarding any bedroom or bed which is normally in the same occupation for more than 21 consecutive nights⁵.

Additional information may be included in the notice, provided that it does not detract from the prominence to be given to the above information⁶.

If any person who provides sleeping accommodation in a hotel fails to display a notice which complies with the above requirements, he is guilty of an offence and liable on summary conviction to a penalty, unless he proves that he had reasonable excuse for the failure⁷.

1 For the meaning of 'hotel' see PARA 695 post.

2 Tourism (Sleeping Accommodation Price Display) Order 1977, SI 1977/1877, art 3(1).

3 Ibid art 3(2).

4 Ibid art 3(3).

5 Ibid art 3(4).

6 Ibid art 3(5).

7 Ibid art 4. The penalty is a fine not exceeding £200: see art 4. Where an offence under the Tourism (Sleeping Accommodation Price Display) Order 1977, SI 1977/1877, committed by a body corporate is committed with the consent or connivance of, or is attributable to any neglect on the part of, any director,

manager, secretary or other similar officer of the body corporate, or any other person who was purporting to act in any such capacity, he, as well as the body corporate, is also guilty of an offence: art 6(1). As to the meaning of 'manager' see PARA 500 note 3 ante. Where the affairs of a body corporate are managed by its members, art 6(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: art 6(2). As to enforcement see PARA 696 post.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

693-696 Tourists' Sleeping Accommodation

SI 1977/1877 revoked: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/B. PRICE MARKING/(D) Tourists' Sleeping Accommodation/695. Meaning of 'hotel'.

695. Meaning of 'hotel'.

'Hotel' means¹ any establishment in Great Britain at which sleeping accommodation is provided by way of trade or business:

1483 (1) which for the purposes of letting has not fewer than four bedrooms or eight beds, including beds situated in dormitories, excluding any which are normally in the same occupation for more than 21 consecutive nights; and

1484 (2) at which such accommodation is offered, whether for one night or for a longer period, to any person who wishes to avail himself thereof and appears able and willing to pay therefor and is in a fit state to be received,

but excluding any establishment which is a bona fide members' club and provides such accommodation as a benefit of membership and any establishment where accommodation is normally provided for a price which includes the provision of other services and those other services are not merely ancillary to the accommodation².

¹ ie for the purposes of the Tourism (Sleeping Accommodation Price Display) Order 1977, SI 1977/1877.

² Ibid art 2. Regulations may be made to exclude any class of establishment from this definition, and to make consequential amendments to the Tourism (Sleeping Accommodation Price Display) Order 1977, SI 1977/1877: art 7. At the date at which this volume states the law no such regulations had been made.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

693-696 Tourists' Sleeping Accommodation

SI 1977/1877 revoked: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/B. PRICE MARKING/(D) Tourists' Sleeping Accommodation/696. Enforcement provisions.

696. Enforcement provisions.

A duly authorised officer of a local weights and measures authority¹ may, at all reasonable hours and on production, if required, of his credentials, enter and inspect any establishment within the area of that authority at which sleeping accommodation is provided by way of trade or business for the purpose of determining whether the statutory requirements relating to the price display in respect of sleeping accommodation² are being complied with; and where a local weights and measures authority has made arrangements for the discharge of any of its functions as such by another local authority, the power so conferred is also exercisable by a duly authorised officer of that other local authority³.

Any person who wilfully obstructs any person in the exercise of such a right of entry and inspection is guilty of an offence⁴.

1 As to local weights and measures authorities see PARA 398 ante.

2 I.e. the Tourism (Sleeping Accommodation Price Display) Order 1977, SI 1977/1877: see PARAS 694-695 ante.

3 Ibid art 5(1).

4 Ibid art 5(2). A person guilty of such an offence is liable on summary conviction to a fine not exceeding £100: see art 5(2). As to offences by bodies corporate see PARA 694 note 7 ante.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

693-696 Tourists' Sleeping Accommodation

SI 1977/1877 revoked: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/B. PRICE MARKING/(E) Resale of Tickets/697. Resale of tickets.

(E) RESALE OF TICKETS

697. Resale of tickets.

When any person, other than the holder or promoter of the entertainment¹ to which the ticket² relates or a person acting on behalf of such holder or promoter who is prepared or may be prepared to supply a ticket by way of resale, gives to consumers in the course of business an

indication of the price at which a ticket, or a ticket in combination with another element, is or will be available ('a price indication'), the following information must be given to consumers:

- 1485 (1) the price, if any, and any other detail which appears on the ticket which relates to, or affects the rights conferred or to be conferred on the holder of, the ticket, including the location of any seat or space, which has been caused to be placed on it by the holder or promoter of the entertainment to which the ticket relates; and
- 1486 (2) the location of the seat or space, if any, which the holder of the ticket will have the right to use and any features of such seat or space which would adversely affect the holder's use or enjoyment of it and which are known, or could reasonably be expected to be known, to the person giving the price indication³.

Any information which is so given must be accurate⁴. The information required to be so given:

- 1487 (a) must be given before the person who gives a price indication enters into any contract with a consumer under which the ticket is to be supplied⁵, and, except in cases where the contract to supply the ticket is concluded by telephone, the information required to be given by head (1) above must be given in writing⁶;
- 1488 (b) need not be given in the same manner as the price indication but, if the information is given orally, it must be given audibly and in a manner that is comprehensible to the consumer and, if it is given in writing, must be given clearly, prominently and legibly; and, in any case, the information must be given in such a way that it comes to the attention of the consumer before he enters into any contract under which the ticket is to be supplied to him⁷.

If a person contravenes the above requirements, he is guilty of an offence⁸.

1 For these purposes, 'entertainment' includes any gathering, amusement, exhibition, performance, game, sport or trial of skill or other similar event: Price Indications (Resale of Tickets) Regulations 1994, SI 1994/3248, reg 2.

2 For these purposes, 'ticket' means a card, badge or document which gives its holder:

32 (1) the right of admission to a place of entertainment; or

33 (2) the right of admission to a place of entertainment and the right to use a seat or space in such a place,

and the fact that those rights are subject to the condition that the holder may be refused admission to, or may be removed from, the place of entertainment does not cause it to be treated as other than a ticket: *ibid* reg 2.

3 *Ibid* regs 3(1), (2), 4. The Price Indications (Resale of Tickets) Regulations 1994, SI 1994/3248, do not apply where a person gives a price indication in relation to a package to which the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) apply (see PARA 817 et seq post): Price Indications (Resale of Tickets) Regulations 1994, SI 1994/3248, reg 3(3).

4 *Ibid* reg 7.

5 *Ibid* reg 5(1).

6 *Ibid* reg 5(2). The requirement of reg 5(2) is deemed to be satisfied if the consumer is shown the ticket in accordance with reg 5(1) (see the text and note 5 *supra*) and in such a manner that the details appearing on the ticket are visible by and legible to the consumer: reg 5(3).

7 *Ibid* reg 6.

8 *Ibid* reg 8(1). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see reg 8(1). As to the statutory maximum

see PARA 401 note 31 ante. In relation to an offence under reg 8: (1) the Consumer Protection Act 1987 s 24(2) (defence that indication was not contained in an advertisement: see PARA 705 post) applies as it applies to an offence under s 20(1) or (2) (see PARA 702 post); (2) s 39 (defence of due diligence: see PARA 706 post) applies as it applies to an offence mentioned in s 39(5); (3) s 40(1) (liability of persons other than the principal offender: see PARA 707 post) applies as it applies to an offence mentioned in s 39(5); and (4) the provisions of s 40(2), (3) (see PARA 707 post) apply as they apply to an offence under the Consumer Protection Act 1987: Price Indications (Resale of Tickets) Regulations 1994, SI 1994/3248, reg 8(2), (3).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/C. PRICE RANGE NOTICES/698. Price range notices.

C. PRICE RANGE NOTICES

698. Price range notices.

The Secretary of State had power by order to make provision for requiring persons selling by retail either food¹ or any other articles which appeared to the Secretary of State to be necessities normally the subject of recurrent expenditure by, and significantly affecting the cost of living for, persons with small incomes to display such information as might be specified in the order with respect to the range of prices within which it appeared to the Secretary of State that such goods were being commonly sold by retail in the United Kingdom, or in a particular part of it, at a particular date or during a particular period². Such an order could³:

- 1489 (1) make provision as to the place and manner in which any information was to be displayed; and
- 1490 (2) make different provision in relation to different circumstances and contain such supplementary provisions as the Secretary of State thought necessary or expedient⁴.

Any person who contravened such an order was guilty of an offence⁵.

1 For these purposes, 'food' means food and drink for human consumption: Prices Act 1974 s 9(2).

2 Ibid ss 2(3), 5(1), (2) (ss 2, 5 repealed by the Statute Law (Repeals) Act 2004). At the date at which this volume states the law no such order had been made. The power to make such an order is exercisable by statutory instrument and includes power to vary or revoke a previous order; and a statutory instrument containing such an order is subject to annulment in pursuance of a resolution of either House of Parliament: Prices Act 1974 s 5(5) (repealed). As to the Secretary of State see PARA 15 ante.

3 Ie without prejudice to the generality of ibid s 5(1) (repealed): see the text and notes 1-2 supra.

4 Ibid s 5(3) (repealed: see note 2 supra).

5 Ibid s 7, Schedule para 5(1) (amended by virtue of the Magistrates' Courts Act 1980 s 32(2)). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the prescribed sum: see the Prices Act 1974 s 7, Schedule para 5(1) (as so amended). As to the prescribed sum see PARA 498 note 2 ante. As to offences by bodies corporate see PARA 700 post. As to enforcement see PARA 699 post.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/D. ENFORCEMENT OF PRICE MARKING AND PRICE RANGE ORDERS/699. In general.

D. ENFORCEMENT OF PRICE MARKING AND PRICE RANGE ORDERS

699. In general.

It is the duty of each local weights and measures authority¹ to enforce within its area any price marking² or price range³ order⁴. A local weights and measures authority may make, or may authorise any of its officers to make, any purchases of goods and any contracts for services for the purpose of determining whether any such order is being complied with⁵.

Proceedings for an offence relating to a price marking or price range order may not be instituted except by or on behalf of a local weights and measures authority⁶; and such proceedings may not be instituted:

- 1491 (1) unless there has been served on the person charged a notice in writing⁷ of the date and nature of the offence alleged, being (except where he is a street trader) a notice served before the expiration of the period of 30 days beginning with that date; or
- 1492 (2) after the expiration of the period of three months beginning with that date⁸.

A duly authorised officer of a local weights and measures authority may, at all reasonable hours and on production, if required, of his credentials, exercise any of the following powers, that is to say:

- 1493 (a) a power to seize and detain any document or goods which the officer has reason to believe may be required as evidence in proceedings for such an offence; and
- 1494 (b) a power to seize and detain any goods if the officer has reason to believe that their examination is likely to produce evidence of the commission of any such offence,

for the purpose of determining whether such an offence has been committed⁹.

Any person who wilfully obstructs an officer acting in pursuance of such powers, or wilfully fails to comply with a requirement so imposed on him, or without reasonable cause fails to give to any officer acting under such powers any other assistance or information which the officer may reasonably require for the performance by the officer of his functions, is guilty of an offence¹⁰.

Any person who, with intent to deceive, produces or gives, in compliance with these provisions¹¹, a document or information which to his knowledge is or may be misleading, or false or deceptive in a material particular is guilty of an offence¹².

Nothing in these provisions¹³ is to be construed as requiring a person to answer any question or give any information if to do so might incriminate him or as authorising the taking of possession of any document containing a privileged communication made by or to him which is in the possession of a barrister, advocate or solicitor¹⁴.

- 1 As to local weights and measures authorities see PARA 398 ante.
- 2 Ie an order under the Prices Act 1974 s 4 (as amended): see PARA 681 ante.
- 3 Ie an order under ibid s 5 (repealed): see PARA 698 ante.
- 4 Ibid s 7, Schedule para 6.
- 5 Ibid Schedule para 7.
- 6 Ibid Schedule para 8(1).
- 7 Such a notice may be served on any person either by serving it on him personally or by sending it to him by post at his usual or last known residence or place of business in the United Kingdom or, in the case of a company, at the company's registered office: ibid Schedule para 8(3).
- 8 Ibid Schedule para 8(2).
- 9 Ibid Schedule para 9(1), (2). As to the restriction on the disclosure of information see PARA 401 ante. Where a local weights and measures authority has made arrangements for the discharge of any of its functions as such by another local authority, the powers conferred by Schedule para 9 (as amended) are also exercisable by a duly authorised officer of that other local authority: Schedule para 10. Offences under Schedule para 9 (as amended) are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.
- 10 Prices Act 1974 Schedule para 9(3) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). A person who is guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see the Prices Act 1974 Schedule para 9(3) (as so amended). As to the standard scale see PARA 498 note 3 ante.
- 11 Ie in compliance with a requirement under ibid Schedule para 9(1)-(3) (as amended): see the text and notes 9-10 supra.
- 12 Ibid Schedule para 9(4) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see the Prices Act 1974 Schedule para 9(4) (as so amended).
- 13 Ie ibid Schedule para 9 (as amended): see the text and notes 9-12 supra.
- 14 Ibid Schedule paras 3(5), 9(5).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/D. ENFORCEMENT OF PRICE MARKING AND PRICE RANGE ORDERS/700. Offences by bodies corporate.

700. Offences by bodies corporate.

Where an offence relating to price marking or price range notices¹ committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager², secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of the offence and is liable to be proceeded against and punished accordingly³.

1 le an offence under the Prices Act 1974 s 7, Schedule (as amended): see PARAS 698-699 ante.

2 As to the meaning of 'manager' see PARA 500 note 3 ante.

3 Prices Act 1974 Schedule para 13. Offences under Schedule para 13 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/E. PRICE DISCRIMINATION/701. Foreign package holidays.

E. PRICE DISCRIMINATION

701. Foreign package holidays.

It is unlawful:

- 1495 (1) for a travel agent¹ or a tour operator² (where the tour operator and travel agent are interconnected bodies corporate and when the tour operator is supplying or offering to supply foreign package holidays³ directly to the public or any class of persons) to discriminate either in respect of the price charged for a foreign package holiday or by requiring payment of an additional charge against a person who does not acquire travel insurance⁴ in respect of that holiday from that travel agent or, as the case may be, tour operator⁵;
- 1496 (2) for a tour operator to make or carry out an agreement (whenever made) with a travel agent which obliges the travel agent to comply with a most favoured customer requirement⁶ except in circumstances where the tour operator is required to compensate the travel agent for the value of the inducements⁷ required to be offered by the travel agent as a result of a most favoured customer requirement⁸;
- 1497 (3) for a tour operator to withhold or threaten to withhold supplies of foreign package holidays from, or to discriminate in respect of the supply of foreign package holidays to, a travel agent as a result of the failure of the travel agent to enter into or comply with an agreement which is or would be unlawful under head (2) above⁹.

1 For these purposes, 'travel agent' means a person who supplies or offers for supply a foreign package holiday (see note 3 infra) organised by a tour operator (see note 2 infra): Foreign Package Holidays (Tour Operators and Travel Agents) Order 2001, SI 2001/2581, art 1(2).

2 For these purposes, 'tour operator' means a person who, otherwise than occasionally, organises foreign package holidays and supplies or offers them for supply, whether directly or through a travel agent: *ibid* art 1(2).

3 For these purposes, 'foreign package holiday' means services, accommodation and facilities provided under a contract, made within the United Kingdom, by a tour operator for a holiday outside the United Kingdom, provided transport to or from the United Kingdom and accommodation outside the United Kingdom (whether or not for the duration of the holiday) are included: *ibid* art 1(2). 'Accommodation' means the provision of place to sleep, including the provision of a site for the erection of a tent or a parking place for a caravan, mobile home or other similar vehicle, but does not include the provision of sleeping accommodation in a means of transport unless that accommodation represents a substantial proportion of the accommodation for the holiday: art 1(2).

4 For these purposes, 'travel insurance' means any policy of insurance against the risks to any person arising during or in connection with a foreign package holiday: *ibid* art 1(2).

5 *Ibid* art 2.

6 For these purposes, 'most favoured customer requirement' means a requirement contained within an agreement between a travel agent and tour operator which obliges the travel agent, when supplying or offering to supply foreign package holidays of that operator, to offer inducements at least equal in value to or marginally less in value than the inducements which the travel agent applies when supplying or offering to supply the foreign package holidays of another tour operator: *ibid* art 1(2).

7 For these purposes, 'inducement' means a benefit, whether pecuniary or not, offered by a travel agent as an incentive to acquire a foreign package holiday through him: *ibid* art 1(2).

8 *Ibid* art 3.

9 *Ibid* art 4.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/F. MISLEADING PRICE INDICATIONS/(A) In general/702. Offence of giving misleading price indication.

F. MISLEADING PRICE INDICATIONS

(A) IN GENERAL

702. Offence of giving misleading price indication.

If, in the course of any business of his¹, a person gives, by any means whatever, to any consumers² an indication which is misleading³ as to the price⁴ at which any goods, services, accommodation or facilities⁵ are available, whether generally or to particular persons, he is guilty⁶ of an offence⁷.

Further, if a person:

- 1498 (1) in the course of any business of his, has given an indication to any consumers which, after it was given, has become misleading⁸; and
 1499 (2) some or all of those consumers might reasonably be expected to rely on the indication at a time after it has become misleading; and
 1500 (3) he fails to take all such steps as are reasonable to prevent those consumers from relying on the indication,

he is guilty⁹ of an offence¹⁰.

For these purposes, it is immaterial:

- 1501 (a) whether the person who gives or gave the indication is or was acting on his own behalf or on behalf of another;
 1502 (b) whether or not that person is the person, or included among the persons, from whom the goods, services, accommodation or facilities are available; and
 1503 (c) whether the indication is or has become misleading in relation to all the consumers to whom it is or was given or only in relation to some of them¹¹.

No prosecution for an offence under these provisions may be brought after whichever is the earlier of:

- 1504 (i) the end of the period of three years beginning with the day on which the offence was committed; and
 1505 (ii) the end of the period of one year beginning with the day on which the person bringing the prosecution discovered that the offence had been committed¹².

1 'In the course of any business of his' means any business of which an accused is either the owner or in which he has a controlling interest: *R v Warwickshire County Council, ex p Johnson* [1993] AC 583, sub nom *Warwickshire County Council v Johnson* [1993] 1 All ER 299, HL (manager of shop being an employee only held not to be liable).

2 For these purposes, 'consumer': (1) in relation to any goods, means any person who might wish to be supplied with the goods for his own private use or consumption; (2) in relation to any services or facilities, means any person who might wish to be provided with the services or facilities otherwise than for the purposes of any business of his; and (3) in relation to any accommodation, means any person who might wish to occupy the accommodation otherwise than for the purposes of any business of his: Consumer Protection Act 1987 s 20(6). For the meaning of 'goods' see PARA 521 note 3 ante; for the meaning of 'supply' see PARA 523 ante; and for the meaning of 'business' see PARA 521 note 5 ante. Nothing in the definition of 'consumer' precludes a test purchase by an officer of an enforcing authority: *Toys 'R' Us v Gloucestershire CC* (1994) 158 JP 338, DC.

3 For meaning of 'misleading' see PARA 703 post.

4 For these purposes, 'price', in relation to any goods, services, accommodation or facilities, means: (1) the aggregate of the sums required to be paid by a consumer for or otherwise in respect of the goods or the provision of the services, accommodation or facilities; or (2) except in the Consumer Protection Act 1987 s 21 (meaning of 'misleading': see PARA 703 post), any method which will be or has been applied for the purpose of determining that aggregate: s 20(6). A statement of an annual percentage rate is an indication as to price for the purposes of the offence of giving a misleading indication under the Consumer Protection Act 1987 s 20 (as amended): *R v Kettering Magistrates' Court, ex p MRB Insurance Brokers Ltd* [2000] 2 All ER (Comm) 353, DC.

5 For meaning of references to services or facilities and accommodation or facilities see PARA 704 post.

6 Ie subject to the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended).

7 Ibid s 20(1), (4). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 20(1), (4). As to the statutory maximum see PARA 401 note 31 ante. As to general defences see PARA 705 post; and as to the defence of due diligence in respect of an offence under s 20(1) see PARA 706 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 707 post.

See *R v Warwickshire County Council, ex p Johnson* [1993] AC 583, sub nom *Warwickshire County Council v Johnson* [1993] 1 All ER 299, HL (notice stating that retailer would 'beat any TV, hi-fi and video price by £20 on the spot'; notice was a continuing offer and whether it was misleading or not could only be tested by somebody taking up the offer; since the terms of the notice were not honoured, the notice was held to be misleading); applied in *DSG Retail Ltd v Oxfordshire County Council* [2001] EWHC Admin 253 (Admin), [2001] 1 WLR 1765, [2001] LGR 301, DC. See also *Berkshire County Council v Olympic Holidays Ltd* (1993) 158 JP 421, DC (discrepancy between price of holiday displayed on travel agent's computer screen and price in holiday brochure which contained statement that price stated therein should prevail; defence of due diligence established); *Toys 'R' Us v Gloucestershire County Council* (1994) 158 JP 338, DC (stickers attached to goods indicating prices which were lower than those appearing on the till display when customers paid for them held to be misleading); *AG Stanley Ltd (t/a Fads) v Surrey County Council* (1994) 159 JP 691, DC (statements that goods available at reduced price held to be misleading); *MFI Furniture Centre Ltd v Hibbert* (1995) 160 JP 178, DC (it does not have to be proved that a particular misleading description has been given to a particular customer who might wish to be supplied with the relevant goods for his own private use or consumption); *MGN Ltd v Northampton County Council* (1997) 161 JP 735, DC (advertisement of 'a £50 watch for just £4.99'; watches not available until a fortnight later; price comparison not valid as there was a misleading impression that watches were available at date of advertisement); *Surrey County Council v Burton Retail Ltd* (1997) 162 JP 545, DC (misleading prices of goods fixed on price tickets by concessionaires; concession area in store held to be a joint business venture; company granting the concession, therefore, held liable for displaying misleading price indications even though it had not fixed the misleading prices and was not in a position to ensure that the prices were accurate); *Thomson Tour Operations Ltd v Birch* (1999) 163 JP 465, DC (cited in PARA 703 note 7 post).

The Consumer Protection Act 1987 s 20(1) and s 20(2) do not apply in relation to an indication given: (1) in a catalogue or work of reference of which copies are first made available for publication in the ordinary course of business before 1 June 1989; (2) in a periodical published before that date, being a periodical ordinarily published at regular intervals of more than seven days; (3) in a direct mail advertisement, circular or price list first issued before that date; (4) in a cinematograph film or programme included in a cable programme service first exhibited before that date or in a radio or a television broadcast first broadcast before that date: Consumer Protection Act 1987 (Commencement No 3) Order 1988, SI 1988/2076, art 3.

As to codes of practice see PARA 709 post; as to the power to make regulations to facilitate the enforcement of the Consumer Protection Act 1987 s 20 (as amended) see PARA 708 post; and as to enforcement generally see PARA 710 et seq post.

A person is not guilty of an offence under the Consumer Protection Act 1987 s 20(1) or 20(2) if, in giving the misleading indication which would otherwise constitute an offence under either of those provisions, he is guilty of an offence under the Financial Services and Markets Act 2000 s 397 (misleading statements and practices: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 568): Consumer Protection Act 1987 s 20(5A) (added by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649).

8 A notice which sets out the price at which goods or services are available without being misleading on its face becomes misleading on a consumer's being refused the goods or services on the terms set out in the notice: *R v Warwickshire County Council, ex p Johnson* [1993] AC 583, sub nom *Warwickshire County Council v Johnson* [1993] 1 All ER 299, HL.

9 See note 6 supra.

10 Consumer Protection Act 1987 s 20(2), (4). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 20(2), (4). See also note 7 supra; and *AG Stanley Ltd (t/a Fads) v Surrey County Council* (1994) 159 JP 691, DC. The Consumer Protection Act 1987 s 20(2)(a) (see head (1) in the text) focuses on a price indication which, although not misleading when it is first given, becomes misleading by the time a consumer seeks to enter into a contract with the advertiser: *Link Stores Ltd v Harrow London Borough Council* [2001] 1 WLR 1479, DC.

11 Consumer Protection Act 1987 s 20(3).

12 Ibid s 20(5).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

702-705 Offence of giving misleading price indication ... General defence

Repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/F. MISLEADING PRICE INDICATIONS/(A) In general/703. Meaning of 'misleading'.

703. Meaning of 'misleading'.

An indication given to any consumers¹ is misleading² as to a price³ if what is conveyed by the indication, or what those consumers might reasonably be expected to infer from the indication or from any omission from it, includes any of the following:

- 1506 (1) that the price is less than in fact it is⁴;
- 1507 (2) that the applicability of the price does not depend on facts or circumstances on which its applicability does in fact depend⁵;
- 1508 (3) that the price covers matters in respect of which an additional charge is in fact made⁶;
- 1509 (4) that a person who in fact has no such expectation:
- 135 202. (a) expects the price to be increased or reduced, whether or not at a particular time or by a particular amount; or
- 203. (b) expects the price, or the price as increased or reduced, to be maintained, whether or not for a particular period⁷; or
- 136 1510 (5) that the facts or circumstances by reference to which the consumers might reasonably be expected to judge the validity of any relevant comparison⁸ made or implied by the indication are not what in fact they are⁹.

An indication given to any consumers is misleading¹⁰ as to a method of determining a price if what is conveyed by the indication, or what those consumers might reasonably be expected to infer from the indication or any omission from it, includes any of the following:

- 1511 (i) that the method is not what in fact it is¹¹;
- 1512 (ii) that the applicability of the method does not depend on facts or circumstances on which its applicability does in fact depend¹²;
- 1513 (iii) that the method takes into account matters of which an additional charge will in fact be made¹³;
- 1514 (iv) that a person who in fact has no such expectation expects the method to be altered, whether or not at a particular time or in a particular respect, or expects the method, or that method as altered, to remain unaltered, whether or not for a particular period¹⁴; or
- 1515 (v) that the facts or circumstances by reference to which the consumers might reasonably be expected to judge the validity of any relevant comparison¹⁴ made or implied by the indication are not what in fact they are¹⁵.

1 For the meaning of 'consumer' see PARA 702 note 2 ante.

2 Ie for the purposes of the Consumer Protection Act 1987 s 20: see PARA 702 ante.

3 For meaning of 'price' see PARA 702 note 4 ante.

4 Consumer Protection Act 1987 s 21(1)(a).

5 Ibid s 21(1)(b).

6 Ibid s 21(1)(c).

7 Ibid s 21(1)(d). See *Thomson Tour Operations Ltd v Birch* (1999) 163 JP 465, DC (tour operator's holiday brochure contained a statement that, if the total price of a holiday were reduced after it had been booked by a customer, that customer would be charged the lower price; a customer who booked and paid in full for a holiday had a friend who later booked the same holiday, but at a 10% discount; upon request from the customer, the sales manager of the tour operator refused to match the discount but the tour operator's head office later refunded an amount equivalent to the discount in question; as the Consumer Protection Act 1987 s 20(1) (see PARA 702 ante) is expressed in the present and not the future tense, only those indications of price which were misleading at the time they were made give rise to criminal liability, and not price indications which only later become misleading; thus, in order to secure a conviction under s 20(1), it was necessary for the prosecution to establish that the tour operator had indicated to the customer that it expected a reduction in price when it did not in fact have such an expectation, the statement in the brochure merely referring to the possibility of a decrease in the holiday price after it had been booked but not indicating an expectation on the tour operator's behalf that the holiday price would be reduced).

8 For these purposes, and for the purposes of the Consumer Protection Act 1987 s 21(2)(e) (see head (v) in the text), a comparison is a relevant comparison in relation to a price or method of determining a price if it is made between that price or that method, or any price which has been or may be determined by that method, and: (1) any price or value which is stated or implied to be, to have been or to be likely to be attributed or attributable to the goods, services, accommodation or facilities in question or to any other goods, services, accommodation or facilities; or (2) any method, or other method, which is stated or implied to be, to have been or to be likely to be applied or applicable for the determination of the price or value of the goods, services, accommodation or facilities in question or of the price or value of any other goods, services, accommodation or facilities: s 21(3). For the meaning of 'goods' see PARA 521 note 3 ante; and for the meaning of references to services and facilities and accommodation or facilities see PARA 704 post.

9 Ibid s 21(1)(e). A statement that is not misleading on its face can be rendered misleading if on one occasion the person making it declines to enter into a contract within its terms: *R v Warwickshire County Council, ex p Johnson* [1993] AC 583, sub nom *Warwickshire County Council v Johnson* [1993] 1 All ER 299, HL; applied in *DSG Retail Ltd v Oxfordshire County Council* [2001] EWHC Admin 253, [2001] 1 WLR 1765, [2001] LGR 301, DC. See also *MGN Ltd v Northampton County Council* (1997) 161 JP 735, DC (advertisement of 'a £50 watch for just £4.99'; watches not available until a fortnight later; price comparison not valid as there was a misleading impression that watches were available at date of advertisement); *Suffolk County Council v Hilary's Blinds Ltd* [2002] EWHC 87 (Admin), [2002] All ER (D) 194 (Jan) (advertisement '2 for 1 special price', but no comparison made to a non-special price; prosecution failed).

10 Consumer Protection Act 1987 s 21(2)(a).

11 Ibid s 21(2)(b).

12 Ibid s 21(2)(c).

13 Ibid s 21(2)(d).

14 See note 8 supra.

15 Consumer Protection Act 1987 s 21(2)(e).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

702-705 Offence of giving misleading price indication ... General defence

Repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/F. MISLEADING PRICE INDICATIONS/(A) In general/704. Services, facilities and accommodation.

704. Services, facilities and accommodation.

For the purposes of the prohibition on giving misleading price indications¹, references to services² or facilities are references to any services or facilities whatever including, in particular:

- 1516 (1) the provision of credit³ or of banking or insurance services and the provision of facilities incidental to the provision of such services⁴;
- 1517 (2) the purchase or sale of foreign currency⁵;
- 1518 (3) the supply of electricity⁶;
- 1519 (4) the provision of a place, other than on a highway, for the parking of a motor vehicle⁷;
- 1520 (5) the making of arrangements for a person to put or keep a caravan⁸ on any land other than arrangements by virtue of which that person may occupy the caravan as his only or main residence⁹.

For the purposes of the prohibition on giving misleading price indications¹⁰, references to accommodation or facilities being available do not include references to accommodation or facilities being available to be provided by means of the creation or disposal of an interest in land except where:

- 1521 (a) the person who is to create or dispose of the interest will do so in the course of any business¹¹ of his¹²; and
- 1522 (b) the interest to be created or disposed of is a relevant interest¹³ in a new dwelling¹⁴ and is to be created or disposed of for the purpose of enabling that dwelling to be occupied as a residence, or one of the residences, of the person acquiring the interest¹⁵.

This does not prevent the application of any relevant provision¹⁶ in relation to the supply of any goods¹⁷ as part of the same transaction as any creation or disposal of an interest in land or the provision of any services or facilities for the purposes of, or in connection with, any transaction for the creation or disposal of such an interest¹⁸.

1 Ie in the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended).

2 References in *ibid* Pt III (ss 20-26) (as amended) to services do not include references to services provided to an employer under a contract of employment: s 22(2). For these purposes, 'employer' and 'contract of employment' have the same meanings as in the Employment Rights Act 1996 (see EMPLOYMENT vol 39 (2009) PARA 2): Consumer Protection Act 1987 s 22(5) (amended by the Employment Rights Act 1996 s 240, Sch 1 para 34).

3 For these purposes, 'credit' has the same meaning as in the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 83): Consumer Protection Act 1987 s 22(5).

4 *Ibid* s 22(1)(a).

5 Ibid s 22(1)(b). In relation to a service consisting in the purchase or sale of foreign currency, references in Pt III (as amended) to the method by which the price of the service is determined include references to the rate of exchange: s 22(4).

6 Ibid s 22(1)(c). As to the supply of electricity see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1033 et seq.

7 Ibid s 22(1)(d). For the meaning of 'motor vehicle' see PARA 523 note 25 ante.

8 For these purposes, 'caravan' has the same meaning as in the Caravan Sites and Control of Development Act 1960 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1033): Consumer Protection Act 1987 s 22(5).

9 Ibid s 22(1)(e).

10 See note 1 supra.

11 For the meaning of 'business' see PARA 521 note 5 ante.

12 Consumer Protection Act 1987 s 23(1)(a).

13 For these purposes, 'relevant interest', in relation to a new dwelling in England and Wales, means the freehold estate in the dwelling or a leasehold interest in the dwelling for a term of years absolute of more than 21 years, not being a term of which 21 years or less remains unexpired: ibid s 23(3).

14 For these purposes, 'new dwelling' means any building or part of a building in Great Britain which:

34 (1) has been constructed or adapted to be occupied as a residence; and

35 (2) has not previously been so occupied or has been so occupied only with other premises or as more than one residence,

and includes any yard, garden, outhouses or appurtenances which belong to that building or part or are to be enjoyed with it: ibid s 23(3). For the meaning of 'premises' see PARA 557 note 7 ante.

15 Ibid s 23(1)(b).

16 Ibid s 23(2)(a).

17 For the meaning of 'goods' see PARA 521 note 3 ante.

18 Consumer Protection Act 1987 s 23(2)(b).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

702-705 Offence of giving misleading price indication ... General defence

Repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/F. MISLEADING PRICE INDICATIONS/(A) In general/705. General defences.

705. General defences.

In any proceedings against a person for an offence in respect of any price indication which is or becomes misleading¹ it is a defence for that person to show that his acts or omissions were authorised for these purposes by regulations made² by the Secretary of State³.

In proceedings against a person for an offence in respect of any price indication which is or becomes misleading⁴ and is published in a book, newspaper, magazine or film or in a programme included in a programme service⁵, it is a defence for that person to show that the indication was not contained in an advertisement⁶.

In proceedings against a person for an offence in respect of any price indication which is or becomes misleading⁷ and is published in an advertisement it is a defence for that person to show that:

- 1523 (1) he is a person who carries on a business⁸ of publishing or arranging for the publication of advertisements;
- 1524 (2) he received the advertisement for publication in the ordinary course of that business; and
- 1525 (3) at the time of publication he did not know and had no grounds for suspecting that the publication would involve the commission of the offence⁹.

In any proceedings against a person for an offence of giving a misleading price indication¹⁰, it is a defence for that person to show that:

- 1526 (a) the indication did not relate to the availability from him of any goods¹¹, services, accommodation or facilities¹²;
- 1527 (b) a price¹³ had been recommended to every person from whom the goods, services, accommodation or facilities were indicated as being available¹⁴;
- 1528 (c) the indication related to that price and was misleading as to that price only by reason of a failure by any person to follow the recommendation¹⁵; and
- 1529 (d) it was reasonable for the person who gave the indication to assume that the recommendation was for the most part being followed¹⁶.

1 Ie an offence under the Consumer Protection Act 1987 s 20(1) or (2): see PARA 702 ante. For the meaning of 'misleading' see PARA 703 ante.

2 Ie under *ibid* s 26 (as amended): see PARA 708 post.

3 *Ibid* s 24(1). The provisions of s 24 (as amended) are without prejudice to s 39 (defence of due diligence: see PARA 706 post): s 24(5). As to the Secretary of State see PARA 15 ante.

4 See note 1 *supra*.

5 Ie within the meaning of the Broadcasting Act 1990: see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328.

6 Consumer Protection Act 1987 s 24(2) (amended by the Broadcasting Act 1990 s 203(1), (3), Sch 20 para 48(a)). See note 3 *supra*. For these purposes, 'advertisement' includes a catalogue, a circular and a price list: Consumer Protection Act 1987 s 24(6).

7 See note 1 *supra*.

8 For the meaning of 'business' see PARA 521 note 5 ante.

9 Consumer Protection Act 1987 s 24(3). See note 3 *supra*.

10 Ie an offence under *ibid* s 20(1): see PARA 702 ante.

11 For the meaning of 'goods' see PARA 521 note 3 ante.

12 Consumer Protection Act 1987 s 24(4)(a). See note 3 supra. For the meaning of references to services or facilities and accommodation or facilities see PARA 704 ante.

13 For the meaning of 'price' see PARA 702 note 4 ante.

14 Consumer Protection Act 1987 s 24(4)(b). See note 3 supra.

15 Ibid s 24(4)(c). See note 3 supra.

16 Ibid s 24(4)(d). See note 3 supra.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

702-705 Offence of giving misleading price indication ... General defence

Repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/F. MISLEADING PRICE INDICATIONS/(A) In general/706. Defence of due diligence.

706. Defence of due diligence.

In proceedings against any person for an offence of giving a misleading price indication¹ it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence². Where in any proceedings against any person for such an offence the defence of due diligence involves an allegation that the commission of the offence was due to the act or default of another or to reliance on information³ given by another, that person is not, without the leave of the court, entitled to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice in writing giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time he serves it⁴.

A person is not entitled to rely on the defence of due diligence by reason of his reliance on information supplied by another, unless he shows that it was reasonable in all the circumstances for him to have relied on the information, having regard, in particular, to the steps which he took, and those which might reasonably have been taken, for the purpose of verifying the information and to whether he had any reason to disbelieve the information⁵.

1 ie an offence under the Consumer Protection Act 1987 s 20(1): see PARA 702 ante.

2 Ibid s 39(1), (5). As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 707 post. See also *Berkshire County Council v Olympic Holidays Ltd* (1993) 158 JP 421, DC (discrepancy between price of holiday displayed on travel agent's computer screen and price in holiday brochure which contained statement that price stated therein should prevail; defence of due diligence established); and the cases in PARA 537 note 2 ante.

3 For the meaning of 'information' see PARA 531 note 2 ante.

4 Consumer Protection Act 1987 ss 39(2), (3), 45(1). As to service of documents etc see PARA 531 ante.

5 Ibid s 39(4).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/F. MISLEADING PRICE INDICATIONS/(A) In general/707. Liability of persons other than the principal offender; offences by bodies corporate.

707. Liability of persons other than the principal offender; offences by bodies corporate.

Where the commission by any person of an offence of giving a misleading price indication¹ is due to the act or default committed by some other person in the course of any business² of his, the other person is guilty of the offence and may be proceeded against and punished, whether or not proceedings are taken against the first-mentioned person³.

Where a body corporate is guilty of an offence under the Consumer Protection Act 1987⁴ in respect of any act or default which is shown to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager⁵, secretary, or other similar officer of the body corporate, or of any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly⁶.

1 Ie an offence under the Consumer Protection Act 1987 s 20(1): see PARA 702 ante.

2 For the meaning of 'business' see PARA 521 note 5 ante.

3 Consumer Protection Act 1987 s 40(1).

4 Ie including where it is so guilty by virtue of ibid s 40(1): see the text and notes 1-3 supra.

5 As to the meaning of 'manager' see PARA 500 note 3 ante.

6 Consumer Protection Act 1987 s 40(2). Where the affairs of a body corporate are managed by its members, s 40(2) applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 40(3).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix)

Prices/F. MISLEADING PRICE INDICATIONS/(B) Power to make Regulations/708. Secretary of State's power to make regulations.

(B) POWER TO MAKE REGULATIONS

708. Secretary of State's power to make regulations.

After consulting the Office of Fair Trading¹ and such other persons as the Secretary of State considers it appropriate to consult, the Secretary of State may by regulations² make provision:

- 1530 (1) for the purpose of regulating the circumstances and manner in which any person gives any indication as to the price³ at which any goods⁴, services, accommodation or facilities⁵ will be or are available or have been supplied⁶ or provided or indicates any other matter in respect of which any such indication may be misleading⁷;
- 1531 (2) for the purpose of facilitating the enforcement of the statutory provisions relating to misleading price indications⁸ or of any regulations made under those provisions⁹.

The Secretary of State may not make regulations by virtue of head (1) above except in relation to:

- 1532 (a) indications given by persons in the course of business¹⁰; and
- 1533 (b) such indications given otherwise than in the course of business as are given by or on behalf of persons by whom accommodation is provided to others by means of leases¹¹ or licences and relate to goods, services or facilities supplied or provided to those others in connection with the provision of the accommodation¹².

The regulations may¹³:

- 1534 (i) prohibit an indication as to a price from referring to such matters as may be prescribed by the regulations;
- 1535 (ii) require an indication as to a price or other matter to be accompanied or supplemented by such explanation or such additional information¹⁴ as may be prescribed by the regulations;
- 1536 (iii) require information or explanations with respect to a price or other matter to be given to an officer¹⁵ of an enforcement authority¹⁶ and to authorise such an officer to require such information or explanations to be given;
- 1537 (iv) require any information or explanation provided for the purposes of any regulations made by virtue of head (ii) or head (iii) above to be accurate;
- 1538 (v) prohibit the inclusion in indications as to a price or other matter of statements that the indications are not to be relied on;
- 1539 (vi) provide that expressions used in any indication as to price or other matter are to be construed in a particular way¹⁷;
- 1540 (vii) provide that a contravention¹⁸ of any provision of the regulations is to constitute a criminal offence punishable on conviction on indictment by a fine or on summary conviction by a fine not exceeding the statutory maximum;
- 1541 (viii) apply any provision of the Consumer Protection Act 1987 which relates to a criminal offence to an offence created by virtue of head (vii) above¹⁹.

1 As to the Office of Fair Trading see PARA 407 ante.

2 The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and includes power: (1) to make different provision for different cases; and (2) to make such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: Consumer Protection Act 1987 s 26(4). In exercise of the power so conferred the Secretary of State has made the Price Indications (Method of Payment) Regulations 1991, SI 1991/199 (see PARA 719 et seq post); the Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737 (see PARA 756 et seq post); and the Price Indications (Resale of Tickets) Regulations 1994, SI 1994/3248 (see PARA 697 ante). As to the Secretary of State see PARA 15 ante.

3 For the meaning of 'price' see PARA 702 note 4 ante.

4 For the meaning of 'goods' see PARA 521 note 3 ante.

5 For the meaning of references to services or facilities and accommodation or facilities see PARA 704 ante.

6 For the meaning of 'supply' see PARA 523 ante.

7 Consumer Protection Act 1987 s 26(1)(a) (s 26(1) amended by the Enterprise Act 2002 s 278(1), Sch 25 para 16(1), (3)). For the meaning of 'misleading' see PARA 703 ante.

8 Ie the provisions of the Consumer Protection Act 1987 s 20 (as amended): see PARA 702 ante.

9 Ibid s 26(1)(b). As to enforcement generally see PARA 710 et seq ante.

10 Ibid s 26(2)(a). For the meaning of 'business' see PARA 521 note 5 ante.

11 For these purposes, 'lease' includes a sublease and an agreement for a lease and a statutory tenancy within the meaning of the Landlord and Tenant Act 1985 (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 52): Consumer Protection Act 1987 s 26(5).

12 Ibid s 26(2)(b).

13 Ie without prejudice to the generality of ibid s 26(1) (as amended) (see the text and notes 1-9 supra).

14 For the meaning of 'information' see PARA 531 note 2 ante.

15 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.

16 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

17 Ie for the purposes of the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended): see PARA 702 et seq ante.

18 For the meaning of 'contravention' see PARA 534 note 2 ante.

19 Consumer Protection Act 1987 s 26(3). As to the statutory maximum see PARA 401 note 31 ante. As to the confidentiality of information received in compliance with regulations made under s 26 see PARA 401 ante.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

708-709 Secretary of State's power to make regulations, In general

Repealed: SI 2008/1277.

(C) CODE OF PRACTICE

709. In general.

The Secretary of State may, after consulting the Office of Fair Trading¹ and such other persons as the Secretary of State considers it appropriate to consult, by order² approve any code of practice issued, whether by the Secretary of State or another person, for the purpose of:

- 1542 (1) giving practical guidance with respect to any of the statutory requirements relating to misleading price indications³; and
- 1543 (2) promoting what appear to the Secretary of State to be desirable practices as to the circumstances and manner in which any person gives an indication as to the price⁴ at which any goods⁵, services, accommodation or facilities⁶ are available or indicates any other matter in respect of which any such indication may be misleading⁷.

A contravention of a code of practice so approved does not of itself give rise to any criminal or civil liability, but in any proceedings against any person for a relevant offence⁸:

- 1544 (a) any contravention⁹ by that person of such a code may be relied on in relation to any matter for the purpose of establishing that that person committed the offence or of negating any defence¹⁰; and
- 1545 (b) compliance by that person with such a code may be relied on in relation to any matter for the purpose of showing that the commission of the offence by that person has not been established or that that person has a defence¹¹.

Where the Secretary of State approves a code of practice under these provisions, he may, after due consultation¹², at any time by order approve any modification¹³ of the code or withdraw his approval¹⁴.

1 As to the Secretary of State see PARA 15 ante. As to the Office of Fair Trading see PARA 407 ante.

2 The power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Consumer Protection Act 1987 s 25(4). In exercise of the power so conferred the Secretary of State has made the Consumer Protection (Code of Practice for Traders on Price Indications) Approval Order 1988, SI 1988/2078 (amended by SI 2001/1149; SI 2001/3649), approving the Code of Practice for Traders on Price Indications 1988, which relates to:

- 36 (1) price comparisons, covering:
 - 5. (a) price comparisons generally;
5
 - 6. (b) comparisons with a trader's own previous price;
6
 - 7. (c) introductory offers, 'after-sale' or 'after-promotion' prices;
7
 - 8. (d) comparisons with prices related to different circumstances;
8
 - 9. (e) comparisons with another trader's prices;
9
 - 10. (f) comparisons with 'recommended retail price' or similar;
10
 - 11. (g) pre-printed prices;

- 11
12. (h) references to value or worth;
12
13. (i) sales or special events;
13
14. (j) free offers;
14
- 37 (2) actual price to the consumer, covering:
 15. (a) indication of two different prices;
15
 16. (b) incomplete information and non-optional extras;
16
 17. (c) products available in limited numbers or range;
17
 18. (d) prices relating to differing forms of products;
18
 19. (e) postage, packing and delivery charges;
19
 20. (f) VAT;
20
 21. (g) service, cover and minimum charges in hotels, restaurants and similar establishments;
21
 22. (h) holiday and travel prices;
22
 23. (i) ticket prices;
23
 24. (j) call-out charges;
24
 25. (k) credit facilities;
25
 26. (l) insurance;
26
- 38 (3) price indications which become misleading after they have been given, covering:
 27. (a) general provisions;
27
 28. (b) newspaper and magazine advertisements;
28
 29. (c) mail order advertisements, catalogues and leaflets;
29
 30. (d) selling through agents;
30
 31. (e) changes in the rate of VAT;
31
- 39 (4) the sale of new homes.

3 le the requirements of the Consumer Protection Act 1987 s 20: see PARA 702 ante.

4 For the meaning of 'price' see PARA 702 note 4 ante.

5 For the meaning of 'goods' see PARA 521 note 3 ante.

6 For the meaning of references to services or facilities and accommodation or facilities see PARA 704 ante.

7 Consumer Protection Act 1987 s 25(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 16(1), (3)). For the meaning of 'misleading' see PARA 703 ante.

8 Ie an offence under the Consumer Protection Act 1987 s 20(1) or (2): see PARA 702 ante.

9 For the meaning of 'contravention' see PARA 534 note 2 ante.

10 Consumer Protection Act 1987 s 25(2)(a).

11 Ibid s 25(2)(b).

12 Ie such consultation as is mentioned in ibid s 25(1) (as amended): see the text and notes 1-7 supra.

13 For the meaning of 'modifications' see PARA 520 note 1 ante.

14 Consumer Protection Act 1987 s 25(3). References in s 25(2) (see the text and notes 8-11 supra) to a code of practice approved under s 25 (as amended) are to be construed accordingly: s 25(3).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

708-709 Secretary of State's power to make regulations, In general

Repealed: SI 2008/1277.

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(D) ENFORCEMENT

710. Enforcement.

It is the duty of every weights and measures authority¹ in Great Britain to enforce within its area the statutory provisions² relating to misleading price indications³.

Regulations may:

- 1546 (1) wholly or partly transfer any duty imposed by the statutory provisions relating to misleading price indications on a weights and measures authority to such other person who has agreed to the transfer as is specified in the regulations;
- 1547 (2) relieve such an authority of any such duty so far as it is exercisable in relation to such goods⁴ as may be described in the regulations⁵.

1 As to local weights and measures authorities see PARA 398 ante.

2 Ie any provisions made by or under the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended): see PARA 702 et seq ante.

3 Ibid s 27(1)(a). As to the application of s 27 in relation to consumer safety see PARA 555 ante.

4 For the meaning of 'goods' see PARA 521 note 3 ante.

5 Consumer Protection Act 1987 s 27(2). Nothing in s 27 authorises any weights and measures authority, or any person on whom functions are conferred by regulations made by the Secretary of State, to bring proceedings in Scotland for an offence: s 27(4).

The power to make regulations under s 27 is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and includes power: (1) to make different provision for different cases; and (2) to make such supplemental, consequential and transitional provision as the Secretary of State considers appropriate: s 27(3). Persons on whom functions are conferred by regulations under s 27(2) must report to the Secretary of State when so directed: see PARA 529 ante. As to the restrictions on disclosure of information obtained as a result of the exercise of enforcement powers see PARA 401 ante. As to the Secretary of State see PARA 15 ante.

7 Ibid s 27(4).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

710 Enforcement

NOTE 3--Consumer Protection Act 1987 s 27(1)(a) amended: SI 2008/1277.

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711. Test purchases.

An enforcement authority¹ has power, for the purpose of ascertaining whether any of the statutory provisions relating to misleading price indications² has been contravened³ in relation to any goods⁴, services, accommodation or facilities⁵, to make, or to authorise an officer⁶ of the authority to make, any purchase of any goods or to secure, or to authorise an officer of the authority to secure, the provision of any services, accommodation or facilities⁷.

Where any goods so purchased by or on behalf of an enforcement authority are submitted to a test and the test leads to the bringing of proceedings for an offence in respect of a contravention in relation to the goods of any of the statutory provisions relating to misleading price indications⁸, and the authority is requested to do so and it is practicable for the authority to comply with the request, the authority must allow the person from whom the goods were purchased⁹ or any person who is a party to the proceedings to have the goods tested¹⁰.

Regulations may provide that any test of goods so purchased by or on behalf of an enforcement authority:

- 1548 (1) is to be carried out at the expense of the authority in a manner and by a person prescribed by or determined under the regulations; or
- 1549 (2) is to be carried out either as mentioned in head (1) above or by the authority in a manner prescribed by the regulations¹¹.

Nothing in these provisions authorises the acquisition by or on behalf of an enforcement authority of any interest in land¹².

- 1 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.
- 2 Is any provision made by or under the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended): see PARA 702 et seq ante.
- 3 For the meaning of 'contravention' see PARA 534 note 2 ante.
- 4 For the meaning of 'goods' see PARA 521 note 3 ante.
- 5 For the meaning of references to services or facilities and accommodation or facilities cf para 704 ante.
- 6 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.
- 7 Consumer Protection Act 1987 s 28(1). As to the application of s 28 in relation to consumer safety see PARA 556 ante; and as to the restrictions on disclosure of information obtained as a result of the exercise of enforcement powers see PARA 401 ante.
- 8 See note 2 supra.
- 9 As to the power to prescribe by regulations the person who is to be treated as the person from whom goods were purchased where the goods were obtained from a vending machine see the Consumer Protection Act 1987 s 44(4); and PARA 531 ante.
- 10 Ibid s 28(2).
- 11 Ibid s 28(3). The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and includes power: (1) to make different provision for different cases; and (2) to make supplemental, consequential and transitional provision: see s 28(4).
- 12 Ibid s 28(5).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

711 Test purchases

NOTES 7, 10--Consumer Protection Act 1987 s 28(1), (2) amended: SI 2008/1277.

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712. Powers of search etc.

A duly authorised officer¹ of an enforcement authority² may, at any reasonable hour and on production, if required, of his credentials, exercise any of the following powers³.

The officer may, for the purpose of ascertaining whether there has been any contravention⁴ of any of the statutory provisions relating to misleading price indications⁵, inspect any goods⁶ and enter any premises⁷ other than premises occupied only as a person's residence⁸. An officer so entering any premises may take with him such other persons and such equipment as may appear to him necessary⁹.

If the officer has reasonable grounds for suspecting that there has been a contravention in relation to any goods of any of the statutory provisions relating to misleading price indications¹⁰, he may:

- 1550 (1) for the purpose of ascertaining whether there has been any such contravention, require any person carrying on a business¹¹, or employed in connection with a business, to produce any records¹² relating to the business;
- 1551 (2) for the purpose of ascertaining, by testing or otherwise, whether there has been any such contravention, seize and detain the goods;
- 1552 (3) take copies of, or of any entry in, any records produced by virtue of head (1) above¹³.

The officer may seize and detain any goods or records which he has reasonable grounds for believing may be required as evidence in proceedings for an offence in respect of a contravention of any of the statutory provisions¹⁴ relating to misleading price indications¹⁵.

If, and to the extent that, it is reasonably necessary to do so to prevent a contravention of any of the statutory provisions relating to misleading price indications¹⁶, the officer may, for the purpose of exercising his power under these provisions¹⁷ to seize any goods or records:

- 1553 (a) require any person having authority to do so to open any container or to open any vending machine; and
- 1554 (b) himself open or break open any such container or machine where a requirement made under head (a) above in relation to the container or machine has not been complied with¹⁸.

1 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.

2 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

3 Consumer Protection Act 1987 s 29(1). As to the application of s 29 in relation to consumer safety see PARA 557 ante; and as to obstruction of an authorised officer see PARA 714 post.

4 For the meaning of 'contravention' see PARA 534 note 2 ante.

5 In any provision made by or under the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended): see PARA 702 et seq ante.

6 For the meaning of 'goods' see PARA 521 note 3 ante.

7 For the meaning of 'premises' see PARA 557 note 7 ante.

8 Consumer Protection Act 1987 s 29(2).

9 Ibid s 30(3).

10 See note 5 supra.

11 For the meaning of 'business' see PARA 521 note 5 ante.

12 For the meaning of 'records' see PARA 532 note 1 ante.

13 Consumer Protection Act 1987 s 29(4); and see *Dudley Metropolitan Borough Council v Debenhams plc* (1994) 159 JP 18, DC (search of premises held to be in breach of the Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises; computer evidence inadmissible). As to the procedure on seizure of goods and records see PARA 713 post; as to appeals against the detention of goods see PARA 715 post; and as to the right to compensation for seizure and detention if there has been no contravention of any of the provisions relating to misleading price indications see PARA 716 post.

14 See note 5 supra.

- 15 Consumer Protection Act 1987 s 29(5).
- 16 Ibid s 29(6).
- 17 Ie under ibid s 29(5) or (6): see the text and notes 15-16 supra.
- 18 Ibid s 29(7).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

712 Powers of search etc

NOTES 8, 15-18--Consumer Protection Act 1987 s 29(2), (5)-(7) amended: SI 2008/1277.

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713. Procedure on seizure of goods or records.

An officer¹ seizing any goods² or records³ must inform the person from whom they are seized and, in the case of imported goods seized on any premises under the control of the Commissioners for Her Majesty's Revenue and Customs⁴, the importer of those goods⁵ that the goods or records have been so seized⁶.

If a justice of the peace:

1555 (1) is satisfied by any written information on oath that there are reasonable grounds for believing either that any goods or records which any officer has power to inspect⁷ are on any premises⁸ and that their inspection is likely to disclose evidence that there has been a contravention⁹ of any of the statutory provisions relating to misleading price indications¹⁰ or that such a contravention has taken place, is taking place or is about to take place on any premises; and

1556 (2) is also satisfied by any such information that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant has been given to the occupier or that an application for admission or the giving of such a notice would defeat the object of the entry or that the premises are unoccupied or that the occupier is temporarily absent and it might defeat the object of the entry to await his return,

the justice may by warrant under his hand, which continues in force for a period of one month, authorise any officer of an enforcement authority to enter the premises, if need be by force¹¹.

An officer entering any premises¹² may take with him such other persons and such equipment as may appear to him necessary¹³. On leaving any premises which a person is authorised to enter by such a warrant, that person must, if the premises are unoccupied or the occupier is

temporarily absent, leave the premises as effectively secured against trespassers as he found them¹⁴.

If any person who is not an officer of an enforcement authority purports to act as such¹⁵, he is guilty of an offence¹⁶.

Where any goods seized by an officer¹⁷ are submitted to a test, the officer must inform the person from whom they are seized and, in the case of imported goods seized on any premises under the control of the Commissioners for Her Majesty's Revenue and Customs, the importer of those goods of the result of the test; and if:

- 1557 (a) proceedings are brought for an offence in respect of a contravention in relation to the goods of any of the statutory provisions relating to misleading price indications¹⁸; and
- 1558 (b) the officer is requested to do so and it is practicable to comply with the request,

the officer must allow any person who is a party to the proceedings or, as the case may be, has an interest in the goods to which the notice relates to have the goods tested¹⁹.

Regulations may provide that any test of goods seized²⁰ by an officer of an enforcement authority must:

- 1559 (i) be carried out at the expense of the authority in a manner and by a person prescribed by or determined under the regulations; or
- 1560 (ii) be carried out either as mentioned in head (i) above or by the authority in a manner prescribed by the regulations²¹.

1 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante; and for the meaning of 'enforcement authority' see PARA 549 note 1 ante.

2 For the meaning of 'goods' see PARA 521 note 3 ante.

3 Ie under the Consumer Protection Act 1987 s 29: see PARA 557 ante. For the meaning of 'records' see PARA 532 note 1 ante.

4 Note that the Inland Revenue and Her Majesty's Customs and Excise have merged to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005.

5 Ie within the meaning of the Customs and Excise Management Act 1979. For the meaning of 'importer' see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 964; and for the meaning of 'goods' see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 413.

6 Consumer Protection Act 1987 s 30(1); Commissioners for Revenue and Customs Act 2005 s 50. As to the application of the Consumer Protection Act 1987 s 30 in relation to consumer safety see PARA 558 ante. As to obstruction of an authorised officer see PARA 714 post. As to appeals against the detention of goods see PARA 715 post. As to the power to prescribe by regulations the person who is to be treated as the person from whom goods were seized where the goods were seized from a vending machine see s 44(4); and PARA 531 ante.

7 See note 3 supra.

8 For the meaning of 'premises' see PARA 557 note 7 ante.

9 For the meaning of 'contravention' see PARA 534 note 2 ante.

10 Ie any provision made by or under the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended): see PARA 702 et seq ante.

11 Ibid s 30(2).

12 Ie by virtue of ibid s 29 or a warrant under s 30(2) (see the text and notes 7-11 supra).

13 Ibid s 30(3).

14 Ibid s 30(4).

15 Ie under ibid s 29 or s 30.

16 Ibid s 30(5). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see s 30(5). As to the standard scale see PARA 498 note 3 ante.

17 See note 3 supra.

18 See note 10 supra.

19 Consumer Protection Act 1987 s 30(6).

20 See note 3 supra.

21 Consumer Protection Act 1987 s 30(7). The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament, and includes power to make different provision for different cases and to make supplemental, consequential and transitional provision: see s 30(8).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

713 Procedure on seizure of goods or records

NOTES 11, 19--Consumer Protection Act 1987 s 30(2), (6) amended: SI 2008/1277.

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714. Obstruction of authorised officer.

Any person who:

- 1561 (1) intentionally obstructs any officer¹ of an enforcement authority² who is acting in pursuance of any of the enforcement provisions³; or
- 1562 (2) intentionally fails to comply with any requirement made of him by any officer of an enforcement authority under any of the enforcement provisions³; or
- 1563 (3) without reasonable cause fails to give any officer of an enforcement authority who is so acting any other assistance or information⁴ which the officer may reasonably require of him for the purposes of the exercise of the officer's functions under any of the enforcement provisions⁵,

is guilty of an offence⁶.

If a person, in giving any information which is required of him by virtue of head (3) above, makes any statement which he knows is false in a material particular or recklessly makes a statement which is false in a material particular, he is guilty of an offence and liable on

conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum⁷.

- 1 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.
- 2 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.
- 3 In under any provision of the Consumer Protection Act 1987 Pt IV (ss 27-35): see PARA 710 et seq ante.
- 4 For the meaning of 'information' see PARA 531 note 2 ante.
- 5 See note 3 supra.
- 6 Consumer Protection Act 1987 s 32(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see s 32(1). As to the standard scale see PARA 498 note 3 ante. As to the application of s 32 in relation to consumer safety see PARA 560 ante. See also *R v Greater Manchester Justices, ex p Aldi GmbH & Co KG* (1994) 159 JP 717, DC (instructions of a superior held not to constitute a defence to the requirement to answer questions).
- 7 Consumer Protection Act 1987 s 32(2), (3). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 32(2), (3). As to the statutory maximum see PARA 401 note 31 ante.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/F. MISLEADING PRICE INDICATIONS/(D) Enforcement/715. Appeals against detention of goods.

715. Appeals against detention of goods.

Any person having an interest in any goods¹ which are for the time being detained² by an enforcement authority³ or by an officer⁴ of such an authority may apply for an order requiring the goods to be released to him or to another person⁵. Such an application may be made:

- 1564 (1) to any magistrates' court in which proceedings have been brought for an offence in respect of a contravention⁶ in relation to the goods of any of the statutory provisions relating to misleading price indications⁷;
- 1565 (2) where no such proceedings have been so brought, by way of complaint to a magistrates' court⁸.

On such an application an order requiring goods to be released is to be made only if the court is satisfied:

- 1566 (a) that proceedings for an offence in respect of a contravention in relation to the goods of any of the statutory provisions relating to misleading price indications⁹ have not been brought; and
- 1567 (b) where no such proceedings have been brought, that more than six months have elapsed since the goods were seized¹⁰.

Any person aggrieved by such an order, or by a decision of a magistrates' court not to make such an order, may appeal against that order or decision to the Crown Court; and an order so made may contain such provision as appears to the court to be appropriate for delaying the coming into force of the order pending the making and determination of any appeal¹¹.

1 For the meaning of 'goods' see PARA 521 note 3 ante.

2 Ie under any provision of the Consumer Protection Act 1987 Pt IV (ss 27-35): see PARA 710 et seq ante.

3 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

4 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.

5 Consumer Protection Act 1987 s 33(1). As to the application of s 33 in relation to consumer safety see PARA 561 ante.

6 For the meaning of 'contravention' see PARA 534 note 2 ante.

7 Ie any provision made by or under the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended): see PARA 702 et seq ante.

8 Ibid s 33(2)(a), (b).

9 See note 7 supra.

10 Consumer Protection Act 1987 s 33(3).

11 Ibid s 33(4). For these purposes, 'appeal' includes any application under the Magistrates' Courts Act 1980 s 111 (case stated: see MAGISTRATES vol 29(2) (Reissue) PARA 885 et seq): Consumer Protection Act 1987 s 33(4).

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680-725 Prices

For consumer protection from unfair trading see PARA 725A.

715 Appeals against detention of goods

NOTES 8, 10--Consumer Protection Act 1987 s 33(2), (3) amended: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/F. MISLEADING PRICE INDICATIONS/(D) Enforcement/716. Compensation for seizure and detention.

716. Compensation for seizure and detention.

Where an officer¹ of an enforcement authority² exercises any power³ to seize and detain goods⁴, the enforcement authority is liable to pay compensation to any person having an interest in the goods in respect of any loss or damage caused by reason of the exercise of the power if there has been no contravention⁵ in relation to the goods of any of the statutory provisions relating to misleading price indications⁶ and the exercise of the power is not attributable to any neglect or default by that person⁷.

Any disputed question as to the right to or the amount of any compensation so payable is to be determined by arbitration⁸.

- 1 For the meaning of 'officer', in relation to an enforcement authority, see PARA 556 note 5 ante.
- 2 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.
- 3 Ie under the Consumer Protection Act 1987 s 29: see PARA 712 ante.
- 4 For the meaning of 'goods' see PARA 521 note 3 ante.
- 5 For the meaning of 'contravention' see PARA 534 note 2 ante.
- 6 Ie any provision made by or under the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended): see PARA 702 et seq ante.
- 7 Ibid s 34(1). As to the application of s 34 in relation to consumer safety see PARA 562 ante.
- 8 Ibid s 34(2).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

716 Compensation for seizure and detention

NOTE 7--Consumer Protection Act 1987 s 34(1) amended: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/F. MISLEADING PRICE INDICATIONS/(D) Enforcement/717. Recovery of expenses of enforcement.

717. Recovery of expenses of enforcement.

Where a court convicts a person of an offence in respect of a contravention¹ in relation to any goods² of any of the statutory provisions relating to misleading price indications³, the court may, in addition to any other order it may make as to costs or expenses, order the person convicted or, as the case may be, any person having an interest in the goods to reimburse an enforcement authority⁴ for any expenditure which has been or may be incurred by that authority in connection with any seizure or detention of the goods by or on behalf of the authority⁵.

- 1 For the meaning of 'contravention' see PARA 534 note 2 ante.
- 2 For the meaning of 'goods' see PARA 521 note 3 ante.
- 3 Ie any provision made by or under the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended): see PARA 702 et seq ante.
- 4 For the meaning of 'enforcement authority' see PARA 549 note 1 ante.

5 Consumer Protection Act 1987 s 35(1), (2)(a). As to the application of s 35 in relation to consumer safety see PARA 563 ante.

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

717 Recovery of expenses of enforcement

NOTE 5--Consumer Protection Act 1987 s 35(1) amended: SI 2008/1277.

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(E) CIVIL PROCEEDINGS

718. Civil proceedings.

The Consumer Protection Act 1987 is not to be construed as conferring any other right of action in civil proceedings, apart from the right conferred by virtue of the statutory provisions relating to product liability¹, in respect of any loss or damage suffered in consequence of a contravention² of a safety provision³ or of a provision made by or under the statutory provisions⁴ relating to misleading price indications⁵.

Subject to any provision to the contrary in the agreement itself, an agreement is not void or unenforceable by reason only of a contravention of a provision made by or under the statutory provisions⁶ relating to misleading price indications⁷.

1 Ie by virtue of the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended): see PARA 518 et seq ante.

2 For the meaning of 'contravention' see PARA 534 note 2 ante.

3 For the meaning of 'safety provision' see PARA 529 note 3 ante.

4 Ie by or under a provision made by or under the Consumer Protection Act 1987 Pt III (ss 20-26) (as amended): see PARA 702 et seq ante.

5 Ibid s 41(2). See also PARA 543 ante.

6 See note 4 supra.

7 Consumer Protection Act 1987 s 41(3).

UPDATE

680-725 Prices

For consumer protection from unfair trading see PARA 725A.

718 Civil proceedings

NOTES 5, 7--Consumer Protection Act 1987 s 41(2), (3) amended: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/G. METHODS OF PAYMENT/719. Application of provisions.

G. METHODS OF PAYMENT

719. Application of provisions.

The Price Indications (Method of Payment) Regulations 1991¹ apply where a person gives consumers an indication of a price at which goods (other than motor fuel), services, accommodation or facilities will be or are available and that price does not apply to all methods of payment accepted by him². In such circumstances he must make available to consumers a statement of any method of payment to which the indicated price does not apply and the difference between the price payable by each such method and the indicated price³.

The regulations:

- 1568 (1) do not have effect in relation to an indication of a price⁴ which is given to a consumer in response to a specific request from him that he be informed of the price⁵ payable by a specified method⁶ for or otherwise in respect of the supply of specified goods or the provision of specified services, accommodation or facilities⁷;
- 1569 (2) apply to anything done otherwise than in the course of business⁸.

1 See the Price Indications (Method of Payment) Regulations 1991, SI 1991/199: see PARA 720 et seq post.

2 See *ibid* reg 3(1); and PARA 720 post. For these purposes, 'goods' does not include fuel of any kind supplied for the propulsion of a vehicle intended or adapted for use on roads: reg 2(1).

3 See *ibid* reg 3(1)-(3); and PARA 720 post.

4 For these purposes, an indication of the price (see note 5 *infra*) at which goods will be or are available by way of hire-purchase agreement, conditional sale agreement or credit-sale agreement is not to be treated as an indication of price: *ibid* reg 2(4)(a).

5 For these purposes, 'price', in relation to any goods, services, accommodation or facilities, has the meaning assigned to it in the Consumer Protection Act 1987 s 20(6)(a) (see PARA 702 note 4 head (1) *ante*): Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 2(2). However, in the case of an indication of a price within the meaning of the Consumer Protection Act 1987 s 20(6)(b) (see PARA 702 note 4 head (2) *ante*), the Price Indications (Method of Payment) Regulations 1991, SI 1991/199, have effect as if references to a price were references to the monetary amount or to all the monetary amounts included in a method referred to in the Consumer Protection Act 1987 s 20(6)(b): Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 2(3).

6 For these purposes, references to a method of payment do not include a method of payment which is available only to persons having a pre-existing contractual or other connection with the person indicating the price in question or with some person connected with him, being a connection which relates principally to matters other than payment in respect of transactions between that person and the consumer: *ibid* reg 2(5). The entry into, or making of payments under, a hire-purchase agreement, conditional sale agreement or credit-sale agreement is not to be treated as a method of payment: reg 2(4)(b). Payment in a currency other than that in which a price indication is given is not to be treated as a different method of payment from payment in the currency in which the indication is given: reg 2(4)(c).

7 *Ibid* reg 2(6).

8 *Ibid* reg 2(7).

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680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/G. METHODS OF PAYMENT/720. Differential price indications.

720. Differential price indications.

Where a person gives to consumers an indication of price¹ at which any goods², services, accommodation or facilities will be or are available and which is not a price applicable to all methods of payment accepted by him ('the indicated price'), he must, before he enters into any contract under which they are to be supplied or, as the case may be, provided, make available to consumers statements of the following matters:

- 1570 (1) any method of payment³, being a method of payment accepted by the person giving the indication, to which the indicated price does not apply; and
- 1571 (2) the difference between the price payable by each such method and the indicated price expressed, as the case may require, as an addition to, or a deduction from, the indicated price in terms of an amount of money or a percentage of the indicated price⁴.

Where a person gives to consumers more than one indicated price relating to different methods of payment in respect of the same goods, services, accommodation or facilities, nothing in these provisions requires a statement to be given of the difference between those prices; and all statements given may be given in relation to any one indicated price only⁵.

If a person contravenes these provisions, he is guilty of an offence⁶.

1 For the meaning of references to an indication of price see PARA 719 note 4 ante; and for the meaning of 'price' see PARA 719 note 5 ante.

2 For the meaning of 'goods' see PARA 719 note 2 ante.

3 For the meaning of references to a method of payment see PARA 719 note 6 ante.

4 Price Indications (Method of Payment) Regulations 1991, SI 1991/199, regs 2(1), 3(1). As to the application of reg 3 see PARA 719 ante; as to the accuracy and reliability of information see PARA 724 post; as to the display of statements see PARA 721 post; as to the manner of giving price indications see PARA 722 post; and as to advertisements see PARA 723 post.

5 Ibid reg 3(2).

6 Ibid reg 8(1). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see reg 8(1). As to the statutory maximum see PARA 401 note 31 ante. As to defences see PARA 725 post.

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680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/G. METHODS OF PAYMENT/721. Display of statements.

721. Display of statements.

Any statement¹, other than one given orally which relates:

- 1572 (1) to one or more items of goods², whether goods of the same description or not, which are exposed for sale at any premises or which may be available for supply to a consumer there, or for the supply of which arrangements may there be made; or
- 1573 (2) to services, facilities or accommodation, whether, in each case, of the same description or not, which may be available for provision to a consumer at any premises, or for the provision of which arrangements may there be made,

must be displayed:

- 1574 (a) at each public entrance to the premises; and
- 1575 (b) at each point in the premises where consumers make payment or become bound to make payment³.

For the purposes of head (a) above, where there is on or adjacent to the forecourt of a petrol filling-station to which the public has access a place used for the exposure for sale of goods or for making available goods to consumers or for the provision of services to consumers or where a place is used for the parking of motor vehicles, and where, in each case, the place would otherwise be comprised in larger premises, the place is to be treated as separate premises and as not comprised in those larger premises⁴.

If the place where goods are exposed for sale or may be available for supply or where services, facilities or accommodation may be provided or, in each case, where arrangements for their supply or provision may be made:

- 1576 (i) is a part of larger premises which are not wholly in the occupation of the person giving the indication, and head (ii) below does not apply, any statement must be displayed, as the case may require, either at each public entrance to that part or, if that part is so arranged that there is no specific public entrance to it, at a conspicuous place at that part, and, in any event, at each point in that part where consumers make payment or become bound to make payment; or
- 1577 (ii) is a kiosk, booth, stall or similar place or a vehicle at which consumers may be served without entering, any statement must be so displayed as to be visible to a consumer at each point where consumers make payment or become bound to make payment⁵.

In relation to prices for food or drink for consumption on the premises where it is sold, any such statement must, in addition, be given on all menus⁶.

In the case of a vehicle, ship or aircraft carrying passengers between places in the United Kingdom, any such statement which relates to a fare⁷ must be displayed at a conspicuous place

on or in the vehicle, ship or aircraft so as to be visible to a consumer before or immediately after he enters it⁸.

If a person contravenes these provisions, he is guilty of an offence⁹.

1 In any statement under the Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 3: see PARA 720 ante.

2 For the meaning of 'goods' see PARA 719 note 2 ante.

3 Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 4(1), (2). As to the application of reg 4 see PARA 719 ante; and as to the accuracy and reliability of information see PARA 724 post.

4 Ibid reg 4(3).

5 Ibid reg 4(4).

6 Ibid reg 4(5).

7 For these purposes, 'fare' means the price for conveyance in the vehicle, ship or aircraft, being a price which is normally payable by a consumer on the vehicle, ship or aircraft or on leaving it: ibid reg 4(6).

8 Ibid reg 4(6).

9 Ibid reg 8(1). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see reg 8(1). As to the statutory maximum see PARA 401 note 31 ante. As to defences see PARA 725 post.

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For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/G. METHODS OF PAYMENT/722. Manner of giving price indications and statements.

722. Manner of giving price indications and statements.

In the case of an oral indication of the indicated price¹, any statement required² may be given in any manner, whether orally or otherwise³. In the case of an indication of the indicated price which is given otherwise than orally, any such statement must be given in the same manner as the indication of the price⁴.

Any indication of the indicated price and any such statement must be clearly expressed, unambiguous and easily identifiable by a consumer as applying to the goods⁵, services, accommodation or facilities concerned and:

1578 (1) in the case of an oral indication, must be given audibly; and

1579 (2) in the case of a written indication or statement, must be given clearly, prominently and legibly⁶.

If a person contravenes these provisions, he is guilty of an offence⁷.

- 1 For the meaning of 'indicated price' see PARA 720 ante; and for the meaning of references to the indication of a price see PARA 719 note 4 ante.
- 2 Ie any statement required under the Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 3: see PARA 720 ante.
- 3 Ibid reg 5(1). As to the application of reg 5 see PARA 719 ante; and as to the accuracy and reliability of information see PARA 724 post.
- 4 Ibid reg 5(2).
- 5 For the meaning of 'goods' see PARA 719 note 2 ante.
- 6 Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 5(3).
- 7 Ibid reg 8(1). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see reg 8(1). As to the statutory maximum see PARA 401 note 31 ante. As to defences see PARA 725 post.

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680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/G. METHODS OF PAYMENT/723. Advertisements.

723. Advertisements.

The provisions relating to methods of payment¹ apply to an indication of a price² given in an advertisement³ if the advertisement contains an invitation, express or implied, to consumers to place orders either by post or by means of a telecommunication system for the supply of goods or for the provision of services, accommodation or facilities⁴.

In the case of an advertisement which does not include such an invitation but which includes an indication of price:

- 1580 (1) at which goods, services, accommodation or facilities will be or are available; and
- 1581 (2) which is not a price applicable to all methods accepted by a specified person,

it is sufficient compliance with the provisions to state a method of payment⁵ to which the indication applies⁶.

If a person contravenes these provisions, he is guilty of an offence⁷.

- 1 Ie the Price Indications (Method of Payment) Regulations 1991, SI 1991/199.
- 2 For the meaning of 'price' see PARA 719 note 5 ante; and for the meaning of references to the indication of a price see PARA 719 note 4 ante.
- 3 For these purposes, 'advertisement' includes a catalogue, a circular and a price list but does not include an advertisement to which regulations under the Consumer Credit Act 1974 s 44 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 145) apply: Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 6(3).

4 Ibid reg 6(1). As to the application of reg 6 see PARA 719 ante; and as to the accuracy and reliability of information see PARA 724 post.

5 For the meaning of references to a method of payment see PARA 719 note 6 ante.

6 Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 6(2).

7 Ibid reg 8(1). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see reg 8(1). As to the statutory maximum see PARA 401 note 31 ante. As to defences see PARA 725 post.

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680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/G. METHODS OF PAYMENT/724. Accuracy and reliability.

724. Accuracy and reliability.

Any information or explanation given in any indication of the indicated price¹ or in any statement applying to it must be accurate and no statement may be included that the indication is not to be relied on².

If a person contravenes these provisions, he is guilty of an offence³.

1 For the meaning of 'indicated price' see PARA 720 ante; and for the meaning of references to the indication of a price see PARA 719 note 4 ante.

2 Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 7. As to the application of reg 7 see PARA 719 ante.

3 Ibid reg 8(1). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see reg 8(1). As to the statutory maximum see PARA 401 note 31 ante. As to defences see PARA 725 post.

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680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/G. METHODS OF PAYMENT/725. Defences; and liability of other persons.

725. Defences; and liability of other persons.

In relation to an offence under the provisions relating to methods of payment¹:

- 1582 (1) the defence of the innocent publication of an advertisement applies²;
- 1583 (2) the defence of due diligence applies³;
- 1584 (3) the provisions relating to the liability of persons other than the principal offender apply⁴.

1 is an offence under the Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 3 (see PARA 720 ante), reg 4 (see PARA 721 ante), reg 5 (see PARA 722 ante), reg 6 (see PARA 723 ante) and reg 7 (see PARA 724 ante).

2 Ibid reg 8(2)(a). Thus the Consumer Protection Act 1987 s 24(3) (see PARA 705 ante) applies as it applies to an offence under s 20(1) or (2) (see PARA 702 ante).

3 Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 8(2)(b). Thus the Consumer Protection Act 1987 s 39 (see PARA 706 ante) applies as it applies to an offence mentioned in s 39(5) (see PARA 706 ante).

4 Price Indications (Method of Payment) Regulations 1991, SI 1991/199, reg 8(2)(c). Thus the Consumer Protection Act 1987 s 40(1) (see PARA 707 ante) applies as it applies to an offence mentioned in s 39(5), and the provisions of s 40(2), (3) (see PARA 707 ante) apply as they apply to an offence under the Consumer Protection Act 1987.

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680-725 Prices

For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(5) STATUTORY PROTECTION; IN GENERAL/(ix) Prices/G. METHODS OF PAYMENT/725A. Consumer protection from unfair trading.

725A. Consumer protection from unfair trading.

For the purposes of implementing EC Parliament and Council Directive 2005/29 concerning unfair business-to-consumer commercial practices, the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, have been made.

Unfair commercial practices (see reg 3(1)) and the promotion of unfair commercial practices by persons responsible for codes of conduct for traders (see reg 4) are prohibited. A commercial practice is unfair if it (1) contravenes the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product (reg 3(2), (3)); or (2) is a misleading action, a misleading omission, aggressive, or a specified unfair commercial practice (regs 3(2), (4), 5-7, Sch 1). Provision is made for criminal offences for breach of the prohibition on unfair commercial practices (regs 8-16), and for defences of due diligence and innocent publication of advertisements (regs 17, 18). Responsibility for enforcement of and for investigation of suspected contravention of SI 2008/1277 lies with the Office of Fair Trading and local weights and measures authorities (regs 19-27). An agreement is not void or unenforceable by reason only of a breach of SI 2008/1277 (reg 29).

All offences under the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): SI 2003/1376 art 2, Schedule (amended by SI 2008/1277). Further, SI 2008/1277 is subject to the Enterprise Act 2002 Pt 9 (ss 237-247), Schs

14, 15 (see COMPETITION vol 18 (2009) PARAS 326-335) relating to disclosure of information: see SI 2003/1400 Sch 4 (amended by SI 2008/1277).

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For consumer protection from unfair trading see PARA 725A.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(i) Accommodation Agencies/726. Illegal commissions and advertisements.

(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES

(i) Accommodation Agencies

726. Illegal commissions and advertisements.

Any person who:

- 1585 (1) demands or accepts payment of any sum of money in consideration of registering, or undertaking to register, the name or requirements of any person seeking the tenancy of a house¹;
- 1586 (2) demands or accepts payment of any sum of money in consideration of supplying, or undertaking to supply, to any person addresses or other particulars of houses to let²; or
- 1587 (3) issues any advertisement, list or other document describing any house as being to let without the authority of the owner³ of the house or his agent⁴,

is guilty of an offence⁵. A person:

- 1588 (a) is not guilty of such an offence by reason of his demanding or accepting payment from the owner of a house of any remuneration payable to him as agent for such owner⁶;
- 1589 (b) being a solicitor⁷, is not guilty of such an offence by reason of his demanding or accepting payment of any remuneration in respect of business done by him as such⁸;
- 1590 (c) is not guilty of such an offence by reason of his demanding or accepting any payment in consideration of the display in a shop, or of the publication in a newspaper⁹, of any advertisement or notice, or by reason of such display or publication of an advertisement or notice received for the purpose in the ordinary course of business¹⁰.

1 Accommodation Agencies Act 1953 s 1(1)(a). For these purposes, 'house' includes any part of a building which is occupied or intended to be occupied as a dwelling: s 1(6).

2 Ibid s 1(1)(b). A requirement to pay a 'deposit' based on anticipated rent before supplying addresses of accommodation is within s 1(1)(b) and an offence is committed although the 'deposit' paid is returnable in cases where the agent is unsuccessful in finding accommodation: *McInnes v Clark* [1955] 1 All ER 346, [1955] 1 WLR 102. No offence is committed, however, where an agency accepts payment from a client who has agreed

that a fee will be payable if the agency finds, and the client takes a tenancy of, acceptable accommodation: *Saunders v Soper* [1975] AC 239, [1974] 3 All ER 1025, HL.

A mischief at which the Accommodation Agencies Act 1953 s 1(1)(b) is aimed is supplying particulars of non-existent houses or of houses which are not to let: see 182 HL Official Report (5th series) col 879. One reading of the enactment, however, is that the words are satisfied only if the particulars given are of houses which are to let. It is submitted that, in construing the enactment, the court will have regard to the mischief which is to be remedied: see *Heydon's Case* (1584) 3 Co Rep 7a (second rule of construction).

3 For these purposes, 'owner', in relation to a house, means the person having power to grant a lease of the house: Accommodation Agencies Act 1953 s 1(6).

4 Ibid s 1(1)(c).

5 Ibid s 1(1), (5) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 3 on the standard scale, or to both: see the Accommodation Agencies Act 1953 s 1(1), (5) (as so amended). As to the standard scale see PARA 498 note 3 ante. All offences under the Accommodation Agencies Act 1953 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

6 Accommodation Agencies Act 1953 s 1(2).

7 For these purposes, the reference in the text to a solicitor includes a reference to a body corporate recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS vol 65 (2008) PARA 687 et seq): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

8 Accommodation Agencies Act 1953 s 1(3).

9 For these purposes, 'newspaper' includes any periodical or magazine: ibid s 1(6).

10 Ibid s 1(4).

UPDATE

726 Illegal commissions and advertisements

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTE 7--Now, being a solicitor or an authorised person, meaning a person (other than a solicitor) who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which is a reserved legal activity (within the meaning of that Act) (see LEGAL PROFESSIONS vol 65 (2008) PARA 512): Accommodation Agencies Act 1953 s 1(3), (6) (s 1(3) amended, definition in s 1(6) added, by Legal Services Act 2007 Sch 21 para 22).

NOTE 7--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/A. IN GENERAL/727. Business advertisements.

(ii) Advertisements and Unsolicited Calls

A. IN GENERAL

727. Business advertisements.

A person who is seeking to sell goods that are being sold in the course of a business must not publish or cause to be published an advertisement which indicates that the goods are for sale and which is likely to induce consumers to buy the goods, unless it is reasonably clear, whether from the contents of the advertisement, its format or size, the place or manner of its publication or otherwise, that the goods are to be sold in the course of a business¹.

These provisions:

- 1591 (1) apply whether the person who is seeking to sell the goods is acting on his own behalf or that of another, and, where he is acting as agent, whether he is acting in the course of a business carried on by him²; but
- 1592 (2) do not apply in relation to advertisements which are concerned only with sales by auction or competitive tender or which are concerned only with the sale of flowers, fruit or vegetables, eggs or dead animals, fish or birds, gathered, produced or taken by the person seeking to sell the goods³.

1 Business Advertisements (Disclosure) Order 1977, SI 1977/1918, art 2(1). See also the Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003, SI 2003/1593, art 2, Schedule.

2 Business Advertisements (Disclosure) Order 1977, SI 1977/1918, art 2(2). The reference in art 2(1) (see the text and note 1 supra) to a business does not, however, include any business carried on by the agent: art 2(2).

3 Ibid art 2(3).

UPDATE

727 Business advertisements

NOTE 1--SI 2003/1593 Schedule amended: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/A. IN GENERAL/728. Consumer credit.

728. Consumer credit.

The Consumer Credit Act 1974 and the Consumer Credit (Advertisements) Regulations 1989¹ impose detailed requirements relating to advertising². There are also certain other statutory controls and codes of practice³. Under the Consumer Credit Act 1974 there are specific offences relating to advertising⁴; and infringement of regulations made under the Act is also a criminal offence⁵.

There is no civil sanction under the Consumer Credit Act 1974 for breach of that Act or regulations made thereunder in relation to advertising; and any resulting agreement is not

thereby unenforceable⁶. This does not affect any right at common law to rescission⁷ or any right to damages for misrepresentation⁸.

Similar provisions apply to advertisements published for the purpose of a business of credit brokerage⁹.

1 See the Consumer Credit (Advertisements) Regulations 1989, SI 1989/1125 (as amended): see CONSUMER CREDIT vol 9(1) (Reissue) PARA 146 et seq.

2 See CONSUMER CREDIT vol 9(1) (Reissue) PARA 144 et seq.

3 See CONSUMER CREDIT vol 9(1) (Reissue) PARAS 66-67.

4 See CONSUMER CREDIT vol 9(1) (Reissue) PARA 150. All offences under the Consumer Credit Act 1974 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

5 See CONSUMER CREDIT vol 9(1) (Reissue) PARA 145.

6 See CONSUMER CREDIT vol 9(1) (Reissue) PARA 301.

7 See CONSUMER CREDIT vol 9(1) (Reissue) PARAS 31, 65; CONTRACT vol 9(1) (Reissue) PARA 986 et seq.

8 See CONSUMER CREDIT vol 9(1) (Reissue) PARAS 31, 40; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 701 et seq.

9 See CONSUMER CREDIT vol 9(1) (Reissue) PARA 279 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/A. IN GENERAL/729. Medicinal products.

729. Medicinal products.

Regulations may be made controlling the advertising of medicinal products¹.

Any person who, being a commercially interested party, or at the request or with the consent of a commercially interested party, issues, or causes another person to issue, a false or misleading advertisement relating to medicinal products of any description is guilty of an offence².

No person may take part in the publication of any advertisement which contains an offer to treat any person for cancer, to prescribe any remedy for cancer or to give any advice in connection with its treatment³.

Regulations may be made prohibiting the advertisement of Human Immunodeficiency Virus (HIV) testing kits, or components of such kits, and services⁴.

1 See MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 157 et seq.

2 See MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 159.

3 See MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 219.

4 See MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 221.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/A. IN GENERAL/730. Television and radio advertising.

730. Television and radio advertising.

It is the duty of OFCOM¹ to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to it best calculated to secure the standards objectives². The standards objectives include:

- 1593 (1) that advertising that contravenes the prohibition on political advertising³ is not included in television or radio services;
- 1594 (2) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
- 1595 (3) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with;
- 1596 (4) that the unsuitable sponsorship of programmes included in television and radio services is prevented;
- 1597 (5) that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services; and
- 1598 (6) that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred⁴.

The standards set by OFCOM⁵ must be contained in one or more codes⁶. Standards set by OFCOM to secure the objectives mentioned in heads (1) to (4) above:

- 1599 (a) must include general provision governing standards and practice in advertising and in the sponsoring of programmes; and
- 1600 (b) may include provision prohibiting advertisements and forms and methods of advertising or sponsorship (whether generally or in particular circumstances)⁷.

OFCOM has, in relation to programme services, a general responsibility with respect to advertisements and methods of advertising and sponsorship and in the discharge of that responsibility may include conditions in any licence which it grants for any such service that enable OFCOM to impose requirements with respect to any of those matters that go beyond the provisions of OFCOM's standards code⁸.

¹ As to OFCOM see PARA 403 ante.

² Communications Act 2003 s 319(1). See also TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (Reissue) PARA 289.

³ As to what constitutes contravention of the prohibition on political advertising see *ibid* s 321(2), (3).

⁴ See *ibid* s 319(2)(g)-(l); and TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (Reissue) PARA 289.

⁵ *Ie* under *ibid* s 319.

⁶ *Ibid* s 319(3).

⁷ *Ibid* s 321(1).

8 Ibid s 321(4). As to supplementary powers relating to advertising see s 322.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/B. MISLEADING ADVERTISEMENTS/731. Complaints to Office of Fair Trading.

B. MISLEADING ADVERTISEMENTS

731. Complaints to Office of Fair Trading.

It is the duty of the Office of Fair Trading¹ (the 'OFT') to consider any complaint made to it that an advertisement is misleading² or is a comparative advertisement which is not permitted³, unless the complaint appears to the OFT to be frivolous or vexatious⁴.

For these purposes, 'advertisement' means any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of goods or services, immovable property, rights or obligations⁵.

The OFT must not, however, consider any complaint which is required⁶, or would be required, leaving aside any question as to the frivolous or vexatious nature of the complaint, to be considered by OFCOM⁷.

Before considering any such complaint, the OFT may require the person making the complaint to satisfy it that:

- 1601 (1) there have been invoked in relation to the same or substantially the same complaint about the advertisement in question such established means of dealing with such complaints as the OFT may consider appropriate, having regard to all the circumstances of the particular case;
- 1602 (2) a reasonable opportunity has been allowed for those means to deal with the complaint in question; and
- 1603 (3) those means have not dealt with the complaint adequately⁸.

In exercising the powers conferred on it⁹, the OFT must have regard to all the interests involved and, in particular, the public interest and the desirability of encouraging the control, by self-regulatory bodies, of advertisements¹⁰.

1 As to the Office of Fair Trading see PARA 407 ante.

2 For these purposes, an advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote: Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 2(2).

3 As to comparative advertisements see *ibid* reg 4A (as added); and PARA 732 post.

4 *Ibid* reg 4(1) (amended by virtue of the Enterprise Act 2002 s 2; and by SI 2000/914). The Control of Misleading Advertisements Regulations 1988, SI 1988/915 (as amended) implement EC Council Directive 84/450 (OJ L250, 19.9.84, p 17) (amended by European Parliament and EC Council Directive 97/55 (OJ L290, 23.10.97, p 18)) (see PARA 393 ante). See further PARA 732 et seq post.

Regulation of misleading and comparative advertising, except regulation specifically in relation to food, tobacco and tobacco products, is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2) (b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C7, Pt III

para 5. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

5 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 2(1).

6 le by the Control of Misleading Advertisements Regulations 1988, SI 1988/915 (as amended).

7 See *ibid* regs 2(1), 4(2) (reg 2(1) amended by SI 2003/3183; and the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4(2) amended by virtue of the Enterprise Act 2002 s 2; and by SI 2003/3183). As to OFCOM see PARA 403 ante. As to complaints to OFCOM see PARAS 736-739 post.

8 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4(3) (amended by virtue of the Enterprise Act 2002 s 2).

9 See note 6 *supra*.

10 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4(4) (amended by virtue of the Enterprise Act 2002 s 2).

UPDATE

731-739 Misleading Advertisements

SI 1988/915, SI 2000/914 revoked: SI 2008/1277. As to business protection from misleading marketing, see the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

731 Complaints to Office of Fair Trading

NOTE 4--EC Council Directive 84/450 replaced by European Parliament and EC Council Directive 2006/114 (OJ L376, 27.12.2006, p 21), implemented by Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/B. MISLEADING ADVERTISEMENTS/732. Comparative advertisements.

732. Comparative advertisements.

An advertisement¹ is comparative if in any way, either explicitly or by implication, it identifies a competitor or goods or services offered by a competitor².

A comparative advertisement is, as far as the comparison is concerned, permitted only when the following conditions are met: (1) it is not misleading³; (2) it compares goods or services meeting the same needs or intended for the same purpose; (3) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price; (4) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor; (5) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor; (6) for products with designation of origin, it relates in each case to products with the same designation; (7) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the

designation of origin of competing products; (8) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name⁴.

In the case of a comparative advertisement referring to a special offer, such an advertisement is not permitted unless it indicates in a clear and unequivocal way the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services, and, where the special offer has not yet begun, the date of the start of the period during which the special price or other specific conditions are to apply⁵.

These provisions do not: (a) confer a right of action in any civil proceedings in respect of any contravention of them except as provided for in the regulations⁶; or (b) derogate from any right of action or other remedy, whether civil or criminal, in proceedings instituted otherwise than by virtue of the regulations⁷.

1 For the meaning of 'advertisement' see PARA 731 ante.

2 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 2(2A) (added by SI 2000/914).

3 For the meaning of 'misleading' see PARA 731 note 2 ante.

4 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4A(1) (reg 4A added by SI 2000/914).

5 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4A(2) (as added: see note 4 supra).

6 Ie the Control of Misleading Advertisements Regulations 1988, SI 1988/915 (as amended).

7 Ibid reg 4A(3) (as added: see note 4 supra).

UPDATE

731-739 Misleading Advertisements

SI 1988/915, SI 2000/914 revoked: SI 2008/1277. As to business protection from misleading marketing, see the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

732 Comparative advertisements

NOTE 4--See Case C-59/05 *Siemens AG v VIPA Gesellschaft für Visualisierung und Prozessautomatisierung mbH* [2006] 2 CMLR 865, ECJ (virtually identical product identification system took unfair advantage).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/B. MISLEADING ADVERTISEMENTS/733. Applications to the court by the Office of Fair Trading.

733. Applications to the court by the Office of Fair Trading.

If, having considered a complaint about an advertisement¹, the Office of Fair Trading² (the 'OFT') considers that the advertisement is misleading³ or is a comparative advertisement which is not permitted⁴, it may, if it thinks it appropriate to do so, bring proceedings for an injunction

(in which proceedings it may also apply for an interim injunction) against any person appearing to it to be concerned or likely to be concerned with the publication⁵ of the advertisement⁶.

The OFT must give reasons for its decision to apply or not to apply, as the case may be, for an injunction in relation to any complaint which it is required⁷ to consider⁸.

1 Ie pursuant to the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4(1): see PARA 731 ante. For the meaning of 'advertisement' see PARA 731 ante.

2 As to the Office of Fair Trading see PARA 407 ante.

3 For the meaning of 'misleading' see PARA 731 note 2 ante.

4 As to permitted comparative advertisements see PARA 732 ante.

5 For these purposes, 'publication', in relation to an advertisement, means the dissemination of that advertisement whether to an individual person or a number of persons and whether orally or in writing or in any other way whatsoever; and 'publish' is to be construed accordingly: Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 2(1).

6 Ibid reg 5(1) (amended by virtue of the Enterprise Act 2002 s 2; and by SI 2000/914).

7 Ie by the Control of Misleading Advertisements Regulations 1988, SI 1988/915 (as amended).

8 Ibid reg 5(2) (amended by virtue of the Enterprise Act 2002 s 2).

UPDATE

731-739 Misleading Advertisements

SI 1988/915, SI 2000/914 revoked: SI 2008/1277. As to business protection from misleading marketing, see the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/B. MISLEADING ADVERTISEMENTS/734. Functions of the court.

734. Functions of the court.

On an application by the Office of Fair Trading (the 'OFT')¹, the court² may grant an injunction on such terms as it may think fit but, except where it grants an interim injunction, only if the court is satisfied that the advertisement³ to which the application relates is misleading⁴ or is a comparative advertisement which is not permitted⁵. Before granting an injunction, the court must have regard to all the interests involved and, in particular, the public interest⁶.

In considering an application for an injunction, the court may, whether or not on the application of any party to the proceedings, require any person appearing to the court to be responsible for the publication⁷ of the advertisement to which the application relates to furnish the court with evidence of the accuracy of any factual claim made in the advertisement⁸. The court must not make such a requirement unless it appears to the court to be appropriate in the circumstances of the particular case, having regard to the legitimate interests of the person who would be the subject of or affected by the requirement and of any other person concerned with the advertisement⁹. If such evidence is not furnished to it following a requirement so made by it or

if it considers such evidence inadequate, the court may decline to consider the factual claim accurate¹⁰.

The court must not refuse to grant an injunction for lack of evidence that:

- 1604 (1) the publication of the advertisement in question has given rise to loss or damage to any person; or
- 1605 (2) the person responsible for the advertisement intended it to be misleading or failed to exercise proper care to prevent its being misleading; or
- 1606 (3) the person responsible for the comparative advertisement intended to breach the conditions in respect of comparative advertisements¹¹ or failed to exercise proper care to meet those conditions¹².

An injunction may: (a) relate not only to a particular advertisement but to any advertisement in similar terms or likely to convey a similar impression¹³; (b) prohibit the publication or the continued or further publication of an advertisement¹⁴.

1 le under the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 5 (as amended): see PARA 733 ante. As to the Office of Fair Trading see PARA 407 ante.

2 For these purposes, 'court' means the High Court: *ibid* reg 2(1).

3 For the meaning of 'advertisement' see PARA 731 ante.

4 For the meaning of 'misleading' see PARA 731 note 2 ante.

5 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 6(1) (amended by virtue of the Enterprise Act 2002 s 2; and by SI 2000/914). As to permitted comparative advertisements see PARA 732 ante.

6 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 6(1).

7 For the meaning of 'publication' see PARA 733 note 5 ante.

8 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 6(3).

9 *Ibid* reg 6(3).

10 *Ibid* reg 6(4).

11 le the conditions in *ibid* reg 4A(1), (2) (as added): see PARA 732 ante.

12 *Ibid* reg 6(5) (amended by SI 2000/914).

13 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 6(2). In granting the injunction, the court must avoid the extremes of granting an injunction which is so specific that the advertiser may escape its effect and still publish a misleading advertisement merely by making a small alteration in the terms of the advertisement or of granting an injunction which is so general that the advertiser has no clear idea of what he is not allowed to do: *Director General of Fair Trading v Tobyward Ltd* [1989] 2 All ER 266, [1989] 1 WLR 517.

14 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 6(6).

UPDATE

731-739 Misleading Advertisements

SI 1988/915, SI 2000/914 revoked: SI 2008/1277. As to business protection from misleading marketing, see the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/B. MISLEADING ADVERTISEMENTS/735. Powers of the Office of Fair Trading to obtain and disclose information; disclosure of information generally.

735. Powers of the Office of Fair Trading to obtain and disclose information; disclosure of information generally.

For the purpose of facilitating the exercise by it of any functions conferred on it under the statutory provisions relating to misleading advertisements¹, the Office of Fair Trading² (the 'OFT') may, by notice in writing signed on its behalf, require any person to furnish to it such information as may be specified or described in the notice or to produce to it any documents so specified or described³. Such a notice may specify the way in which, and the time within which, it is to be complied with; and it may be varied or revoked by a subsequent notice⁴. Nothing in these provisions compels the production or furnishing by any person of a document or of information which he would in court proceedings be entitled to refuse to produce or furnish on grounds of legal professional privilege⁵.

If a person makes default in complying with such a notice, the court⁶ may, on the application of the OFT, make such order as the court thinks fit for requiring the default to be made good; and any such order may provide that all the costs or expenses of and incidental to the application are to be borne by the person in default or by any officers of a company or other association who are responsible for its default⁷.

Subject to any provision to the contrary made by or under any enactment, where the OFT considers it appropriate to do so for the purpose of controlling misleading⁸ advertisements⁹ or comparative advertisements which do not comply with the regulatory provisions¹⁰, it may refer to any person any complaint, including any related documentation, about an advertisement or disclose to any person any information, whether or not obtained by means of the exercise of the powers conferred¹¹ by these provisions¹².

The OFT may arrange for the dissemination in such form and manner as it considers appropriate of such information and advice concerning the operation of these provisions as may appear to it to be expedient to give to the public and to all persons likely to be affected by these provisions¹³.

1 le under the Control of Misleading Advertisements Regulations 1988, SI 1988/915 (as amended).

2 As to the Office of Fair Trading see PARA 407 ante.

3 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 7(1) (amended by virtue of the Enterprise Act 2002 s 2).

4 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 7(2).

5 Ibid reg 7(3).

6 For the meaning of 'court' see PARA 734 note 2 ante.

7 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 7(4) (amended by virtue of the Enterprise Act 2002 s 2).

8 For the meaning of 'misleading' see PARA 731 note 2 ante.

9 For the meaning of 'advertisement' see PARA 731 ante.

10 le the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4A (as added): see PARA 732 ante.

11 le the power conferred by ibid reg 7(1) (as amended): see the text and note 3 supra.

12 Ibid reg 7(5) (amended by virtue of the Enterprise Act 2002 s 2; and by SI 2000/914).

13 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 7(8) (amended by virtue of the Enterprise Act 2002 s 2).

UPDATE

731-739 Misleading Advertisements

SI 1988/915, SI 2000/914 revoked: SI 2008/1277. As to business protection from misleading marketing, see the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/B. MISLEADING ADVERTISEMENTS/736. Complaints to OFCOM.

736. Complaints to OFCOM.

It is the duty of OFCOM¹ to consider any complaint made to it that any advertisement² included or proposed to be included in a licensed service³ is misleading⁴ or is a comparative advertisement and is not permitted under the regulatory provisions⁵, unless the complaint appears to OFCOM to be frivolous or vexatious⁶. In exercising the powers conferred on it by the regulatory provisions, OFCOM must have regard to all the interests involved and in particular the public interest⁷. OFCOM must give reasons for its decisions⁸.

1 As to OFCOM see PARA 403 ante.

2 For the meaning of 'advertisement' see PARA 731 ante.

3 For these purposes, 'licensed service' means a service in respect of which a licence has been granted under the Broadcasting Act 1990 Pt I (ss 1-71) (as amended) or Pt III (ss 85-126) (as amended) or under the Broadcasting Act 1996 Pt I (ss 1-39) (as amended) or Pt II (ss 40-72) (as amended) (see TELECOMMUNICATIONS AND BROADCASTING): Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 2(1) (definition substituted by SI 2003/3183).

4 For the meaning of 'misleading' see PARA 731 note 2 ante.

5 le the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4A (as added): see PARA 732 ante.

6 Ibid reg 8(1) (substituted by SI 2003/3183).

7 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 8(4) (substituted by the Broadcasting Act 1990 Sch 20 para 51(3); and amended by SI 2000/3183).

8 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 8(3) (substituted by SI 2003/3183).

UPDATE

731-739 Misleading Advertisements

SI 1988/915, SI 2000/914 revoked: SI 2008/1277. As to business protection from misleading marketing, see the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/B. MISLEADING ADVERTISEMENTS/737. Control by OFCOM of misleading advertisements.

737. Control by OFCOM of misleading advertisements.

If, having considered a complaint about an advertisement¹, it considers that the advertisement is misleading², or is a comparative advertisement and is not permitted under the regulatory provisions³, OFCOM⁴ may, if it thinks it appropriate to do so, exercise in relation to the advertisement any power conferred on it by virtue of a condition included in a licence for a programme service⁵.

OFCOM may require any person appearing to it to be responsible for an advertisement which OFCOM believes may be misleading, or may be a comparative advertisement which is not permitted, to furnish it with evidence as to the accuracy of any factual claim made in the advertisement. In deciding whether or not to make such a requirement OFCOM must have regard to the legitimate interests of any person who would be the subject of or affected by the requirement⁶. If such evidence is not furnished to it following such a requirement within a time specified by OFCOM, or if it considers such evidence inadequate, OFCOM may consider the factual claim inaccurate⁷.

1 Ie pursuant to the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 8(1) (as substituted): see PARA 736 ante. For the meaning of 'advertisement' see PARA 731 ante.

2 For the meaning of 'misleading' see PARA 731 note 2 ante.

3 Ie the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4A (as added): see PARA 732 ante.

4 As to OFCOM see PARA 403 ante.

5 Ie in accordance with the Communications Act 2003 s 325(4) (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 289): see the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 9(1) (substituted by SI 2003/3183).

6 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 9(2) (substituted by the Broadcasting Act 1990 Sch 20 para 51(3); and amended by SI 2000/914; SI 2003/3183).

7 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 9(3) (substituted by the Broadcasting Act 1990 Sch 20 para 51(3); and amended by SI 2000/914; SI 2003/3183).

UPDATE

731-739 Misleading Advertisements

SI 1988/915, SI 2000/914 revoked: SI 2008/1277. As to business protection from misleading marketing, see the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/B. MISLEADING ADVERTISEMENTS/738. Complaints about advertisements on S4C or S4C Digital.

738. Complaints about advertisements on S4C or S4C Digital.

It is the duty of OFCOM¹ to consider any complaint made to it that any advertisement² broadcast or proposed to be broadcast on S4C or S4C Digital³ is misleading⁴, or is a comparative advertisement and is not permitted under the regulatory provisions⁵, unless the complaint appears to OFCOM to be frivolous or vexatious⁶. In exercising the powers conferred on it by the regulatory provisions, OFCOM must have regard to all the interests involved and in particular the public interest⁷. OFCOM must give reasons for its decisions⁸.

1 As to OFCOM see PARA 403 ante.

2 For the meaning of 'advertisement' see PARA 731 ante.

3 'S4C' and 'S4C Digital' have the same meanings as in the Communications Act 2003 Pt III (ss 198-362) (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 395): Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 2(1) (definition added by SI 2003/3183).

4 For the meaning of 'misleading' see PARA 731 note 2 ante.

5 I.e. the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4A (as added): see PARA 732 ante.

6 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 10(1) (substituted by SI 2003/3183).

7 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 10(4) (substituted by the Broadcasting Act 1990 s 203(1), (3), Sch 20 para 51(3); and amended by SI 2003/3183).

8 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 10(3) (substituted by SI 2003/3183).

UPDATE

731-739 Misleading Advertisements

SI 1988/915, SI 2000/914 revoked: SI 2008/1277. As to business protection from misleading marketing, see the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/B. MISLEADING ADVERTISEMENTS/739. Control of misleading advertisements and comparative advertisements by S4C and S4C Digital.

739. Control of misleading advertisements and comparative advertisements by S4C and S4C Digital.

If, having considered a complaint about an advertisement¹, it considers that the advertisement is misleading² or is a comparative advertisement and is not permitted under the regulatory provisions³, OFCOM⁴ may, if it thinks it appropriate to do so, exercise in relation to the advertisement, the power conferred on it⁵ to direct the exclusion of advertisements from Welsh public television services⁶.

OFCOM may require any person appearing to it to be responsible for an advertisement which OFCOM believes may be misleading or may be a comparative advertisement which is not permitted to furnish it with evidence as to the accuracy of any factual claim made in the advertisement. In deciding whether or not to make such a requirement, OFCOM must have regard to the legitimate interests of any person who would be the subject of or affected by the requirement⁷. If such information is not furnished to it following such a requirement within a time specified by OFCOM, or if it considers such evidence inadequate, OFCOM may consider the factual claim inaccurate⁸.

1 Ie pursuant to the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 10(1) (as substituted): see PARA 738 ante. For the meaning of 'advertisement' see PARA 731 ante.

2 For the meaning of 'misleading' see PARA 731 note 2 ante.

3 Ie the Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 4A (as added): see PARA 732 ante.

4 As to OFCOM see PARA 403 ante.

5 Ie by the Communications Act 2003 s 338, Sch 12 para 14: see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 406.

6 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 11(1) (substituted by SI 2003/3183).

7 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 11(2) (substituted by the Broadcasting Act 1990 Sch 20 para 51(3); and amended by SI 2000/914; SI 2003/3183).

8 Control of Misleading Advertisements Regulations 1988, SI 1988/915, reg 11(3) (substituted by the Broadcasting Act 1990 Sch 20 para 51(3); and amended by SI 2000/914; SI 2003/3183).

UPDATE

731-739 Misleading Advertisements

SI 1988/915, SI 2000/914 revoked: SI 2008/1277. As to business protection from misleading marketing, see the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ii) Advertisements and Unsolicited Calls/C. DIRECT MARKETING/740. Use of electronic communications systems for direct marketing.

C. DIRECT MARKETING

740. Use of electronic communications systems for direct marketing.

A provider of a public electronic communications service¹ ('the service provider') has certain duties in connection with the privacy of subscribers to its service². It is required to safeguard the security of the service by taking appropriate technical and organisational measures, if necessary in conjunction with the provider of the electronic communications network³ by means of which the service is provided⁴. Restrictions are placed on the processing of traffic data⁵ and location data⁶ relating to subscribers or users⁷; and there are requirements relating to itemised billing, calling line identification, and call forwarding designed to protect the privacy of subscribers⁸.

Where a directory of subscribers, whether in printed or electronic form, is made available to members of the public or a section of the public, including by means of a directory enquiry service, provision is made for the protection of the personal data of subscribers and its exclusion from any such directory at the subscriber's request⁹.

Restrictions are placed on the use of telecommunication services and electronic mail¹⁰ for direct marketing purposes. A person must not use, or instigate the use of, a public electronic communications service, and a subscriber must not permit his line to be used, for the purposes of making unsolicited calls¹¹ for direct marketing purposes, where the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line, or the number allocated to a subscriber in respect of the called line is one listed in the register¹² kept for the purpose¹³. A person must neither transmit, nor instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling system¹⁴, unless the called line is that of a subscriber who has previously notified the caller that for the time being he consents to such communications being sent by, or at the instigation of, the caller on that line¹⁵. A subscriber must not permit his line to be used in contravention of this provision¹⁶. A person must neither transmit, nor instigate the transmission of, unsolicited communications for direct marketing purposes by means of a facsimile machine¹¹, where the called line is that of:

- 1607 (1) an individual subscriber, except where the individual subscriber has previously notified the caller that he consents for the time being to such communications being sent by, or at the instigation of, the caller;
- 1608 (2) a corporate subscriber who has previously notified the caller that such communications should not be sent on that line; or
- 1609 (3) a subscriber and the number allocated to that line is listed in the register kept¹⁷ for the purpose¹⁸.

Where a public electronic communications service is used for the transmission of a communication for direct marketing purposes, the person using, or instigating the use of, the service must ensure that the following information is provided with that communication¹⁹:

- 1610 (a) in relation to a communication by an automated calling system or a facsimile machine: (i) the name of the person; and (ii) either the address of the person or a telephone number on which he can be reached free of charge²⁰;
- 1611 (b) in relation to a communication by unsolicited telephone call: (i) the name of the person; and (ii) if the recipient of the call so requests, either the address of the person or a telephone number on which he can be reached free of charge²¹.

Except in the circumstances referred to below²², a person may neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender²³. A subscriber must not permit his line to be used in contravention of this

requirement²⁴. A person may send or instigate the sending of electronic mail for the purposes of direct marketing where:

- 1612 (A) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;
- 1613 (B) the direct marketing is in respect of that person's similar products and services only; and
- 1614 (C) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication²⁵.

A person must neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail, where the identity of the person on whose behalf the communication has been sent has been disguised or concealed, or where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided²⁶.

A person who suffers damage by reason of any contravention of any of these provisions by any other person is entitled to bring proceedings for compensation from that other person for that damage²⁷. In such proceedings brought against a person it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the relevant requirement²⁸. The enforcement provisions of the Data Protection Act 1998²⁹ may also be invoked³⁰.

To the extent that any term in a contract between a subscriber to and the provider of a public electronic communications service or such a provider and the provider of an electronic communications network would be inconsistent with a requirement of the provisions set out above, that term is void³¹.

1 'Public electronic communications service' has the meaning given in the Communications Act 2003 s 151 (see TELECOMMUNICATIONS vol 97 (2010) PARA 104): Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426, reg 2(1).

2 See the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426 (as amended), which implement in part European Parliament and EC Council Directive 2002/58 (OJ L201, 31.7.2002, p 37) concerning the processing of personal data and the protection of privacy in the electronic communications sector; and TELECOMMUNICATIONS vol 97 (2010) PARA 223 et seq. 'Subscriber' means a person who is a party to a contract with a provider of public electronic communications services for the supply of such services: Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426, reg 2(1).

3 'Electronic communications network' has the meaning given by the Communications Act 2003 s 32 (see TELECOMMUNICATIONS vol 97 (2010) PARA 60): Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426, reg 2(1).

4 See *ibid* regs 5, 6; and TELECOMMUNICATIONS vol 97 (2010) PARA 223.

5 'Traffic data' means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing in respect of that communication and includes data relating to the routing, duration or time of a communication: *ibid* reg 2(1).

6 'Location data' means any data processed in an electronic communications network indicating the geographical position of the terminal equipment of a user of a public electronic communications service, including data relating to: (1) the latitude, longitude or altitude of the terminal equipment; (2) the direction of travel of the user; or (3) the time the location information was recorded: *ibid* reg 2(1).

7 See *ibid* regs 7, 8, 14; and TELECOMMUNICATIONS vol 97 (2010) PARAS 224, 226.

- 8 See *ibid* regs 9-13, 15, 17; and TELECOMMUNICATIONS vol 97 (2010) PARAS 225, 227.
- 9 See *ibid* reg 18; and TELECOMMUNICATIONS vol 97 (2010) PARA 228.
- 10 'Electronic mail' means any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service: *ibid* reg 2(1).
- 11 'Call' means a connection established by means of a telephone service available to the public allowing two-way communication in real time; and 'communication' means any information exchanged or conveyed between a finite number of parties by means of a public electronic communications service, but does not include information conveyed as part of a programme service, except to the extent that such information can be related to the identifiable subscriber or user receiving the information: *ibid* reg 2(1).
- 12 *Ie* the register kept under *ibid* reg 26 (as amended): see TELECOMMUNICATIONS vol 97 (2010) PARA 229.
- 13 See the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426, reg 21(1), (2); and TELECOMMUNICATIONS vol 97 (2010) PARA 229.
- 14 An automated calling system is a system which is capable of: (1) automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system; and (2) transmitting sounds which are not live speech for reception by persons at some or all of the destinations so called: *ibid* reg 19(4).
- 15 See *ibid* reg 19(1), (2); and TELECOMMUNICATIONS vol 97 (2010) PARA 229.
- 16 *Ibid* reg 19(3).
- 17 *Ie* under *ibid* reg 25: see TELECOMMUNICATIONS vol 97 (2010) PARA 229.
- 18 See *ibid* reg 20(1); and TELECOMMUNICATIONS vol 97 (2010) PARA 229.
- 19 See *ibid* reg 24(1); and TELECOMMUNICATIONS vol 97 (2010) PARA 229.
- 20 *Ibid* reg 24(1)(a), (2).
- 21 *Ibid* reg 24(1)(b), (2).
- 22 See *ibid* reg 22(3); and the text to note 25 *infra*.
- 23 See *ibid* reg 22(2); and TELECOMMUNICATIONS vol 97 (2010) PARA 230.
- 24 *Ibid* reg 22(4).
- 25 *Ibid* reg 22(3).
- 26 See *ibid* reg 23; and TELECOMMUNICATIONS vol 97 (2010) PARA 230.
- 27 See *ibid* reg 30; and TELECOMMUNICATIONS vol 97 (2010) PARA 231.
- 28 *Ibid* reg 30(2).
- 29 *Ie* the Data Protection Act 1998 Pt V (ss 40-50), Sch 6, Sch 9 (as amended) (see CONFIDENCE AND DATA PROTECTION), which are extended for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426 (as amended), and, for those purposes, have effect subject to the modifications set out in Sch 1: reg 31(1).
- 30 See *ibid* regs 31, 32; and TELECOMMUNICATIONS vol 97 (2010) PARA 231.
- 31 See *ibid* reg 27; and TELECOMMUNICATIONS vol 97 (2010) PARA 231.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(iii) Agricultural and Horticultural Products/741. Grading of agricultural and fresh horticultural produce.

(iii) Agricultural and Horticultural Products

741. Grading of agricultural and fresh horticultural produce.

Regulations may be made prescribing designations ('grade designations') to indicate the quality of any articles of agricultural produce; and any such regulations must contain a definition ('the statutory definition') of the quality indicated by every grade designation thereby prescribed¹. Where any person sells any article of agricultural produce to which a grade designation is applied², then, notwithstanding any contract or notice to the contrary, it is deemed to be a term of the contract of sale that the quality of the article accords with the statutory definition indicated by the grade designation³.

Regulations may be made, in relation to any description of fresh horticultural produce designating and defining grades of quality, and prescribing for each grade the form of a label for indicating that produce in connection with which the label is used falls within that grade⁴. Except in the case of:

- 1615 (1) a sale of the produce by retail;
 - 1616 (2) a sale where the produce is to be transported to a country outside the United Kingdom by, or to the order of, the buyer;
 - 1617 (3) a sale where the produce is to be used by the buyer in manufacturing or producing any commodity for sale or other disposal by him;
 - 1618 (4) a direct sale⁵ by the producer of any produce to a person who undertakes:
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- 204. (a) that, before any sale by him of any of the produce, not being a sale such as is mentioned in head (2) or head (3) above, the produce will be sorted into the prescribed grades and produce the quality of which is inferior to that required for the lowest prescribed grade will be separated from other produce; and
 - 205. (b) that, on any sale by him of any of the produce falling within a prescribed grade, not being a sale such as is mentioned in head (2) or head (3) above, the produce will be packed in a container to which is affixed a label in the form prescribed for that or any lower grade or, if not packed in a container, will have affixed to it such a label; or
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- 1619 (5) a direct sale by the producer of any produce where the produce is, or is to be, delivered at premises, or at any stall or vehicle, from which it is to be sold by retail,

a person must not sell any fresh horticultural produce of a description in relation to which grades of quality are so designated ('regulated produce') unless the produce falls within a prescribed grade and is packed in a container to which is affixed a label in the form prescribed for that or any lower grade or, if not packed in a container, has affixed to it such a label⁶.

1 See the Agricultural Produce (Grading and Marking) Act 1928 s 1(1) (as amended); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1117. As to grade designation marks see s 2 (as amended); the Agriculture Produce (Grading and Marking) (General) Regulations 1928, SI 1928/674; and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1118.

2 For these purposes, a grade designation is deemed to be applied to an article if it is used by or on behalf of the vendor, when the article is sold or delivered or exposed or offered for sale, in any manner calculated to lead to the belief that the quality of the article in connection with which it is used accords with the statutory definition indicated by the grade description: Agricultural Produce (Grading and Marking) Act 1928 s 1(3).

3 See *ibid* s 1(2) (as amended); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1117.

4 See the Agriculture and Horticulture Act 1964 s 11(1); the Grading of Horticultural Produce (Amendment) Regulations 1973, SI 1973/22 (as amended); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1147 et seq.

5 For these purposes, 'direct sale' means a sale where negotiations on behalf of the vendor are not conducted by any agent other than a person employed by him under a contract of service: Agriculture and Horticulture Act 1964 s 12(4).

6 See ibid s 12(1), (2); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1150.

UPDATE

741 Grading of agricultural and fresh horticultural produce

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(iii) Agricultural and Horticultural Products/742. Farm and garden chemicals.

742. Farm and garden chemicals.

Regulations may be made for imposing requirements as to, and otherwise regulating, the labelling and marking of products consisting of or containing any substance, whether organic or inorganic, having any of the following properties:

- 1620 (1) destroying or repelling any insect, mite, mollusc, nematode, fungus, bacterial organism, virus or other pest capable of destroying or damaging plants;
- 1621 (2) directly or indirectly controlling the activity of, or preventing or mitigating the harmful effect on plants of, any such pest;
- 1622 (3) destroying weeds;
- 1623 (4) acting as a bird or animal repellent, plant growth regulator, defoliant, desiccant or agent for thinning fruit or preventing the premature fall of fruit,

or in the preparation of which any such substance has been used as an ingredient, being products intended for sale for use in agriculture or gardening for protecting, or controlling the growth of, plants or for destroying weeds¹. Without prejudice to the generality of the provisions described above, regulations may be made:

- 1624 (a) for providing for the name to be used for any such substance in any label attached to or written on the container for, or supplied with, any product in which the substance is contained or in the preparation of which it has been used as an ingredient; and
- 1625 (b) for requiring any such label to bear a prescribed mark, symbol or colour to indicate the extent of any hazard which the product constitutes to human beings or other forms of life and to bear prescribed words of explanation or warning².

¹ See the Farm and Garden Chemicals Act 1967 ss 1(1), 2; the Farm and Garden Chemicals Regulations 1971, SI 1971/729; and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1051. As to transactions in

unlabelled products see the Farm and Garden Chemicals Act 1967 s 3 (as amended); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1052.

2 See note 1 *supra*.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(iii) Agricultural and Horticultural Products/743. Fertilisers and feeding stuffs.

743. Fertilisers and feeding stuffs.

A person who sells material of a prescribed description for use as a fertiliser or feeding stuff must give to the purchaser a statement in writing (a 'statutory statement') in such form, if any, as may be prescribed, containing:

- 1626 (1) such particulars as may be prescribed of the nature, substance or quality of the material; and
- 1627 (2) such information or instructions as to the storage, handling or use of the materials as may be prescribed¹.

The above provisions do not apply to:

- 1628 (a) sales of two or more materials which are mixed at the request of the purchaser before delivery to him; or
- 1629 (b) sales in quantities of not more than 25 kilograms if the material sold is taken in the presence of the purchaser from a parcel bearing a conspicuous label on which are marked in the prescribed manner the matters which would otherwise be required to be contained in a statutory statement on the sale of the material².

¹ See the Agriculture Act 1970 s 68(1); the Fertilisers Regulations 1991, SI 1991/2197 (amended by SI 1995/16; SI 1997/1543; SI 1998/2024); the Feeding Stuffs Regulations 2000, SI 2000/2481 (amended, in relation to England, by SI 2001/541; SI 2001/3389; SI 2003/1026; SI 2003/1503; SI 2003/2912; SI 2004/1301; SI 2004/2688), which, in general, apply only to England; and the Feeding Stuffs (Wales) Regulations 2001, SI 2001/343 (amended by SI 2001/2253; SI 2001/3461; SI 2002/1797; SI 2003/989; SI 2003/1850; SI 2003/3119; SI 2004/1749; SI 2004/3091); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 944. As to the marking of material prepared for sale see the Agriculture Act 1970 s 69 (as amended); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 945.

² See *ibid* s 68(2) (as amended); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 944.

UPDATE

743 Fertilisers and feeding stuffs

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 1--SI 2000/2481 replaced: Feeding Stuffs (England) Regulations 2005, SI 2005/3281 (amended by SI 2006/113, SI 2006/3120, SI 2006/2808, SI 2007/3008, SI 2008/1523, SI 2009/28); Feeding Stuffs (Wales) Regulations 2006, SI 2006/116

(amended by SI 2006/617, SI 2006/2928, SI 2006/3256, SI 2007/3171, SI 2008/1806, SI 2009/106). SI 2001/343 further amended: SI 2006/116, SI 2006/2928. SI 2001/3461; SI 2002/1797; SI 2003/989; SI 2003/1850; SI 2003/3119; SI 2004/1749; SI 2004/3091 revoked: SI 2006/116.

See EC Fertilisers (England and Wales) Regulations 2006, SI 2006/2486; and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARAS 964-968.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(iii) Agricultural and Horticultural Products/744. Seeds.

744. Seeds.

After consultation with representatives of such interests as appear to be concerned, regulations may be made by statutory instrument for the purpose:

- 1630 (1) of ensuring that reliable and adequate information is afforded as to the nature, condition and quality of seeds which are sold or are for sale;
- 1631 (2) of preventing the sale of seeds which are deleterious and of preventing the sale of seeds which have not been tested for purity and germination, or which are of a variety the performance of which has not been subjected to trials;
- 1632 (3) of preventing the spread of plant disease by means of seeds;
- 1633 (4) of regulating the descriptions under which seeds are sold; and
- 1634 (5) of prescribing anything which is¹ authorised or required to be prescribed².

¹ le under the Plant Varieties and Seeds Act 1964 Pt II (ss 16-31) (as amended): see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 906 et seq.

² See ibid s 16(1) (as amended); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 906. As to the specific matters which the regulations may contain see s 16(2), (3) (as amended); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 906.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(iv) Auctions/745. Sales by auction.

(iv) Auctions

745. Sales by auction.

The Sale of Goods Act 1979 deals specifically with the putting up of goods for sale by auction in lots¹, with the time of completion of a sale by auction² and with the seller's rights to bid and to impose a reserve price³. There are also other enactments dealing with mock auctions⁴ and bidding agreements⁵. Sales by auction are otherwise subject to the general law relating to sale of goods⁶.

¹ See the Sale of Goods Act 1979 s 57(1); and AUCTION vol 2(3) (Reissue) PARA 237. The regulation of auctions of goods and services is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2) (b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C7. As to

the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

2 See the Sale of Goods Act 1979 s 57(2); and AUCTION vol 2(3) (Reissue) PARA 244.

3 See *ibid* s 57(3)-(6); *Barry v Heathcote Ball & Co (Commercial Auctions) Ltd* [2001] 1 All ER 944, [2000] 1 WLR 1962; and AUCTION vol 2(3) (Reissue) PARAS 208, 242.

4 See the Mock Auctions Act 1961; para 746 post; and AUCTION vol 2(3) (Reissue) PARA 245.

5 See the Auctions (Bidding Agreements) Act 1927; the Auctions (Bidding Agreements) Act 1969; para 747 post; and AUCTION vol 2(3) (Reissue) PARAS 241, 246-248.

6 See eg *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA (condition and warranty). As to contracts that fall within the Sale of Goods Act 1979 see PARA 27 et seq ante.

UPDATE

745 Sales by auction

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(iv) Auctions/746. Mock auctions.

746. Mock auctions.

If a person promotes or conducts, or assists in the conduct of, a mock auction at which one or more lots consisting of or including one or more of the following articles, that is to say, any plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament or any musical or scientific instrument or apparatus are offered for sale, he is guilty of an offence¹.

For these purposes, a sale of goods by way of competitive bidding² is to be taken to be a mock auction if, but only if, during the course of the sale³:

- 1635 (1) any such lot is sold to a person bidding for it⁴, and either it is sold to him at a price lower than the amount of his highest bid⁵ for that lot, or part of the price at which it is sold to him is repaid or credited to him or is stated⁶ to be so repaid or credited; or
- 1636 (2) the right to bid for any such lot is restricted, or is stated to be restricted, to persons who have bought or agreed to buy one or more articles; or
- 1637 (3) any articles are given away or offered for gifts⁷.

A sale is not to be taken to be a mock auction by virtue of head (1) above if it is proved that the reduction in price, or the repayment or credit, as the case may be:

- 1638 (a) was on account of a defect discovered after the highest bid in question had been made, being a defect of which the person conducting the sale was unaware when that bid was made; or
- 1639 (b) was on account of damage sustained after the bid was made⁸.

1 Mock Auctions Act 1961 s 1(1), (2) (amended by the Criminal Law Act 1977 s 32(1); and the Magistrates' Courts Act 1980 s 32). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or both, or on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding the prescribed sum, or both: see the Mock Auctions Act 1961 s 1(1), (2) (as so amended).

Subject to the Interpretation Act 1978 s 18 (offences under two or more laws: see STATUTES vol 44(1) (Reissue) PARA 1445), nothing in the Mock Auctions Act 1961 derogates from any right of action or other remedy, whether civil or criminal, in proceedings instituted otherwise than under the Mock Auctions Act 1961: s 3(6).

Where an offence punishable under the Mock Auctions Act 1961 which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person purporting to act in such capacity, he, as well as the body corporate, is deemed to be guilty of that offence and is liable to be proceeded against and punished accordingly: s 2. As to the meaning of 'manager' see PARA 500 note 3 ante.

All offences under the Mock Auctions Act 1961 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

The regulation of mock auctions of goods and services is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2)(b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C7. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

2 For these purposes, 'sale of goods by way of competitive bidding' means any sale of goods at which the persons present, or some of them, are invited to buy articles by way of competitive bidding; and 'competitive bidding' includes any mode of sale whereby prospective purchasers may be enabled to compete for the purchase of articles, whether by way of increasing bids or by the offer of articles to be bid for at successively decreasing prices or otherwise: Mock Auctions Act 1961 s 3(1). See *Lomas v Rydeheard* (1975) 119 Sol Jo 233, DC (seller calling out successively decreasing prices but not asking for offers until he reached his final price); *Clements v Rydeheard* [1978] 3 All ER 658, DC (offering boxes at fixed price and selecting purchasers who put up hands; purchasers of later lots similarly selected from amongst those who had purchased boxes). The competition need not relate to the price: *Allen v Simmons* [1978] 3 All ER 662, [1978] 1 WLR 879, DC. The words 'or otherwise' are not to be construed ejusdem generis with the preceding words: *R v Pollard* (1983) 148 JP 679, CA.

3 For these purposes, anything done in or about the place where a sale of goods by way of competitive bidding is held, if done in connection with the sale, is to be taken to be done during the course of the sale, whether it is done at the time when any articles are being sold or offered for sale by way of competitive bidding or before or after any such time: Mock Auctions Act 1961 s 3(5).

4 For these purposes, any reference to the sale of a lot to a person who has made a bid for it includes a reference to a purported sale thereof to a person stated to have bid for it, whether that person exists or not: *ibid* s 3(4).

5 For these purposes, any bid stated to have been made at a sale of goods by way of competitive bidding is to be conclusively presumed to have been made, and to have been a bid of the amount stated: *ibid* s 3(4).

6 For these purposes, 'stated', in relation to a sale of goods by way of competitive bidding, means stated by or on behalf of the person conducting the sale, by an announcement made to the persons for the time being present at the sale: *ibid* s 3(3).

7 *Ibid* s 1(3). As to what constitutes a mock auction see also *Aitchison v Cooper* 1982 SLT (Sh Ct) 41.

8 Mock Auctions Act 1961 s 1(4).

UPDATE

746 Mock auctions

TEXT AND NOTES--Mock Auctions Act 1961 repealed: SI 2008/1277. SI 2003/1376 Schedule amended: see SI 2008/1277 Sch 2 para 101, Sch 3 para 9.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(iv) Auctions/747. Damping the sale; bidding agreements.

747. Damping the sale; bidding agreements.

Improper or fraudulent acts, which are likely to prevent the property put up from realising its fair value and to 'damp' the sale, will invalidate any purchase by persons guilty of or privy to such acts, so that the purchaser will be disentitled to specific performance and the auctioneer will be justified in withdrawing the property¹. Furthermore, if a person maliciously makes false statements with the consequence that no sale results, the unsuccessful vendor may sue for malicious falsehood².

At common law an agreement between two or more persons not to bid against each other at an auction, even if amounting to what is popularly known as a 'knock-out', is not illegal, nor does it invalidate the sale³.

Where two or more persons agree not to bid against each other at an auction on the understanding that the successful purchaser is to convey part of the property purchased to the other or others, equity will give relief if the purchaser fails to implement his promise⁴.

By statute a dealer⁵ who offers or agrees to give or gives any gift or consideration to any other person as an inducement or reward for abstaining or for having abstained from bidding at a sale by auction, either generally or for any particular lot, and any person who attempts to obtain or agrees to accept or accepts any such gift or consideration from a dealer as such an inducement or reward is guilty of an offence⁶. A prosecution may not be instituted without the consent of the Attorney General or Solicitor General⁷.

A written agreement made before an auction whereby a dealer agrees with one or more persons to purchase goods at that auction bona fide on a joint account is not a contravention of the statutory provisions, provided that a copy of the agreement is deposited with the auctioneer before any purchase is made in pursuance of it⁸.

A copy of the Auctions (Bidding Agreements) Act 1927 is one of the particulars required to be conspicuously displayed in the auction room⁹.

1 *Twining v Morrice* (1788) 2 Bro CC 326; *Mason v Armitage* (1806) 13 Ves 25; *Fuller v Abrahams* (1821) 6 Moore CP 316.

2 *Mayer v Pluck* (1971) 223 Estates Gazette 219.

3 *Rawlings v General Trading Co* [1921] 1 KB 635, CA; *Cohen v Roche* [1927] 1 KB 169; *Harrop v Thompson* [1975] 2 All ER 94, [1975] 1 WLR 545.

4 *Pallant v Morgan* [1953] Ch 43, [1952] 2 All ER 951; *Chattock v Muller* (1878) 8 ChD 177 (the successful purchaser buys for himself and the person who refrains from bidding jointly).

5 For these purposes, 'dealer' means a person who in the normal course of business attends sales by auction for the purpose of purchasing goods with a view to reselling them: Auctions (Bidding Agreements) Act 1927 s 1(2). It is submitted that the Act does not apply to sales of land by auction.

6 *Ibid* s 1(1) (amended by the Magistrates' Courts Act 1980 s 32(2)); Auctions (Bidding Agreements) Act 1969 s 1(1). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the prescribed sum, or both: see the Auctions (Bidding Agreements) Act 1927 s 1(1) (as so amended); and the Auctions (Bidding Agreements) Act 1969 s 1(1). As to the prescribed sum see PARA 498 note 2 ante. It was held before the passing of the Auctions (Bidding Agreements) Act 1969 (which introduced the alternative of trial on indictment) that the offence, being the creation of statute and not an offence at common law, was triable only as provided by the Auctions (Bidding Agreements) Act 1927 and not on

indictment, and that a count in an indictment which alleged conspiracy to contravene the Auctions (Bidding Agreements) Act 1927 and, on the facts, amounted substantially to the statutory offence, was bad: *R v Barnett* [1951] 2 KB 425, [1951] 1 All ER 917, CCA. Since the offence is now triable either summarily or on indictment, it would seem that a charge of conspiracy to contravene the Auctions (Bidding Agreements) Act 1927 will now lie.

7 Auctions (Bidding Agreements) Act 1927 s 1(3).

8 Ibid s 1(1) proviso.

9 See ibid s 3. This provision applies the Auctioneers Act 1845 (see AUCTION vol 2(3) (Reissue) PARA 241).

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(v) Building and Construction

A. THE BUILDING REGULATIONS

748. Power to make building regulations.

Regulations ('building regulations') may be made for any of the purposes of:

- 1640 (1) securing the health, safety, welfare and convenience of persons in or about buildings¹ and of others who may be affected by buildings or matters connected with buildings;
- 1641 (2) furthering the conservation of fuel and power; and
- 1642 (3) preventing waste, undue consumption, misuse or contamination of water,

with respect to the design and construction of buildings and the provision of services, fittings and equipment in or in connection with buildings².

1 For these purposes, 'building' means any permanent or temporary building and, unless the context otherwise requires, it includes any other structure or erection of whatever kind or nature, whether permanent or temporary: Building Act 1984 s 121(1). 'Structure or erection' includes a vehicle, vessel, hovercraft, aircraft or other movable object of any kind in such circumstances as may be prescribed, being circumstances that justify treating it as a building: see s 121(2). Unless the context otherwise requires, a reference to a building includes a reference to part of a building and a reference to the provision of services, fittings and equipment in or in connection with buildings, or to services, fittings and equipment so provided, includes a reference to the affixing of things to buildings or, as the case may be, to things so affixed: s 121(3).

2 Ibid s 1(1), (2). For the matters as to which building regulations may provide see s 1(3), Sch 1; and BUILDING vol 4(2) (2002 Reissue) PARA 307. As to the regulations made see the Building (Inner London) Regulations 1985, SI 1985/1936 (as amended); the Building (Inner London) Regulations 1987, SI 1987/798 (as amended); the Building (Local Authority Charges) Regulations 1998, SI 1998/3129; the Building Regulations 2000, SI 2000/2531 (as amended); and the Building (Approved Inspectors etc) Regulations 2000, SI 2000/2532 (as amended): see BUILDING vol 4(2) (2002 Reissue) PARA 306 et seq. As to the Building Regulations 2000, SI 2000/2531 (as amended) see PARA 749 et seq post.

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749. Requirements relating to building work.

Building work, that is to say:

- 1643 (1) the erection or extension of a building¹;
- 1644 (2) the provision or extension of a controlled service or fitting² in or in connection with a building;
- 1645 (3) the material alteration³ of a building, or a controlled service or fitting;
- 1646 (4) work⁴ relating to a material change of use⁵;
- 1647 (5) the insertion of insulating material into a cavity wall of a building;
- 1648 (6) work involving the underpinning of a building,

must be carried out so that:

- 1649 (a) it complies with the relevant requirements⁶ and, so that, in complying with any such requirement, there is no failure to comply with any other such requirement; and
- 1650 (b) after it has been completed, any building which is extended or to which a material alteration is made, or any building in, or in connection with which a controlled service or fitting is provided, extended or materially altered, or any controlled service or fitting, complies with the relevant requirements or, where it did not comply with any such requirement, is no more unsatisfactory in relation to that requirement than before the work was carried out⁷.

These requirements do not apply to the erection of an exempt building or extension⁸ or the carrying out of any work to or in connection with such a building or extension, if, after the carrying out of that work, it is still an exempt building or extension⁹.

1 For these purposes, 'building' means any permanent or temporary building but not any other kind of structure or erection; and a reference to a building includes a reference to part of a building: Building Regulations 2000, SI 2000/2531, reg 2(1).

2 For these purposes, 'controlled service or fitting' means a service or fitting in relation to which *ibid* reg 2(1), Sch 1 Pt G (hygiene), Sch 1 Pt H (as substituted) (drainage and waste disposal), Sch 1 Pt J (as substituted) (combustion appliances and fuel storage systems), Sch 1 Pt L (as substituted) (conservation of fuel and power) or Sch 1 Pt P (as added) (electrical safety) imposes a requirement: reg 2(1) (amended by SI 2004/3210). The provision or extension of a controlled service or fitting in or in connection with an existing dwelling and being a service or fitting in relation to which the Building Regulations 2000, SI 2000/2531, Sch 1 Pt L para L1 (as substituted), but not Sch 1 Pt G, Sch 1 Pt H (as substituted), Sch 1 Pt J (as substituted) or Sch 1 Pt P (as added), imposes a requirement is only building work where that work consists of the provision of a window, rooflight, roof window, door (being a door which together with its frame has more than 50% of its internal face area glazed), a space heating or hot water service boiler, or a hot water vessel: reg 3(1A) (added by SI 2001/3335).

3 For these purposes, an alteration is material if the work, or any part of it, would at any stage result in: (1) a building or controlled service or fitting not complying with a relevant requirement where previously it did; or (2) a building or controlled service or fitting which before the work did not comply with a relevant requirement, being more unsatisfactory in relation to such a requirement: Building Regulations 2000, SI 2000/2531, regs 2(1), 3(2). 'Relevant requirement' means any of the following applicable requirements of Sch 1, namely Sch 1 Pt A (as amended) (structure), Sch 1 Pt B para B1 (as substituted) (means of warning and escape), Sch 1 Pt B para B3 (as substituted) (internal fire spread: structure), Sch 1 Pt B para B4 (as substituted) (external fire spread), Sch 1 Pt B para B5 (as substituted) (access and facilities for the fire service) and Sch 1 Pt M (as substituted) (access to and use of buildings): reg 3(3) (amended by SI 2003/2692).

4 The work required by the Building Regulations 2000, SI 2000/2531, reg 6 (as amended) (requirements relating to material change of use): see BUILDING vol 4(2) (2002 Reissue) PARA 309.

5 For these purposes, there is a material change of use where there is a change in the purposes for which or the circumstances in which a building is used, so that after that change: (1) the building is used as a dwelling, where previously it was not; (2) the building contains a flat, where previously it did not; (3) the building is used as a hotel or boarding house, where previously it was not; (4) the building is used as an institution, where previously it was not; (5) the building is used as a public building, where previously it was not; (6) the building is not a building described in *ibid* reg 5, Sch 2 Classes I-VI (see note 8 *infra*), where previously it was; (7) the building, which contains at least one dwelling, contains a greater or a lesser number of dwellings than it did previously; (8) the building contains a room for residential purposes, where previously it did not; (9) the building, which contains at least one room for residential purposes, contains a greater or lesser number of such rooms than it did previously; or (10) the building is used as a shop, where previously it was not: reg 5 (amended by SI 2002/2871; SI 2003/2692).

'Dwelling' includes a dwelling house and a flat; 'dwelling house' does not include a flat or a building containing a flat; and 'flat' means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which it is divided horizontally: Building Regulations 2000, SI 2000/2531, reg 2(1). 'Institution' means an institution, whether described as a hospital, home, school or similar establishment, which is used as living accommodation for, or for the treatment, care or maintenance of, persons: (a) suffering from disabilities due to illness or old age or other physical or mental capacity; or (b) under the age of five years, where such persons sleep on the premises: reg 2(1). 'Public building' means a building consisting of or containing:

- 40 (i) a theatre, public library, hall or other place of public resort;
- 41 (ii) a school or other educational establishment not exempted from the operation of building regulations by virtue of the Building Act 1984 s 4(1)(a) (as amended; prospectively repealed) (see BUILDING vol 4(2) (2002 Reissue) PARA 313); or
- 42 (iii) a place of public worship,

but a building is not to be treated as a place of public resort because it is, or it contains, a shop, storehouse or warehouse, or is a dwelling to which members of the public are occasionally admitted: Building Regulations 2000, SI 2000/2531, reg 2(2). 'Room for residential purposes' means a room, or a suite of rooms, which is not a dwelling house or a flat and which is used by one or more persons to live and sleep and includes a room in a hostel, an hotel, a boarding house, a hall of residence or a residential home, whether or not the room is separated from or arranged in a cluster group with other rooms, but does not include a room in a hospital, or other similar establishment, used for patient accommodation; and, for the purposes of this definition, a 'cluster' is a group of rooms for residential purposes which is separated from the rest of the building in which it is situated by a door which is designed to be locked and not designed to be occupied by a single household: reg 2(1) (added by SI 2002/2871; and substituted by SI 2004/1465). 'Shop' includes premises: (A) used for the sale to members of the public of food or drink for consumption on or off the premises; (B) used for retail sales by auction to members of the public; (C) used by members of the public as a barber or hairdresser, or for the hiring of any item; and (D) where members of the public may take goods for repair or other treatment: Building Regulations 2000, SI 2000/2531, reg 2(1).

6 *Ie* the relevant requirements contained in *ibid* Sch 1 (as amended): see BUILDING vol 4(2) (2002 Reissue) PARA 308.

The provisions of Sch 1 Pts A-D, F-K, N and P (except for Sch 1 paras H2, J6) (as substituted and amended) do not require anything to be done except for the purpose of securing reasonable standards of health and safety for persons in or about buildings, and any others who may be affected by buildings, or matters connected with buildings: reg 8 (substituted by SI 2002/2871; and amended by SI 2004/3210).

7 Building Regulations 2000, SI 2000/2531, regs 3(1), 4(1), (2) (reg 3(1) amended by SI 2001/3335). See BUILDING vol 4(2) (2002 Reissue) PARA 308. As to unauthorised building work see the Building Regulations 2000, SI 2000/2531, reg 21; and BUILDING vol 4(2) (2002 Reissue) PARA 353.

8 *Ie* a building or extension of a kind described in *ibid* reg 9 (as amended), Sch 2. The buildings which are so exempt are: (1) buildings controlled under other legislation (Class I); (2) buildings not frequented by people (Class II); (3) greenhouses and agricultural buildings (Class III); (4) temporary buildings (Class IV); (5) ancillary buildings (Class V); (6) small detached buildings (Class VI); and (7) extensions (Class VII): Sch 2.

9 *Ibid* reg 9(1) (renumbered and amended by SI 2004/3210). However, the requirements of the Building Regulations 2000, SI 2000/2531, Sch 1 Pt P (as added) (see note 6 head (14) *supra*) apply to any greenhouse, any small detached building falling within Sch 2 class VI (see note 8 head (6) *supra*) and any extension of a building falling within Sch 2 class VII (see note 8 head (7) *supra*), which in any case receives its electricity from a source shared with or located inside a dwelling: Building Regulations 2000, SI 2000/2531, reg 9(2) (added by SI 2004/3210).

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750. Materials and workmanship.

Building work¹ must be carried out:

- 1651 (1) with adequate and proper materials which are appropriate for the circumstances in which they are used, are adequately mixed or prepared and are applied, used or fixed so as adequately to perform the functions for which they are designed; and
- 1652 (2) in a workmanlike manner².

The local authority may make such tests of any building work as may be necessary to establish whether it complies with this provision or any of the applicable requirements³ of the building regulations⁴. The local authority may take such samples of the material to be used in the carrying out of building work as may be necessary to enable it to ascertain whether such materials comply with the regulations⁵.

1 For the meaning of 'building work' see PARA 749 ante.

2 Building Regulations 2000, SI 2000/2531, reg 7. See BUILDING vol 4(2) (2002 Reissue) PARA 308.

3 ie the requirements contained in ibid Sch 1 (as amended): see PARA 749 ante.

4 Ibid reg 18 (substituted by SI 2001/3335).

5 Building Regulations 2000, SI 2000/2531, reg 19.

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751. Relaxation of building regulations.

If on an application for a direction, it is considered that the operation of a requirement in building regulations¹ would be unreasonable in relation to the particular case to which the application relates, a direction may be given dispensing with or relaxing that requirement².

1 For the meaning of 'building regulations' see PARA 748 ante.

2 See the Building Act 1984 s 8; and BUILDING vol 4(2) (2002 Reissue) PARA 315 et seq. The power under s 8(1) to dispense with or relax any requirement contained in the Building Regulations 2000, SI 2000/2531 (as amended) is exercisable by the local authority: see the Building Act 1984 s 8(2); and the Building Regulations 2000, SI 2000/2531, reg 11(1).

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752. Notices and plans.

A person who intends to carry out building work¹ or to make a material change of use² must give to the local authority a building notice³ or deposit⁴ full plans with the local authority⁵.

A person who intends to carry out building work consisting only of a specified installation or minor work⁶ is not required to give a building notice or deposit full plans if the appliance is to be installed by a designated⁷ person⁸.

1 For the meaning of 'building work' see PARA 749 ante.

2 For the meaning of 'material change of use' see PARA 749 note 5 ante.

3 In accordance with the Building Regulations 2000, SI 2000/2531, reg 13 (as amended) (particulars and plans where a building notice is given): see BUILDING vol 4(2) (2002 Reissue) PARA 324.

4 In accordance with *ibid* reg 14 (as amended) (full plans): see BUILDING vol 4(2) (2002 Reissue) PARA 325. A person must deposit full plans: (1) where he intends to carry out building work in relation to a building put or intended to be put to a use which is a relevant use (reg 12(3)); (2) where he intends to carry out work which includes the erection of a building fronting on to a private street (reg 12(4)); and (3) where he intends to carry out building work in relation to which Sch 1 para H4 (as substituted) (building over sewers) imposes a requirement (reg 12(4A) (added by SI 2001/3335)). 'Relevant use' means a use as a workplace of a kind to which the Fire Precautions (Workplace) Regulations 1997, SI 1997/1840, Pt II (regs 3-6) (as amended) (see FIRE SERVICES vol 18(2) (Reissue) PARAS 133-135) applies or a use designated under the Fire Precautions Act 1971 s 1 (as amended) (uses of premises for which fire certificate is compulsory) (see FIRE SERVICES vol 18(2) (Reissue) PARA 83); Building Regulations 2000, SI 2000/2531, reg 12(1).

5 *Ibid* reg 12(2). As to notice of commencement and completion of certain stages of work see reg 15 (as amended); and BUILDING vol 4(2) (2002 Reissue) PARA 326. As to completion certificates see reg 17; and BUILDING vol 4(2) (2002 Reissue) PARA 327. As to self-certification schemes see reg 16A (as added and substituted); and BUILDING vol 4(2) (2002 Reissue) PARA 308. As to supervision of building work otherwise than by local authorities see reg 20 (as amended); and BUILDING vol 4(2) (2002 Reissue) PARA 354 et seq.

6 In work described in *ibid* reg 12(5), Sch 2A Table col 1 (as added and amended) or in Sch 2B (as added): see BUILDING vol 4(2) (2002 Reissue) PARA 323.

7 In a person described in the entry in *ibid* Sch 2A Table col 2 (as added and amended) corresponding to the entry for work described in Sch 2A Table col 1 (as added and amended). See note 6 *supra*.

8 *Ibid* reg 12(5) (substituted by SI 2004/3210). Where the Building (Approved Inspectors etc) Regulations 2000, SI 2000/2532, reg 20 (local authority powers in relation to partly completed work) applies (see BUILDING vol 4(2) (2002 Reissue) PARA 364), the owner must comply with the requirements of that regulation instead of with those of the Building Regulations 2000, SI 2000/2531, reg 12 (as amended): reg 12(6).

UPDATE

752 Notices and plans

NOTE 4--1971 Act replaced, SI 1997/1840 replaced, SI 2000/2531 reg 12(1) revoked: Regulatory Reform (Fire Safety) Order, SI 2005/1541. SI 2000/1531 reg 12(3), (4) substituted: SI 2006/652.

TEXT AND NOTES 6-8--SI 2000/2531 reg 12(5) amended: SI 2008/671.

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753. Energy rating.

Where a new dwelling¹ is created by building work² or by a material change of use³ in connection with which building work is carried out, the person carrying out the building work must calculate the energy rating of the dwelling by means of an approved procedure and must give notice of that rating⁴ to the local authority⁵.

1 For the meaning of 'dwelling' see PARA 749 note 5 ante.

2 For the meaning of 'building work' see PARA 749 ante.

3 For the meaning of 'material change of use' see PARA 749 note 5 ante.

4 The notice must be given not later than the notice required by the Building Regulations 2000, SI 2000/2531, reg 15(4) (as amended) (see BUILDING vol 4(2) (2002 Reissue) PARA 326), and where a new dwelling is created by the erection of a building, it must be given at least five days before occupation of the dwelling: reg 16(3).

5 Ibid reg 16(1), (2). For the procedure see reg 16(4)-(7); and BUILDING vol 4(2) (2002 Reissue) PARA 328.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(v) Building and Construction/B. CONSTRUCTION PRODUCTS/754. Requirements to be satisfied by construction products.

B. CONSTRUCTION PRODUCTS

754. Requirements to be satisfied by construction products.

A construction product¹, other than a minor part product², must have such characteristics that the works in which it is to be incorporated, assembled, applied or installed can, if properly designed and built, satisfy the essential requirements³ when, where and to the extent that such works are subject to regulations⁴ containing such requirements⁵. Any construction product which bears the CE marking⁶ is presumed⁷ to satisfy the relevant requirement unless there are reasonable grounds for suspecting that the product does not satisfy the requirement or that the CE marking has not been duly⁸ affixed⁹.

A minor part product must have been manufactured in compliance with, and the manufacturer must have issued in respect of the product a declaration of compliance with, the acknowledged rule of technology¹⁰.

1 For these purposes, 'construction product' means any product which is produced for incorporation in a permanent manner in works: Construction Products Regulations 1991, SI 1991/1620, reg 2(1). 'Works' means construction works, including both buildings and civil engineering works: reg 2(1).

2 For these purposes, 'minor part product' means a construction product which is included in a list of products which play a minor part with respect to health and safety drawn up, managed and revised periodically by the EC Commission: ibid reg 2(1).

3 For these purposes, 'the essential requirements' means requirements applicable to works which may influence the technical characteristics of a construction product as set out in terms of objectives in EC Council Directive 89/106 (OJ L40, 11.2.89, p 12) Annex I and as they may be given concrete form in interpretative documents published in the 'C' series of the Official Journal of the European Communities: Construction Products Regulations 1991, SI 1991/1620, reg 2(1). EC Council Directive 89/106 (OJ L40, 11.2.89, p 12) Annex I is reproduced in the Construction Products Regulations 1991, SI 1991/1620, reg 2(1), Sch 2.

4 For these purposes, 'regulations' includes any rule, regulation or other provision which has the force of law: *ibid* reg 3(2).

5 *Ibid* reg 3(1).

6 For these purposes, 'CE marking' means the CE conformity marking referred to in *ibid* reg 5 (as amended) (CE marking and other information on or accompanying products) consisting of the symbol 'CE' in the form provided for in reg 2(1), Sch 1 (as substituted): reg 2(1) (amended by SI 1994/3051).

7 Where, however, one or more of any other EC Council Directives applying to the product allow the manufacturer, during a transitional period, to choose which arrangements to apply, the CE marking must indicate conformity only to the EC Council Directives applied by the manufacturer: Construction Products Regulations 1991, SI 1991/1620, reg 4(2) (substituted by SI 1994/3051).

8 *Ie* affixed in accordance with the Construction Products Regulations 1991, SI 1991/1620, reg 5 (as amended) (see note 6 *supra*).

9 *Ibid* reg 4(1) (substituted by SI 1994/3051). As to the requirement to keep available and give information about products which bear the CE marking see the Construction Products Regulations 1991, SI 1991/1620, reg 6 (amended by SI 1994/3051); as to the requirement to give information about products which do not bear the CE marking see the Construction Products Regulations 1991, SI 1991/1620, reg 7 (amended by SI 1994/3051); and as to notice of non-conformity see the Construction Products Regulations 1991, SI 1991/1620, reg 7A (added by SI 1994/3051).

10 Construction Products Regulations 1991, SI 1991/1620, reg 3(3).

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755. Prohibition on supply.

If a person supplies, offers to supply, agrees to supply, exposes for supply or possesses for supply any construction product¹ which does not satisfy the relevant requirement², he is guilty of an offence³. In any proceedings against a person for such an offence in respect of any construction product it is a defence for that person to show:

1653 (1) that he reasonably believed that the product would not be used in the European Community; or

1654 (2) that the following conditions are satisfied:

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206. (a) that he supplied the product in the course of carrying on a general retail business⁴; and

207. (b) that, at the time he supplied the product, he neither knew nor had reasonable grounds for believing that the product failed to satisfy the relevant requirement; or

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1655 (3) that the terms on which he supplied the product:

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208. (a) indicated that the product was not supplied or to be supplied as a new product; and

209. (b) provided for, or contemplated, the acquisition of an interest in the product by the persons supplied or to be supplied⁵.
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1 For the meaning of 'construction product' see PARA 754 note 1 ante.

2 le the relevant requirement in the Construction Products Regulations 1991, SI 1991/1620, reg 3: see PARA 754 ante.

3 Ibid reg 8(1), (4). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale, or to both: see reg 8(1), (4). As to the standard scale see PARA 498 note 3 ante. As to the defence of due diligence see reg 12; as to the liability of persons other than the principal offender see reg 27; as to the commencement of proceedings see reg 31; as to the forfeiture of products in the event of a contravention of reg 8 see reg 12; as to suspension notices see regs 10, 11; as to the power to obtain information see reg 14; and as to enforcement see Pt III (regs 15-23).

4 For these purposes, a product is supplied in the course of carrying on a general retail business if: (1) whether or not it is itself acquired for a person's private use, it is supplied in the course of carrying on a business of making a supply of goods which are ordinarily intended for private use or consumption; and (2) the descriptions of goods the supply of which is made available in the course of that business do not, to a significant extent, include construction products: *ibid* reg 8(3).

5 Ibid reg 8(2).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(vi) Bureaux de Change/756. In general.

(vi) Bureaux de Change

756. In general.

When a person who, whether he is acting as principal or as agent for any person, operates a bureau de change¹, that is to say, an enterprise in the course of which he buys from, or sells to, consumers any foreign currency², gives, in the course of business, an indication, however given, of an amount in one currency which he will or may buy from, or sell to, a consumer in exchange for an amount of sterling (an 'exchange rate indication'), whether or not the rate or amount of any commission or other charge is stated and whether or not the indication constitutes an offer, the following provisions³ apply⁴.

An authorised person within the meaning of the Financial Services and Markets Act 2000⁵ may not carry on the business of operating a bureau de change unless he has first informed the Financial Services Authority⁶.

1 The Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737, do not have effect in relation to any person solely because he holds himself out as willing to accept, or accepts, payment in a foreign currency for goods, services, accommodation or facilities which he supplies or has supplied: reg 3(4)(b).

2 For these purposes, 'foreign currency' means the currency, other than sterling, of any country and in any form, other than banker's drafts, and includes ecus: *ibid* reg 2.

3 le the Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737: see PARA 757 et seq post.

4 Ibid regs 2, 3(1)-(3), (4)(a). Regulation 3(2) does not have effect in relation to any act done by any person who operates a bureau de change at any premises to which consumers are admitted and at which he does not in any way hold himself out to consumers generally as being prepared to buy or sell any foreign currency: reg

3(2) proviso. References to a person operating a bureau de change are to be construed in accordance with reg 3(2): see reg 2.

5 See FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 314.

6 See the Money Laundering Regulations 2003, SI 2003/3075; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 789. As to the Financial Services Authority see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 4 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(vi) Bureaux de Change/757. Exchange rate information to be given.

757. Exchange rate information to be given.

Where a person¹ gives an exchange rate indication²:

1656 (1) he must state:

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210. (a) the relevant exchange rate³;

211. (b) if the exchange rate stated applies only to currency of certain values or in certain denominations, the values or denominations to which it applies or the values or denominations to which it does not apply;

212. (c) the rate or amount of any commission or other charge which will or may be chargeable in respect of a transaction to which the indication applies and which is not included in the exchange rate stated; and

213. (d) if an exchange rate or a rate or amount of any commission or other charge applies only to dealings⁴ in certain circumstances or only in relation to certain transactions, those circumstances or those transactions; and

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1657 (2) where the indication:

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214. (a) includes a buying rate⁵, he must also state the corresponding selling rate⁶, if any, or, if there is no corresponding selling rate but he is prepared to supply notes or travellers' cheques to order, that he is so willing; or

215. (b) includes a selling rate, he must also state the corresponding buying rate, if any,

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1658 together with the information specified in heads (1)(b) to (1)(d) above⁷.

Where a person gives an exchange rate indication which relates to one only of travellers' cheques and notes and he is prepared to deal in the other of them, he must either, as the case may require:

1659 (i) state the corresponding exchange rate for notes or for travellers' cheques, together with the information specified in heads (1)(b) to (1)(d) above; or

1660 (ii) in relation to sales, state that he is prepared to supply notes or travellers' cheques to order, together with the rate or amount of any commission or other charge which will be chargeable⁸.

Where a person gives an exchange rate indication and there is to be a lapse of time between the placing of an order and the completion of the transaction and that person indicates that he will, or may, charge a buying rate or a selling rate other than the rate applicable at the time the

order is placed or that any commission or other charge may be different, he must, before the order is placed, state his intention and must also state when and how the rate will be determined and the commission or other charge which will be charged or, if he is unable to state the commission or other charge, how it will be calculated⁹.

Where a consumer makes a specific request for an exchange rate indication relating to notes or to travellers' cheques in a particular currency, the person giving the indication must state:

- 1661 (A) the applicable buying rate or selling rate, as the case may require; and
- 1662 (B) if the rate applies only to currency of certain values or in certain denominations, those values or those denominations; and
- 1663 (C) the rate or amount of any commission or other charge which is not included in the buying rate or the selling rate, as the case may be¹⁰.

These provisions do not have effect in relation to an exchange rate indication given by way of a net price to a consumer who has made a specific request that he be informed of the amount of one currency which a person is prepared to buy or sell net of all commission and other charges in exchange for a specified amount of another currency¹¹.

Any information or explanation provided for the above purposes must be accurate¹². No indication as to a price or any other matter is to include any statement that an exchange rate indication is not to be relied on¹³.

1 As to the persons to whom these provisions apply see PARA 756 ante.

2 For the meaning of 'exchange rate indication' see PARA 756 ante.

3 For these purposes, 'exchange rate', except in the expression 'exchange rate indication', means a buying rate (see note 5 infra) or a selling rate (see note 6 infra), as the case may be: Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737, reg 2.

4 For these purposes, 'deal' means purchase from, or sell to, a consumer foreign currency; and 'dealing' is to be construed accordingly: *ibid* reg 2. For the meaning of 'foreign currency' see PARA 756 note 3 ante.

5 For these purposes, 'buying rate' means the amount of a specified foreign currency which the person giving the exchange rate indication will buy from a consumer for the sum of £1 sterling, subject, if that be the case, to payment of any commission or other charge not taken into account in the calculation of that amount: *ibid* reg 2.

6 For these purposes, 'selling rate' means the amount of a specified foreign currency which the person giving the exchange rate indication will sell to a consumer for the sum of £1 sterling subject, if that be the case, to payment of any commission or other charge not taken into account in the calculation of that amount: *ibid* reg 2.

7 *Ibid* reg 4(1). Regulation 4(1) is subject to reg 4(4), (5) (see the text and notes 10, 11 infra): reg 4(1). As to offences and defences see PARA 761 post.

8 *Ibid* reg 4(2).

9 *Ibid* reg 4(3).

10 *Ibid* reg 4(4). Accordingly, the provisions of reg 4(1), (2) (see the text and notes 1-8 supra) do not have effect: reg 4(4).

11 *Ibid* reg 4(5).

12 *Ibid* reg 8(1).

13 *Ibid* reg 8(2).

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758. Manner of giving exchange rate indications etc.

Where one or more written exchange rate indications¹ are displayed on any premises, a written exchange rate indication, together with related statements required to be given², must be given clearly and prominently and so as to be visible to each consumer as he approaches the premises or the part of the premises where the bureau de change³ is operated or as soon as he enters the premises or, as the case may be, that part⁴.

Any exchange rate indication⁵ and any statement required to be given⁶ must be clearly expressed, unambiguous and easily identifiable by a consumer as applying to the currency in question and must be given audibly, in the case of an oral indication or statement, or legibly, in the case of a written indication or statement⁷.

Any written statement which is displayed on any premises must be given as clearly, legibly and prominently as the exchange rate indication to which it relates⁸.

1 For the meaning of 'exchange rate indication' see PARA 756 ante.

2 Ie under the Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737, reg 4: see PARA 757 ante.

3 For the meaning of 'bureau de change' see PARA 756 ante.

4 Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737, reg 5(1). As to offences and defences see PARA 761 post.

5 For these purposes, the reference in the text to an exchange rate indication includes a reference to any net price to which ibid reg 4(5) (see PARA 757 ante) applies: reg 5(4).

6 See note 2 supra.

7 Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737, reg 5(2).

8 Ibid reg 5(3).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(vi) Bureaux de Change/759. Obligation to furnish receipts etc.

759. Obligation to furnish receipts etc.

When a person¹ who operates a bureau de change² and who has given an exchange rate indication³ relevant to the transaction sells or buys foreign currency⁴, he must furnish to the consumer at the time when the currency is supplied a document (a 'receipt') containing the following information:

- 1664 (1) the date by reference to which the exchange rate is determined;
- 1665 (2) the amount of foreign currency involved;
- 1666 (3) the amount of sterling involved;
- 1667 (4) the rate of exchange⁵;

- 1668 (5) the rate or amount of commission or other charge levied by him which is not included in the exchange rate stated;
- 1669 (6) the net amount paid to the consumer; and
- 1670 (7) the name and address of the person operating the bureau de change or such other information as will enable those particulars to be readily identified by the consumer,

and a receipt must be legible, clearly expressed and unambiguous⁶.

Any information or explanation given for the above purposes must be accurate⁷. No indication as to a price or any other matter is to include any statement that an exchange rate indication is not to be relied on⁸.

Where, however, currency is supplied to a consumer by means of a machine which is operated by him and which exchanges cash or an instrument representing cash⁹ in one currency for cash or an instrument representing cash in another currency:

- 1671 (a) in the case of a machine which is so designed as to be capable of providing a receipt, the obligation to supply a receipt does not arise unless the consumer requests, by means of an instruction given to the machine, that a receipt be supplied; and
- 1672 (b) in the case of a machine which is not so designed, the obligation to supply a receipt does not arise if there is displayed on or in close proximity to the machine and so as to be visible to a consumer as he approaches the machine, a notice to the effect that a receipt will not be provided¹⁰.

1 As to the persons to whom these provisions apply see PARA 756 ante.

2 For the meaning of 'bureau de change' see PARA 756 ante.

3 For the meaning of 'exchange rate indication' see PARA 756 ante.

4 For the meaning of 'foreign currency' see PARA 756 note 3 ante.

5 For the meaning of 'exchange rate' see PARA 757 note 3 ante.

6 Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737, reg 6(1). As to offences and defences see PARA 761 post.

7 Ibid reg 8(1).

8 Ibid reg 8(2).

9 For these purposes, 'instrument representing cash' includes a cheque or travellers' cheque but does not include an instrument capable of being used, whether or not some other action is also required, for the purpose of initiating a transaction through an automatic teller machine or automatic cash dispenser: *ibid* reg 6(3). As to coin exchange machines see PARA 760 post.

10 Ibid reg 6(2).

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760. Coin exchange machines.

In the case of a machine in relation to which a person¹ who operates a bureau de change² gives an indication that, in exchange for the insertion into the machine of one or more specified coins in one currency, with or without some other action by the consumer, one or more coins in another currency will be dispensed by the machine, that person must cause to be displayed on the machine, or in close proximity to it, a notice which is visible to the consumer as he approaches the machine and clearly states the value of coins in the other currency which will be given in exchange for each specified coin of the first-mentioned currency³.

Any information or explanation given for the above purposes must be accurate⁴. No indication as to a price or any other matter is to include any statement that an exchange rate indication is not to be relied on⁵.

In a case where the above provisions have effect, the provisions relating to the exchange rate information to be given⁶, the manner of giving exchange rate indications⁷ and the obligation to furnish receipts⁸ do not apply⁹.

1 As to the persons to whom these provisions apply see PARA 756 ante.

2 For the meaning of 'bureau de change' see PARA 756 ante.

3 Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737, reg 7(1). As to offences and defences see PARA 761 post.

4 Ibid reg 8(1).

5 Ibid reg 8(2).

6 Ie ibid reg 4: see PARA 757 ante.

7 Ie ibid reg 5: see PARA 758 ante.

8 Ie ibid reg 6: see PARA 759 ante.

9 Ibid reg 7(2).

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761. Offences and defences.

A person¹ operating a bureau de change² who contravenes any of the statutory requirements³ is guilty of an offence⁴.

In relation to such an offence the statutory defences that the indication was not contained in an advertisement⁵ and of due diligence⁶ apply, as do the provisions⁷ relating to the liability of persons other than the principal offender⁸.

1 As to the persons to whom these provisions apply see PARA 756 ante.

2 For the meaning of 'bureau de change' see PARA 756 ante.

3 Ie any provision of the Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737: see PARA 756 et seq ante.

4 Ibid reg 9(1), (2). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see reg 9(1), (2). As to the statutory maximum see PARA 401 note 31 ante.

5 le the Consumer Protection Act 1987 s 24(2) (as amended) (see PARA 705 ante) applies as it applies to an offence under s 20(1) or (2) (see PARA 702 ante).

6 le ibid s 39 (see PARA 706 ante) applies as it applies to an offence mentioned in s 39(5) (see PARA 706 ante).

7 le ibid s 40(1) (see PARA 707 ante) applies as it applies to an offence mentioned in s 39(5) (see PARA 706 ante) and s 40(2), (3) (see PARA 707 ante) applies as it applies to an offence under the Consumer Protection Act 1987.

8 Price Indications (Bureaux de Change) (No 2) Regulations 1992, SI 1992/737, reg 9(3), (4).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(vii) Business Names/762. In general.

(vii) Business Names

762. In general.

A person to whom the Business Names Act 1985 applies¹ must state in legible characters on all business letters, written orders for goods or services to be supplied to the business, invoices and receipts issued in the course of the business and written demands for payment of debts arising in the course of the business:

- 1673 (1) in the case of a partnership, the name of each partner;
- 1674 (2) in the case of an individual, his name;
- 1675 (3) in the case of a company, its corporate name; and
- 1676 (4) in relation to each person so named, an address in Great Britain at which service of any document relating in any way to the business will be effective².

The requirement does not, however, apply in relation to any document issued by a partnership of more than 20 persons which maintains at its principal place of business a list of the names of all the partners, if none of the names of the partners appears in the document otherwise than in the text or as a signatory, and if the document states in legible characters the address of the partnership's principal place of business and that the list of the partners' names is open to inspection at that place³.

A person to whom the Business Names Act 1985 applies must, in any premises where the business is carried on and to which the customers of the business or suppliers of any goods and services to the business have access, display in a prominent position so that it may easily be read by such customers or suppliers a notice containing such names and addresses⁴.

1 As to the persons to whom the Business Names Act 1985 applies see COMPANIES vol 14 (2009) PARA 223 et seq.

2 See ibid s 4(1)(a); and COMPANIES vol 14 (2009) PARA 223 et seq.

3 See ibid s 4(3); and COMPANIES vol 14 (2009) PARA 223 et seq.

4 See ibid s 4(1)(b); and COMPANIES vol 14 (2009) PARA 223 et seq.

UPDATE

762 In general

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(viii) Consumer Credit/763. Consumer credit agreements.

(viii) Consumer Credit

763. Consumer credit agreements.

The Consumer Credit Act 1974¹ regulates (inter alia):

- 1677 (1) credit agreements, hire agreements and linked transactions²;
- 1678 (2) the licensing of credit and hire businesses³;
- 1679 (3) seeking business⁴;
- 1680 (4) entry into credit or hire agreements⁵;
- 1681 (5) matters arising during the currency of credit or hire agreements⁶;
- 1682 (6) default and termination of agreements⁷;
- 1683 (7) security requirements⁸;
- 1684 (8) extortionate credit agreements⁹; and
- 1685 (9) ancillary credit business¹⁰.

The Consumer Credit Act 1974 does not replace the common law¹¹. In addition, although Consumer Credit Act 1974 repealed many statutes, it co-exists with certain other earlier and later statutory provisions in this area of the law¹². The Consumer Credit Act 1974 and regulations made under it superimpose a system of regulatory controls on the existing law. In particular, the general law of contract¹³ remains applicable, save where it has been amended or disapplied by the Consumer Credit Act 1974.

1 As to the contracts regulated by the Consumer Credit Act 1974 generally see CONSUMER CREDIT vol 9(1) (Reissue) PARA 4; as to consumer credit agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 81; as to hire-purchase agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 95; and as to conditional sale agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 93.

2 See *ibid* Pt II (ss 8-20) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 83 et seq.

3 See *ibid* Pt III (ss 21-41); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 119 et seq.

4 See *ibid* Pt IV (ss 43-54) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 143 et seq.

5 See *ibid* Pt V (ss 55-74) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 157 et seq.

6 See *ibid* Pt VI (ss 75-86) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 234 et seq.

7 See *ibid* Pt VII (ss 87-104) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 251 et seq.

8 See *ibid* Pt VIII (ss 105-126) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 200 et seq.

9 See *ibid* ss 137-140 (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 151 et seq.

10 See *ibid* Pt X (ss 145-160) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 271 et seq.

11 As to the common law see CONSUMER CREDIT vol 9(1) (Reissue) PARA 11 et seq.

12 See eg the Emergency Laws (Re-enactments and Repeals) Act 1964 s 1 (as amended) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 507); the Hire Purchase Act 1964 Pt III (ss 27-29) (as substituted) (see CONSUMER CREDIT vol 9(1) (Reissue) PARAS 55-57); the Supply of Goods (Implied Terms) Act 1973 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 24); and the Unfair Contract Terms Act 1977 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 63).

13 See CONTRACT vol 9(1) (Reissue) PARA 601 et seq.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(ix) Counterfeited Goods/764. Goods infringing copyright.

(ix) Counterfeited Goods

764. Goods infringing copyright.

If a person:

- 1686 (1) makes for sale or hire; or
- 1687 (2) imports into the United Kingdom otherwise than for his private and domestic use; or
- 1688 (3) in the course of a business sells or lets for hire, offers or exposes for sale or hire or distributes; or
- 1689 (4) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright,

an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work, he is guilty of an offence¹.

The owner of the copyright in a published literary, dramatic or musical work may give notice in writing to the Commissioners for Her Majesty's Revenue and Customs that he is the owner of the copyright in the work and that he requests the Commissioners, for a period specified in the notice, to treat as prohibited goods printed copies of the work which are infringing copies². Similarly, the owner of the copyright in a sound recording or film may give notice in writing to the Commissioners that he is the owner of the copyright in the work, that infringing copies of the work are expected to arrive in the United Kingdom at a time and a place specified in the notice, and that he requests the Commissioners to treat the copies as prohibited goods³.

1 See the Copyright, Designs and Patents Act 1988 s 107(1); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 437. It is the duty of every local weights and measures authority to enforce within its area s 107: see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 442. As to local weights and measures authorities see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 20. As to orders for delivery up of infringing articles in criminal proceedings see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 440. Offences under s 107 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

2 See the Copyright, Designs and Patents Act 1988 s 111(1); the Commissioners for Revenue and Customs Act 2005 s 50; and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 424. Note that the Inland Revenue and Her Majesty's Customs and Excise have merged to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005.

3 See the Copyright, Designs and Patents Act 1988 s 111(3) (as amended: see note 2 supra); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 424.

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765. Hallmarked goods.

If any person:

- 1690 (1) removes any mark of the nature of a sponsor's mark or hallmark from an article of precious metal with intent to transpose it to any other article, whether of precious metal or not, or affixes to any article, whether of precious metal or not, any such mark which has been removed from an article of precious metal;
- 1691 (2) utters any article bearing a counterfeit of such a mark,

he is guilty of an offence¹.

1 See the Hallmarking Act 1973 s 6(1)(b), (c); and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 481. All offences under the Hallmarking Act 1973 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

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766. Patented products.

If any person falsely represents that anything disposed of by him for value is a patented product¹, he is guilty of an offence². For these purposes, a person who for value disposes of an article having stamped, engraved or impressed on it or otherwise applied to it the word 'patent' or 'patented' or anything expressing or implying that it is a patented product is to be taken to represent that the article is a patented product³.

1 For these purposes, 'patented product' means a product which is a patented invention or, in relation to a patented process, a product obtained directly by means of the process or to which the process has been applied: Patents Act 1977 s 130(1). 'Patented invention' means an invention for which a patent is granted; and 'patented process' is to be construed accordingly: s 130(1).

2 See *ibid* s 110(1) (as amended); and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 609.

3 See *ibid* s 110(2); and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 609.

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767. Trade marks.

If a person with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor of a registered trade mark:

- 1692 (1) applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trade mark; or
- 1693 (2) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign; or
- 1694 (3) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under head (2) above;
- 1695 (4) applies a sign identical to, or likely to be mistaken for, a registered trade mark to material intended to be used for labelling or packaging goods, as a business paper in relation to goods or for advertising goods;
- 1696 (5) uses in the course of a business material bearing such a sign for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods; or
- 1697 (6) has in his possession, custody or control in the course of a business any such material with a view to the doing of anything, by himself or another, which would be an offence under head (5) above;
- 1698 (7) makes an article specifically designed or adapted for making copies of a sign identical to, or likely to be mistaken for, a registered trade mark or has such an article in his possession, custody or control in the course of a business, knowing or having reason to believe that it has been, or is to be, used to produce goods, or material for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods,

he is guilty of an offence¹. A person does not commit such an offence unless:

- 1699 (a) the goods are goods in respect of which the trade mark is registered; or
- 1700 (b) the trade mark has a reputation in the United Kingdom and the use of the sign takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the trade mark².

It is a defence for a person charged with such an offence to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark³.

¹ See the Trade Marks Act 1994 s 92(1)-(3), (6); and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARAS 141-144. It is the duty of every local weights and measures authority to enforce within its area the provisions of s 92: see s 93; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 146. As to the forfeiture of counterfeit goods see s 97; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 140. Offences under s 92 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

² See the Trade Marks Act 1994 s 92(4); and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 144.

³ See *ibid* s 92(5); and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 144.

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(x) Credit References

768. Duty to disclose name etc of agency.

A creditor¹, owner² or negotiator³ must⁴, within seven working days⁵ after receiving a request in writing to that effect from the debtor⁶ or hirer⁷, give⁸ him notice in writing of the name and address of any credit reference agency⁹ from which the creditor, owner or negotiator has, during the antecedent negotiations¹⁰, applied for information about his financial standing¹¹.

If the creditor, owner or negotiator fails to comply with these provisions, he is guilty of an offence¹².

1 For these purposes, 'creditor' means the person supplying credit under a consumer credit agreement or the person to whom his rights and duties under the agreement have passed by assignment or operation of law, and, in relation to a prospective consumer credit agreement, includes the prospective creditor: Consumer Credit Act 1974 s 189(1). A 'consumer credit agreement' is a personal credit agreement by which the creditor provides the debtor with credit not exceeding £25,000: see s 8(2) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 81.

2 For these purposes, 'owner' means a person who bails goods under a consumer hire agreement or the person to whom his rights and duties under the agreement have passed by assignment or operation of law, and, in relation to a prospective consumer hire agreement, includes the prospective bailor: *ibid* s 189(1). For the meaning of 'consumer hire agreement' see CONSUMER CREDIT vol 9(1) (Reissue) PARA 82.

3 For these purposes, 'negotiator' means the person by whom antecedent negotiations (see note 10 *infra*) are conducted with the debtor or hirer (see notes 6, 7 *infra*): *ibid* ss 56(1), 189(1).

4 *le* except in the case of a request received more than 28 days after the termination of the antecedent negotiations, whether on the making of the regulated agreement or otherwise. For these purposes, 'regulated agreement' means a consumer credit agreement or consumer hire agreement, other than an exempt agreement: *ibid* s 189(1). 'Exempt agreement' means an agreement specified in or under s 16 (as amended) (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 100): s 189(1).

5 For these purposes, 'working day' means any day other than Saturday or Sunday, Christmas Day or Good Friday or a bank holiday within the meaning of the Banking and Financial Dealings Act 1971 s 1 (see TIME vol 97 (2010) PARA 321): Consumer Credit Act 1974 s 189(1).

6 For these purposes, 'debtor' means the individual receiving credit under a consumer credit agreement or the person to whom his rights and duties under the agreement have passed by assignment or operation of law, and, in relation to a prospective consumer credit agreement, includes the prospective debtor: *ibid* s 189(1). 'Individual' includes a partnership or other unincorporated body of persons not consisting entirely of bodies corporate: s 189(1).

7 For these purposes, 'hirer' means the individual to whom goods are bailed under a consumer hire agreement or the person to whom his rights and duties under the agreement have passed by assignment or operation of law, and, in relation to a prospective consumer hire agreement, includes the prospective hirer: *ibid* s 189(1).

8 For these purposes, 'give' means deliver or send by post to: *ibid* s 189(1).

9 For these purposes, 'credit reference agency' means a person carrying on a business comprising the furnishing of persons with information relevant to the financial standing of individuals, being information collected by the agency for that purpose: *ibid* ss 145(8), 189(1).

10 For these purposes, 'antecedent negotiations' means any negotiations with the debtor or hirer: (1) conducted by the creditor or owner in relation to the making of any regulated agreement; or (2) conducted by a credit broker in relation to goods sold or proposed to be sold by the credit broker to the creditor before forming the subject matter of a debtor-creditor-supplier agreement within *ibid* s 12(a) (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 87); or (3) conducted by the supplier in relation to a transaction financed or proposed to be

financed by a debtor-creditor-supplier agreement within s 12(b) or (c) (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 87): ss 56(1), 189(1). Negotiations conducted with the debtor in a case falling within head (2) or head (3) supra are deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity: s 56(2). For the meaning of 'credit broker' see CONSUMER CREDIT vol 9(1) (Reissue) PARA 94; and for the meaning of 'debtor-creditor-supplier agreement' see CONSUMER CREDIT vol 9(1) (Reissue) PARA 87.

11 Ibid s 157(1), (2); Consumer Credit (Credit Reference Agency) Regulations 2000, SI 2000/290, reg 3. It is apprehended that criminal proceedings under the Consumer Credit 1974 s 157(3) are the only remedy for non-compliance with s 157(1), (2): see s 170(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 301.

12 Ibid ss 157(3), 167(1), Sch 1 (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: see ss 157(3), 167(1), Sch 1 (as so amended). As to the standard scale see PARA 498 note 3 ante. As to defences see the Consumer Credit Act 1974 s 168; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 299. As to offences by bodies corporate see s 169; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 300. As to notification of convictions to the Office of Fair Trading see s 166 (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 304.

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769. Duty of agency to disclose filed information.

A credit reference agency¹ must, within seven working days² after receiving a request in writing to that effect from any partnership or other unincorporated body of persons not consisting entirely of bodies corporate (the 'consumer'), and such particulars as the agency may reasonably require to enable it to identify the file³ and a fee⁴, give the consumer a copy of the file relating to the consumer kept by the agency⁵. When so giving a copy of the file, the agency must also give the consumer a statement in the prescribed form⁶ of the consumer's statutory right to correct wrong information⁷.

If the agency does not keep a file relating to the consumer, it must give the consumer notice of that fact but need not return any money paid⁸.

If the agency contravenes any of these provisions, it is guilty of an offence⁹.

1 For the meaning of 'credit reference agency' see PARA 768 note 9 ante.

2 For the meaning of 'working day' see PARA 768 note 5 ante.

3 For these purposes, 'file', in relation to an individual, means all the information about him kept by a credit reference agency, regardless of how the information is stored; and 'copy of the file', as respects information not in plain English, means a transcript reduced into plain English: Consumer Credit Act 1974 s 158(5).

4 At the date at which this volume states the law the fee is £2: see ibid s 158(1) (amended by the Consumer Credit (Further Increase of Monetary Amounts) Order 1998, SI 1998/997, art 3, Schedule; and the Data Protection Act 1998 s 62(1)(a)).

5 Consumer Credit Act 1974 s 158(1) (as amended: see note 4 supra); Consumer Credit (Credit Reference Agency) Regulations 2000, SI 2000/290, reg 3. For the meaning of 'give' see PARA 768 note 8 ante. It is apprehended that criminal proceedings under the Consumer Credit Act 1974 s 158(4) are the only remedy for non-compliance with s 158(1) (as so amended): see s 170(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 301. As to the right of an individual to correct wrong information see PARA 770 post; and as to the alternative procedure for business customers see PARA 771 post.

6 For the prescribed form of statement see the Consumer Credit (Credit Reference Agency) Regulations 2000, SI 2000/290, reg 4(2), Sch 2.

7 Consumer Credit Act 1974 s 158(2) (amended by the Data Protection Act 1998 s 62(1)(b)).

8 Consumer Credit Act 1974 s 158(3) (amended by the Data Protection Act 1998 s 62(1)(c)).

9 Consumer Credit Act 1974 ss 158(4), 167(1), Sch 1 (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). An agency guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: see the Consumer Credit Act 1974 ss 158(4), 167(1), Sch 1 (as so amended). As to the standard scale see PARA 498 note 3 ante. As to defences see the Consumer Credit Act 1974 s 168; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 299. As to offences by bodies corporate see s 169; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 300. As to notification of convictions to the Office of Fair Trading see s 166; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 304.

UPDATE

769 Duty of agency to disclose filed information

TEXT AND NOTE 5--Consumer Credit Act 1974 s 158(1) further amended: Consumer Credit Act 2006 s 5(5). See further Consumer Credit Act 1974 s 158(4A) (added by Consumer Credit Act 2006 s 5(6)) (meaning of 'consumer' in this context).

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770. Correction of wrong information.

Any individual (the 'objector') given information¹ by a credit reference agency² who considers that an entry in his file³ is incorrect, and that, if it is not corrected, he is likely to be prejudiced, may give⁴ notice in writing to the agency requiring it either to remove the entry from the file or to amend it⁵.

Within 28 days after receiving such a notice⁶, the agency must by notice in writing inform the objector that it has removed the entry from the file, amended the entry or taken no action; and, if the notice states that the agency has amended the entry, it must include a copy of the file⁷ so far as it comprises the amended entry⁸.

Within 28 days after receiving such a notice from the agency⁹, or, where no such notice was given, within 28 days after the expiry of the period mentioned above¹⁰, the objector may, unless he has been informed by the agency that it has removed the entry from his file, serve a further notice on the agency requiring it to add to the file an accompanying notice of correction, not exceeding 200 words, drawn up by the consumer and include a copy of it when furnishing information included in or based on that entry¹¹.

Within 28 days after receiving such a notice¹², the agency must, unless it intends to apply to the relevant authority¹³, by notice in writing inform the objector that it has received such a notice¹⁴ and intends to comply with it¹⁵.

If:

- 1701 (1) the objector has not received a notice within the time required¹⁶; or
- 1702 (2) it appears to the agency that it would be improper for it to publish a notice of correction because it is incorrect, or unjustly defames any person, or is frivolous or scandalous, or is for any other reason unsuitable,

the objector or, as the case may be, the agency may, in the prescribed manner¹⁷ and on payment of the specified fee¹⁸, apply to the relevant authority, which may make such order on the application as it thinks fit¹⁹.

If a person to whom an order under the above provisions is directed fails to comply with it within the period specified in the order, he is guilty of an offence²⁰.

1 Ie under the Data Protection Act 1998 s 7 (as amended) (see PARA 772 post) or the Consumer Credit Act 1974 s 158 (as amended) (see PARA 769 ante). Where the data controller is a credit reference agency, the Data Protection Act 1998 s 7 (as amended) has effect subject to the provisions of s 9: see s 9(1); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 525. An individual making a request under s 7 (as amended) may limit his request to personal data relevant to his financial standing and is to be taken to have so limited his request unless the request shows a contrary intention: see s 9(2); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 525. Where the data controller receives a request under s 7 (as amended) in a case where personal data of which the individual making the request is the data subject are being processed by or on behalf of the data controller, the obligation to supply information under s 7 (as amended) includes an obligation to give the individual making the request a statement, in such form as may be prescribed by regulations, of the individual's rights under the Consumer Credit Act 1974 s 59 (as amended) and, to the extent required by the prescribed form, under the Data Protection Act 1998: see s 9(3) (as amended); the Consumer Credit (Credit Reference Agency) Regulations 2000, SI 2000/290, reg 4(1), Sch 1; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 525.

2 For the meaning of 'credit reference agency' see PARA 768 note 9 ante.

3 For the meaning of 'file' see PARA 769 note 3 ante.

4 For the meaning of 'give' see PARA 768 note 8 ante.

5 Consumer Credit Act 1974 s 159(1) (substituted by the Data Protection Act 1998 s 62(2)(2)). The coming into force of the Data Protection Act 1998 s 62 does not affect the application of the Consumer Credit Act 1974 s 159 (as originally enacted) in any case where a credit reference agency has, in response to a request under s 158(1) (as amended) (see PARA 769 ante), complied with s 158(1), (2) (as amended) (see PARA 769 ante) before 1 March 2000: Data Protection Act 1998 (Commencement) Order 2000, SI 2000/183, art 2(2).

6 Ie under the Consumer Credit Act 1974 s 159(1) (as substituted): see the text and notes 1-5 supra.

7 For the meaning of 'copy of the file' see PARA 769 note 3 ante.

8 Consumer Credit Act 1974 s 159(2) (amended by the Data Protection Act 1998 s 62(3)(a)).

9 Ie under the Consumer Credit Act 1974 s 159(2) (as amended): see the text and notes 6-8 supra.

10 Ie the period mentioned in *ibid* s 159(2) (as amended) (that is, the period of 28 days after notice was given requiring removal or amendment of an entry).

11 Ibid s 159(3) (amended by the Data Protection Act 1998 s 62(3)(a)). As to service of notices see the Consumer Credit Act 1974 s 176; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 314.

12 Ie under *ibid* s 159(3) (as amended): see the text and notes 9-11 supra.

13 Ie under *ibid* s 159(5) (as amended): see the text and notes 16-19 *infra*. For these purposes, 'the relevant authority' means: (1) where the objector is a partnership or other unincorporated body of persons, the Office of Fair Trading; and (2) in any other case, the Information Commissioner: s 159(8) (added by the Data Protection Act 1998 s 62(4); and amended by the Freedom of Information Act 2000 s 18(4), Sch 2 Pt I para 7; and by the Enterprise Act 2002 s 278(1), Sch 25 para 6(30)). As to the Office of Fair Trading see PARA 407 ante; and as to the Information Commissioner see PARA 406 ante.

14 See note 12 supra.

15 Consumer Credit Act 1974 s 159(4) (amended by the Data Protection Act 1998 s 62(3)(a), (b)). The Data Protection Registrar may vary or revoke any order made by him under the Consumer Credit Act 1974 s 159 (as amended): s 159(7) (added by the Data Protection Act 1998 s 62(4)).

16 Ie under the Consumer Credit Act 1974 s 159(4) (as amended): see the text and notes 12-15 supra.

17 Any such application by an objector, business consumer or agency must state the name and address of the agency and of the objector or business consumer and must give an indication of when the notice of correction under *ibid* s 159(3) (as amended) (see the text and notes 9-11 supra) was served by the objector or business consumer on the agency: Consumer Credit (Credit Reference Agency) Regulations 2000, SI 2000/290, reg 5(1), (2). An application by an objector or a business consumer must give particulars of the entry in the file or, as the case may be, of the information received by him from the agency and must state why he considers

the entry or information to be incorrect and why, if it is not corrected, he considers that he is likely to be prejudiced: reg 5(1), (3). An application by an agency must be accompanied by:

- 43 (1) a copy of the file given by the agency to the objector, or of the information given by the agency to the business consumer under the Consumer Credit Act 1974 s 160(3) (see PARA 771 post);
- 44 (2) a copy of the notice of correction; and
- 45 (3) a copy of related correspondence and other documents which have passed between the agency and the objector or business consumer,

and it must state the grounds on which it appears to the agency that it would be improper for it to publish the notice of correction: Consumer Credit (Credit Reference Agency) Regulations 2000, SI 2000/290, reg 5(1), (4). For these purposes, 'agency' means a credit reference agency; and 'business consumer' means a consumer carrying on a business who has been given information under the Consumer Credit Act 1974 s 160 (as amended) (see PARA 771 post): Consumer Credit (Credit Reference Agency) Regulations 2000, SI 2000/290, reg 2.

18 le an amount specified by general notice: see the Consumer Credit Act 1974 s 2(4).

19 Ibid s 159(5) (amended by the Data Protection Act 1998 s 62(3)(a), (b)).

20 Consumer Credit Act 1974 ss 159(6), 167(1), Sch 1 (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: see the Consumer Credit Act 1974 ss 159(6), 167(1), Sch 1 (as so amended). As to the standard scale see PARA 498 note 3 ante. As to defences see s 168; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 299. As to offences by bodies corporate see s 169; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 300. As to notification of convictions to the Office of Fair Trading see s 166; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 304.

UPDATE

770 Correction of wrong information

NOTE 18--See Consumer Credit Act 1974 (Fees) Order 2010, SI 2010/139.

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771. Alternative procedure for business consumers.

The Office of Fair Trading (the 'OFT')¹ may, on an application made by a credit reference agency², direct that these provisions are to apply to the agency if it is satisfied:

- 1703 (1) that compliance with the provisions relating to the agency's duty to disclose filed information³ in the case of consumers⁴ who carry on a business⁵ would adversely affect the service provided to its customers by the agency; and
- 1704 (2) that, having regard to the methods employed by the agency and to any other relevant factors, it is probable that consumers carrying on a business would not be prejudiced by the making of the direction⁶.

Where such an agency receives a request, particulars and the requisite fee⁷ from a consumer who carries on a business⁸, the agency may elect⁹ to deal with the matter under the following provisions¹⁰.

Instead of giving the consumer a copy of the file¹¹, the agency must, within the period of seven working days¹², give¹³ notice in writing to the consumer that it is proceeding under these

provisions, and by notice in writing give the consumer such information included in or based on entries in the file as the OFT may direct, together with a statement in the prescribed form¹⁴ of the consumer's rights¹⁵ to apply to the OFT and to correct any wrong information¹⁶.

If, within 28 days after receiving the information so given to the consumer¹⁷, or such longer period as the OFT may allow, the consumer:

- 1705 (a) gives notice in writing to the OFT that the consumer is dissatisfied with the information; and
- 1706 (b) satisfies the OFT that the consumer has taken such steps in relation to the agency as may be reasonable with a view to removing the cause of the consumer's dissatisfaction; and
- 1707 (c) pays to the OFT the specified fee¹⁸,

the OFT may direct the agency to give the OFT a copy of the file; and the OFT may disclose to the consumer such of the information on the file as the OFT thinks fit¹⁹.

The statutory procedure relating to the correction of wrong information²⁰ applies, with any necessary modifications, to information given to the consumer under these provisions as it applies to information given²¹ under the standard procedure²².

If an agency making an election to deal with a matter under these provisions²³ fails to comply with them²⁴, it is guilty of an offence²⁵.

1 As to the Office of Fair Trading see PARA 407 ante.

2 For the meaning of 'credit reference agency' see PARA 768 note 9 ante.

3 I.e. compliance with the Consumer Credit Act 1974 s 158 (as amended): see PARA 769 ante.

4 For these purposes, 'consumer' has the same meaning as in *ibid* s 158 (as amended) (see PARA 769 ante): s 160(7) (added by the Data Protection Act 1998 s 62(5)(b)).

5 For these purposes, 'business' includes profession or trade; and references to a business apply, subject to the Consumer Credit Act 1974 s 189(2): s 189(1). A person is not to be treated as carrying on a particular type of business merely because occasionally he enters into transactions belonging to a business of that type: s 189(2).

6 *Ibid* s 160(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 6(1), (31)). The coming into force of the Data Protection Act 1998 s 62 does not affect the application of the Consumer Credit Act 1974 s 160 (as originally enacted) in any case where a credit reference agency has, in response to a request under s 158(1) (as amended) (see PARA 769 ante) dealt with the request under s 160(3) (as amended) (see the text and notes 11-16 *infra*) before 1 March 2000: Data Protection Act 1998 (Commencement) Order 2000, SI 2000/183, art 2(2).

7 I.e. under the Consumer Credit Act 1974 s 158(1) (as amended): see PARA 769 ante.

8 I.e. *ibid* s 158(3) (see PARA 769 ante) does not apply.

9 I.e. instead of complying with *ibid* s 158 (as amended) (see PARA 769 ante).

10 *Ibid* s 160(2).

11 For the meaning of 'copy of the file' see PARA 769 note 3 ante.

12 For the meaning of 'working day' see PARA 768 note 5 ante.

13 For the meaning of 'give' see PARA 768 note 8 ante.

14 For the prescribed form of statement see the Consumer Credit (Credit Reference Agency) Regulations 2000, SI 2000/290, reg 4(3), Sch 3.

15 I.e. under the Consumer Credit Act 1974 s 160(4) (as amended) and s 160(5): see the text and notes 17-22 *infra*.

- 16 Ibid ss 160(3), 189(1) (s 160(3) amended by the Enterprise Act 2002 Sch 25 para 6(31)); Consumer Credit (Credit Reference Agency) Regulations 2000, SI 2000/290, reg 3.
- 17 Ie under the Consumer Credit Act 1974 s 160(3) (as amended): see the text and notes 11-16 supra.
- 18 For the meaning of 'specified fee' see PARA 770 note 18 ante.
- 19 Consumer Credit Act 1974 s 160(4) (amended by the Data Protection Act 1998 s 62(5)(a); and the Enterprise Act 2002 Sch 25 para 6(31)).
- 20 Ie the Consumer Credit Act 1974 s 159 (as amended): see PARA 770 ante.
- 21 Ie under ibid s 158 (as amended) (see PARA 769 ante).
- 22 Ibid s 160(5). As to the standard procedure see note 21 supra; and PARA 769 ante.
- 23 Ie under ibid s 160(2): see the text and notes 7-10 supra.
- 24 Ie ibid s 160(3) or (4) (as amended): see the text and notes 11-19 supra.
- 25 Ibid ss 160(6), 167(1), Sch 1 (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). An agency guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: see the Consumer Credit Act 1974 ss 160(6), 167(1), Sch 1 (as so amended). As to the standard scale see PARA 498 note 3 ante. As to defences see s 168; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 299. As to offences by bodies corporate see s 169; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 300. As to notification of convictions to the Office of Fair Trading see s 166 (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 304.

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(xi) Data Protection

772. Right of access to personal data.

An individual is entitled:

- 1708 (1) to be informed by any data controller whether personal data of which that individual is the data subject are being processed¹ by or on behalf of that data controller²;
- 1709 (2) if that is the case, to be given by the data controller a description of:
- 147
216. (a) the personal data of which that individual is the data subject;
217. (b) the purposes for which they are being or are to be processed; and
218. (c) the recipients or classes of recipients to whom they are or may be disclosed³;
- 148
- 1710 (3) to have communicated to him in an intelligible form:
- 149
219. (a) the information constituting any personal data⁴ of which that individual is the data subject; and
220. (b) any information available to the data controller as to the source of those data⁵; and
- 150
- 1711 (4) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him

such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking⁶.

A data controller is not obliged to supply any such information unless he has received a request in writing and, except in prescribed cases, such fee, not exceeding the prescribed maximum, as he may require⁷.

Where a data controller reasonably requires further information in order to satisfy himself as to the identity of the person making a request under these provisions and to locate the information which that person seeks, and has informed him of that requirement, the data controller is not obliged to comply with the request unless he is supplied with that further information⁸.

A data controller must comply with a request promptly⁹; but, where a data controller cannot comply with the request without disclosing information relating to another individual¹⁰ who can be identified from that information, he is not obliged to comply with the request unless:

- 1712 (A) the other individual has consented to the disclosure of the information to the person making the request; or
- 1713 (B) it is reasonable in all the circumstances¹¹ to comply with the request without the consent of the other individual¹².

An individual making a request under these provisions may, in such cases as may be prescribed, specify that his request is limited to personal data of any prescribed description¹³.

If it is satisfied, on the application of any person who has made a request under these provisions, that the data controller in question has failed to comply with the request in contravention of the provisions, the court may order him to comply with the request¹⁴.

Where, however, a data controller has previously complied with a request made under these provisions by an individual, the data controller is not obliged to comply with a subsequent identical or similar request unless a reasonable interval¹⁵ has elapsed between compliance with the previous request and the making of the current request¹⁶.

The information to be supplied pursuant to a request under these provisions must be supplied by reference to the data in question at the time when the request is received, except that it may take account of any amendment or deletion made between that time and the time when the information is supplied, being an amendment or deletion that would have been made regardless of the receipt of the request¹⁷.

1 See *Durant v Financial Services Authority* [2003] EWCA Civ 1746, [2003] All ER (D) 124 (Dec) (data held in manual filing systems included if it is so structured and indexed as to enable easy location within it or sub-files of specific information requested).

2 See the Data Protection Act 1998 s 7(1)(a); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 524. As to the application of s 7 where the data controller is a credit reference agency see PARA 770 note 1 ante; and as to the personal data exempt from the right of access see PARA 773 post. Regulations may be made which provide that, in such cases as may be prescribed, a request for information under any provision of s 7(1) is to be treated as extending also to information under other provisions of s 7(1): s 8(1).

3 See *ibid* s 7(1)(b); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 524. See also note 2 *supra*.

4 See *Durant v Financial Services Authority* [2003] EWCA Civ 1746, [2003] All ER (D) 124 (Dec) (individual is entitled to information about himself constituting personal data in intelligible and permanent form, not to original or copy documents as such).

5 See the Data Protection Act 1998 s 7(1)(c); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 524. See also note 2 supra. The obligation imposed by s 7(1)(c)(i) (see head (3)(a) in the text) must be complied with by supplying the data subject with a copy of the information in permanent form unless the supply of such a copy is not possible or would involve disproportionate effort or the data subject agrees otherwise; and, where any of the information referred to in s 7(1)(c)(i) is expressed in terms which are not intelligible without explanation, the copy must be accompanied by an explanation of those terms: s 8(2).

6 See *ibid* s 7(1)(d); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 524. See also note 2 supra. Section 7(1)(d) is not to be regarded as requiring the provision of information as to the logic involved in any decision-making if, and to the extent that, the information constitutes a trade secret: s 8(5).

7 See *ibid* s 7(2); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 525.

8 See *ibid* s 7(3) (substituted by the Freedom of Information Act 2000 s 73, Sch 6 para 1); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 525.

9 See the Data Protection Act 1998 s 7(8); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 525.

10 For these purposes, the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and *ibid* s 7(4) is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise: s 7(5). Another individual can be identified from the information being disclosed if he can be identified from that information, or from that and any other information which, in the reasonable belief of the data controller, is likely to be in, or to come into, the possession of the data subject making the request: s 8(7).

11 In determining, for these purposes, whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard is to be had, in particular, to: (1) any duty of confidentiality owed to the other individual; (2) any steps taken by the data controller with a view to seeking the consent of the other individual; (3) whether the other individual is capable of giving consent; and (4) any express refusal of consent by the other individual: *ibid* s 7(6). See *Durant v Financial Services Authority* [2003] EWCA Civ 1746, [2003] All ER (D) 124 (Dec) (right to privacy of the other individual relevant to, but not determinative of, reasonableness).

12 See the Data Protection Act 1998 s 7(4); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 525.

13 See *ibid* s 7(7); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 525.

14 See *ibid* s 7(9); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 525. See also *Johnson v Medical Defence Union* [2004] EWHC 2509 (Ch), [2005] 1 All ER 87 (privileged access to material of court determining whether data controller has failed to comply with the Data Protection Act 1998 does not preclude order for disclosure under the civil procedure rules).

15 In determining, for these purposes, whether requests under the Data Protection Act 1998 s 7 are made at reasonable intervals, regard is to be had to the nature of the data, the purpose for which the data are processed and the frequency with which the data are altered: s 8(4).

16 See *ibid* s 8(3); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 524.

17 See *ibid* s 8(6); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 524.

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773. Personal data exempt from the right of access.

The following personal data are exempt from the general right of access¹:

- 1714 (1) personal data in respect of which an exemption is required for the purpose of safeguarding national security²;
- 1715 (2) personal data processed for the purpose of preventing or detecting crime, the apprehension or prosecution of offenders or assessing or collecting any tax or duty or any imposition of a similar nature³;
- 1716 (3) personal data consisting of information as to a data subject's mental or physical health or processed for the purposes of social work⁴;
- 1717 (4) personal data processed for the purposes of regulating the financial services industry or other professions⁵;
- 1718 (5) personal data processed for the purposes of journalism, literature and art⁶;
- 1719 (6) personal data processed for research purposes⁷;
- 1720 (7) personal data required by any enactment to be made available to the public⁸;
- 1721 (8) personal data required for the purpose of avoiding an infringement of the privileges of either House of Parliament⁹;
- 1722 (9) personal data processed for domestic purposes¹⁰;
- 1723 (10) miscellaneous personal data relating to confidential references, the armed forces, judicial appointments and honours, Crown employment, Crown or ministerial appointments, management forecasts, corporate finance, negotiations, examination marks and scripts, legal professional privilege and self-incrimination¹¹.

Further exemptions may be made¹².

- 1 le the general right of access to personal data in the Data Protection Act 1998 s 7: see PARA 772 ante.
- 2 See *ibid* s 28 (as amended); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 546. See also *Re Ewing* [2002] All ER (D) 350 (Dec).
- 3 See the Data Protection Act 1998 s 29; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 547.
- 4 See *ibid* s 30 (as amended); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 548.
- 5 See *ibid* s 31 (as amended); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 549.
- 6 See *ibid* s 32 (as amended); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 550.
- 7 See *ibid* s 33; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 551.
- 8 See *ibid* s 34 (as amended); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 553.
- 9 See *ibid* s 35A (as added); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 555.
- 10 See *ibid* s 36; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 556.
- 11 See *ibid* s 37, Sch 7 (as amended); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 557.
- 12 See *ibid* s 38; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 557.

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774. Right to prevent processing likely to cause damage or distress.

An individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons:

- 1724 (1) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or another; or
- 1725 (2) that damage or distress is or would be unwarranted¹.

¹ See the Data Protection Act 1998 s 10(1); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 526. Section 10(1) does not apply in a case where any of the conditions in s 4(3), Sch 2 paras 1-4 (conditions relevant for the purposes of the first principle; processing of any personal data: see CONFIDENCE AND DATA PROTECTION) is met or in such other cases as may be prescribed by order: see s 10(2) (as amended); and CONFIDENCE AND DATA PROTECTION. As to the procedure following the giving of such a notice see s 10(2)-(5); and CONFIDENCE AND DATA PROTECTION.

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775. Right to prevent processing for purposes of direct marketing.

An individual is entitled at any time, by notice in writing to a data controller, to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing for the purposes of direct marketing¹ personal data in respect of which he is the data subject².

If it is satisfied, on the application of any person who has given such a notice, that the data controller has failed to comply with the notice, the court may order him to take such steps for complying with the notice as the court thinks fit³.

¹ For these purposes, 'direct marketing' means the communication, by whatever means, of any advertising or marketing material which is directed to particular individuals: Data Protection Act 1998 s 11(3). See note 3 infra.

² See *ibid* s 11(1); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 527. See note 3 infra.

³ See *ibid* s 11(2); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 527. Section 11 does not apply in relation to the processing of such data as are mentioned in the Telecommunications (Data Protection and Privacy) Regulations 1999, SI 1999/2093, reg 8(1) (processing of telecommunications billing data for certain marketing purposes) for the purposes mentioned in reg 8(2): Data Protection Act 1998 s 11(2A) (added by the Telecommunications (Data Protection and Privacy) Regulations 1999, SI 1999/2093, reg 3(3), Sch 1 Pt II para 3). The Telecommunications (Data Protection and Privacy) Regulations 1999, SI 1999/2093, have been revoked and replaced by the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see PARA 740 ante.

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776. Rights in relation to automated decision-taking.

An individual is entitled at any time, by notice in writing to any data controller, to require the data controller to ensure that no decision taken by or on behalf of the data controller which significantly affects that individual is based solely on the processing by automatic means of personal data in respect of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct¹.

¹ See the Data Protection Act 1998 s 12(1); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 528. As to the procedure following the giving of such a notice see s 12(2), (3), (8), (9); and CONFIDENCE AND DATA PROTECTION. As to exempt decisions see s 12(4)-(7) (as amended); and CONFIDENCE AND DATA PROTECTION.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xi) Data Protection/777. Rights in relation to exempt manual data.

777. Rights in relation to exempt manual data.

A data subject is entitled at any time, by notice in writing:

- 1726 (1) to require the data controller to rectify, block, erase or destroy exempt manual data¹ which are inaccurate or incomplete²; or
- 1727 (2) to require the data controller to cease holding exempt manual data in a way incompatible with the legitimate purposes pursued by the data controller³.

Such a notice must state the data subject's reasons for believing that the data are inaccurate or incomplete or, as the case may be, his reasons for believing that they are held in a way incompatible with the legitimate purposes pursued by the data controller⁴.

If it is satisfied, on the application of any person who has given such a notice which appears to the court to be justified, or to be justified to any extent, that the data controller in question has failed to comply with the notice, the court may order him to take such steps for complying with the notice, or for complying with it to that extent, as the court thinks fit⁵.

¹ For these purposes, 'exempt manual data' means: (1) in relation to the first transitional period, as defined by the Data Protection Act 1998 s 39, Sch 8 para 1(2), data to which Sch 8 paras 3 or 4 (see CONFIDENCE AND DATA PROTECTION) applies; and (2) in relation to the second transitional period, as so defined, data to which Sch 8 para 14 (see CONFIDENCE AND DATA PROTECTION) applies: s 12A(4) (added by the Data Protection Act 1998 s 72, Sch 13 para 1). This provision has effect until 23 October 2007.

² For these purposes, personal data are incomplete if, and only if, the data, although not inaccurate, are such that their incompleteness would constitute a contravention of the third and fourth data protection principles, if those principles applied to the data: Data Protection Act 1998 s 12A(5) (added by the Data Protection Act 1998 Sch 13 para 1). As to the data protection principles see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 507 et seq.

³ See the Data Protection Act 1998 s 12A(1) (added by the Data Protection Act 1998 Sch 13 para 1); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 529.

⁴ See the Data Protection Act 1998 s 12A(2) (added by the Data Protection Act 1998 Sch 13 para 1); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 529.

⁵ See the Data Protection Act 1998 s 12A(3) (added by the Data Protection Act 1998 Sch 13 para 1); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 529.

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(xii) Employment Agencies

778. In general.

Regulations may be made to secure the proper conduct of employment agencies and employment businesses and to protect the interests of persons availing themselves of the services of such agencies and businesses¹. Such regulations may make provision (inter alia):

- 1728 (1) prescribing qualifications appropriate for persons carrying on such agencies and businesses;
- 1729 (2) regulating advertising by persons carrying on such agencies and businesses;
- 1730 (3) safeguarding clients' money deposited with or otherwise received by persons carrying on such agencies or businesses;
- 1731 (4) restricting the services² which may be provided by persons carrying on such agencies and businesses;
- 1732 (5) regulating the way in which, and the terms on which, services may be provided by persons carrying on such agencies and businesses;
- 1733 (6) restricting or regulating the charging of fees by persons carrying on such agencies and businesses³.

The licensing system for employment agencies under which no person might carry on an employment agency or an employment business at any premises unless he was the holder of a current licence authorising him to carry on such an agency or business there has been abolished⁴. However, an industrial tribunal may by order prohibit a person from carrying on, or being concerned with the business of carrying on, of any employment agency or employment business or any specified description of employment agency or employment business⁵. Such an order may either prohibit a person from engaging in an activity altogether or prohibit him from doing so otherwise than in accordance with specified conditions⁶.

1 See the Employment Agencies Act 1973 s 5 (as amended); and TRADE AND INDUSTRY vol 97 (2010) PARA 884.

2 For these purposes, a reference to services includes a reference to services in respect of: (1) persons seeking employment outside the United Kingdom; (2) persons normally resident outside the United Kingdom seeking employment in the United Kingdom: see *ibid* s 5(1A) (as added); and TRADE AND INDUSTRY vol 97 (2010) PARA 884.

3 See *ibid* s 5(1)(c)-(ec) (as amended); and TRADE AND INDUSTRY vol 97 (2010) PARA 884.

4 See *ibid* ss 1-3 (repealed by the Deregulation and Contracting Out Act 1994 ss 35, 81(1), Sch 10 para 1(1), (2), Sch 17).

5 See the Employment Agencies Act 1973 s 3A(1) (as added); and TRADE AND INDUSTRY vol 97 (2010) PARA 882. Any person who without reasonable excuse fails to comply with a prohibition notice is guilty of an offence: see s 3B (as added); and TRADE AND INDUSTRY vol 97 (2010) PARA 882.

6 See *ibid* s 3A(2) (as added); and TRADE AND INDUSTRY vol 97 (2010) PARA 884.

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(xiii) Energy Efficiency

779. Boilers.

In the case of a hot-water boiler comprising an assembly of a boiler body designed to have a burner fitted and a burner designed to be fitted to a boiler body which is designed to transmit the heat obtained from burning fuel to water, is designed to be fired by liquid or gaseous fuels, has an effective rated output¹ of not less than four kilowatts and not more than 400 kilowatts, and is designed to have an exit temperature for the water of less than 105°C (a 'boiler'), other than:

- 1734 (1) a hot-water boiler which is capable of being fired by different fuels where one or more of those fuels is solid fuel;
- 1735 (2) equipment for the instantaneous preparation of hot water;
- 1736 (3) a boiler designed to be fired by industrial waste gas, biogas or by any other fuel the properties of which differ appreciably from the properties of the liquid or gaseous fuels commonly marketed;
- 1737 (4) a cooker or other appliance which is designed mainly to heat the premises in which it is installed, and, as a subsidiary function, to supply hot water for central heating and sanitary hot water;
- 1738 (5) a device with an effective rated output of less than six kilowatts which uses gravity circulation and is designed solely for the production of stored, sanitary hot water;
- 1739 (6) a boiler manufactured on a one-off basis;
- 1740 (7) a back boiler² or boiler designed to be installed in the living space³ where the efficiency of such a boiler at effective rated output and at 30 per cent part load is equal to or greater than the efficiency requirements for standard boilers minus 4 per cent and, in the case of a boiler designed to be installed in the living space, it bears on its casing the explicit indication that it must be installed in a living space;
- 1741 (8) an appliance intended to form part of any product specified in heads (1) to (7) above,

the following provisions apply⁴:

- 1742 (a) no person is to supply⁵ or put into service a new boiler which does not satisfy the efficiency requirements⁶;
- 1743 (b) no person is to supply or put into service a new appliance⁷ unless it bears the EC mark affixed in a visible, easily legible and indelible manner and is accompanied by an EC declaration of conformity⁸;
- 1744 (c) no person is to affix or cause to be affixed to a boiler or appliance an EC mark⁹, any marking likely to deceive a third party as to the meaning and form of the EC mark or any marking which reduces the visibility and legibility of the EC mark¹⁰;
- 1745 (d) the manufacturer of a boiler or his authorised representative may label a new boiler in accordance with the prescribed requirements¹¹, and any such label must be affixed in a visible, easily legible and indelible manner¹²;
- 1746 (e) the manufacturer of a boiler or appliance or his authorised representative must for a period of ten years from the last date of manufacture of that boiler or

appliance keep at the disposal of the Secretary of State specified information¹³ in respect of that boiler or appliance¹⁴;
 1747 (f) it is the duty of a local weights and measures authority to enforce the above provisions in its area¹⁵.

1 For these purposes, 'effective rated output' expressed in kilowatts means the maximum calorific output laid down and guaranteed by the manufacturer as being deliverable during continuous operation while complying with the useful efficiency indicated by the manufacturer: Boiler (Efficiency) Regulations 1993, SI 1993/3083, reg 2(1). 'Useful efficiency', expressed in percentage terms, means the ratio between the heat output transmitted to the boiler water and the product of the net calorific value at constant fuel pressure and the consumption expressed as a quantity of fuel per unit time: reg 2(1).

2 For these purposes, 'back boiler' means a boiler designed to supply hot water for central heating and to be installed in a fireplace recess as part of a back boiler/gas fire combination: *ibid* reg 3, Sch 3 para 9.

3 For these purposes, 'boiler to be installed in the living space' means a boiler with an effective rate of output of less than 37 kilowatts which: (1) is designed to provide heat to that part of the living space in which it is installed by the emission of heat from the casing; (2) has an open expansion chamber; (3) is capable of heating water using gravity circulation: *ibid* Sch 3 para 9.

4 See *ibid* regs 2(1), Sch 3. Nothing in the Boiler (Efficiency) Regulations 1993, SI 1993/3083 (as amended) prevents the supply or putting into service before 1 January 1998 of boilers or appliances which comply with national rules and schemes in force within the United Kingdom on 21 May 1992 or, before 1 January 1997, those which comply with the provisions in the Boiler (Efficiency) Regulations 1993, SI 1993/3083 (as amended) relating to the marking of boilers or appliances in force before 1 January 1995, provided that the boiler or appliance complies with all other provisions of the Boiler (Efficiency) Regulations 1993, SI 1993/3083 (as amended): reg 16 (amended by SI 1994/3083). The Boiler (Efficiency) Regulations 1993, SI 1993/3083 (as amended) implement EC Council Directive 92/42 (OJ L167, 22.6.92, p 17) (amended by EC Council Directive 93/68 (OJ L220, 30.8.93, p 1)) (see PARA 393 ante).

5 For these purposes, 'supply' includes offering to supply, agreeing to supply, exposing for supply and possessing for supply: Boiler (Efficiency) Regulations 1993, SI 1993/3083, reg 2(1).

6 See *ibid* reg 4(1). For these purposes, 'efficiency requirements' means: (1) in relation to a boiler, the useful efficiency requirements specified in reg 2(1), Sch 2 for a boiler of that description; and (2) in relation to an appliance, the useful efficiency requirements specified in Sch 2 for a boiler of the description of which that appliance is designed to form part: reg 2(1). A boiler with a dual function, that of heating premises and also providing sanitary hot water, satisfies the efficiency requirements if those requirements are satisfied in respect of its heating function only: reg 4(2). As to the efficiency requirements for boilers see also reg 5, Sch 4 (EC type examinations) and Sch 5 (amended by SI 1994/3083) (conformity to type and quality assurance); as to the approval of notified bodies to perform functions relating to the Boiler (Efficiency) Regulations 1993, SI 1993/3083, Sch 5 see reg 8, Sch 6; and as to the powers of notified bodies on failure to comply with Schs 4, 5 see reg 9.

7 For these purposes, 'appliance' means a boiler body designed to have a burner fitted or a burner designed to be fitted to a boiler body: *ibid* reg 2(1).

8 See *ibid* reg 6(1). As to the effect of an EC declaration of conformity, in relation to an appliance, see reg 6(2). No person is to give an EC declaration of conformity in respect of an appliance unless, after assembly, the resulting boiler will satisfy the efficiency requirements: reg 6(3).

9 *Ie* where the boiler or appliance does not comply with the efficiency requirements or any applicable provision of any other EC Directive concerning other aspects which provides for the affixing of an EC mark and to which the boiler or appliance is subject.

10 See the Boiler (Efficiency) Regulations 1993, SI 1993/3083, reg 7(1).

11 *Ie* the requirements of *ibid* reg 10(1), Sch 7.

12 See *ibid* reg 10(1). No person is to affix or cause to be affixed to a boiler a label provided for in reg 10(1) except in accordance with the requirements of Sch 7 (reg 10(2)); nor is a person to affix or cause to be affixed to a boiler a label reasonably likely to be confused with a label provided for in reg 10(1) (reg 10(3)).

13 *Ie* the information specified in *ibid* reg 11(1)(a)-(h). As to the Secretary of State see PARA 15 ante.

14 See *ibid* reg 11(1), (2).

15 See *ibid* reg 12(1), (3) (substituted by SI 1994/3083). As to local weights and measures authorities see PARA 398 *ante*. As to offences and penalties see the Boiler (Efficiency) Regulations 1993, SI 1993/3083, reg 13; as to defences see reg 14 (amended by SI 1994/3083); and as to the liability of a person other than the principal offender and offences by bodies corporate see the Boiler (Efficiency) Regulations 1993, SI 1993/3083, reg 15 (amended by SI 1994/3083).

UPDATE

779 Boilers

TEXT AND NOTES--Revoked, see now Ecodesign for Energy-Using Products Regulations 2007, SI 2007/2037 (amended by SI 2009/2560).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xiii) Energy Efficiency/780. Refrigerators and freezers.

780. Refrigerators and freezers.

In the case of a household refrigerator, frozen food storage cabinet, food freezer and their combinations (an 'appliance'), which is electric mains operated and unable to use other energy sources such as accumulators, other than a secondhand appliance, an appliance working on the absorption principle and an appliance manufactured on a one-off basis, the following provisions apply¹:

1748 (1) a supplier² must not place an appliance on the Community market unless:
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221. (a) the electricity consumption of the appliance is less than or equal to the maximum allowable electricity consumption value for its category³; and

222. (b) the appliance and, where appropriate, its packaging, bears the EC mark affixed in a visible, legible and indelible manner⁴;

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1749 (2) the manufacturer of the appliance, or his authorised representative established within the Community, must draw up a written declaration of conformity relating to the appliance, which attests that the appliance has been assessed in accordance with the prescribed procedure⁵ and conforms with the prescribed requirements⁶;

1750 (3) the manufacturer of an appliance must establish technical documentation sufficient to allow an assessment of whether the appliance conforms with the prescribed requirements⁷;

1751 (4) no person is to affix, or cause to be affixed, to an appliance: (a) an EC mark⁸; (b) a marking which would be likely to mislead another as to the meaning and form of the EC mark; or (c) any marking, object or substance which reduces the visibility or legibility of the EC mark⁹;

1752 (5) where an appliance carrying the EC mark fails to conform to the prescribed requirements and its failure so to conform has been duly established, the supplier of the appliance must take all necessary steps to bring the appliance into conformity with the prescribed requirements and to end the infringement as soon as practicable¹⁰;

1753 (6) the manufacturer of an appliance must take all measures necessary in order that the manufacturing process ensures that the appliance complies with the technical documentation required and with the prescribed requirements¹¹;

1754 (7) it is the duty of every local weights and measures authority to enforce the above provisions within its area¹².

1 See the Energy Efficiency (Refrigerators and Freezers) Regulations 1997, SI 1997/1941, regs 2(1), 3(1)-(3). The Energy Efficiency (Refrigerators and Freezers) Regulations 1997, SI 1997/1941, implement European Parliament and EC Council Directive 96/57 (OJ L236, 18.9.96, p 36) (see PARA 393 ante).

2 For these purposes, 'supplier' means the manufacturer of an appliance or his authorised representative in the European Community or the person who places an appliance on the Community market: Energy Efficiency (Refrigerators and Freezers) Regulations 1997, SI 1997/1941, reg 2(1).

3 I.e. as calculated according to the procedures set out in *ibid* reg 4(1), Sch 1.

4 See *ibid* reg 4(1). As to the supplier's other duties in respect of appliances see reg 4(2)-(5).

5 I.e. the procedure set out in *ibid* reg 5(1), Sch 1 (method for calculating the maximum allowable electricity consumption of an appliance and the procedure for checking conformity).

6 See *ibid* reg 5(1). No person is to issue a declaration of conformity in respect of an appliance unless the appliance complies with the requirements of the Energy Efficiency (Refrigerators and Freezers) Regulations 1997, SI 1997/1941: reg 5(2). The supplier of an appliance must keep a copy of the declaration of conformity with the technical documentation required by reg 6 (see the text and note 7 *infra*): reg 5(3).

7 See *ibid* reg 6(1). So far as relevant to the assessment, the technical documentation must cover design, manufacture and operation of the appliance and must comprise: (1) the name and address of the manufacturer; (2) a general description of the appliance, sufficient for it to be identified unambiguously; (3) information, including drawings as relevant, on the main design features of the appliance and, in particular, items which appreciably affect its energy consumption, such as dimensions, volume or volumes, compressor characteristics, special features etc; (4) the operating instructions, if any; (5) the results of electricity consumption measurements carried out according to the procedures specified in European Standard EN 153 (July 1995); (6) details of the conformity of the measurements as compared to the energy consumption requirements set out in the Energy Efficiency (Refrigerators and Freezers) Regulations 1997, SI 1997/1941, Sch 1: reg 6(2). Technical documentation established for other Community legislation may be used, in so far as it meets the requirements of reg 6: reg 6(3). The supplier must keep the technical documentation, together with a copy of the declaration of conformity, relating to the appliance, for a period of not less than three years from the date on which the last such appliance has been manufactured: reg 6(4). The supplier must as soon as practicable furnish to an enforcement authority such of the technical documentation and the copy declaration of conformity as the authority requires pursuant to reg 10(2), Sch 3 para 9 (power of enforcement authority to require technical documentation etc): reg 6(5).

8 I.e. where the appliance does not comply with *ibid* reg 4(1)(a): see head (1)(a) in the text.

9 See *ibid* reg 7.

10 See *ibid* reg 8.

11 See *ibid* reg 9. Breach of reg 8 or reg 9 is actionable by civil proceedings: reg 9A (added by SI 2001/3142).

12 See the Energy Efficiency (Refrigerators and Freezers) Regulations 1997, SI 1997/1941, reg 10(1). As to local weights and measures authorities see PARA 398 ante. As to offences, enforcement of the Energy Efficiency (Refrigerators and Freezers) Regulations 1997, SI 1997/1941 (as amended), and other matters see reg 10(2), Sch 3 (amended by SI 2001/3142; SI 2003/1398). Nothing in the Energy Efficiency (Refrigerators and Freezers) Regulations 1997, SI 1997/1941 (as amended) authorises a local weights and measures authority in Scotland to bring proceedings in Scotland for an offence: reg 10(3). Where an enforcement authority takes a decision to institute civil proceedings pursuant to the Energy Efficiency (Refrigerators and Freezers) Regulations 1997, SI 1997/1941 (as amended), which may result in a restriction on the placing on the market of an appliance, the authority must without delay inform: (1) the party affected and the Secretary of State of the decision and the precise grounds on which it is based; and (2) the party affected of the possibilities and time limits regarding legal remedies available to it in respect of the decision: reg 10(4) (amended by SI 2001/3142). As to the Secretary of State see PARA 15 ante.

UPDATE

780 Refrigerators and freezers

TEXT AND NOTES--Revoked, see now the Ecodesign for Energy-Using Products Regulations 2007, SI 2007/2037 (amended by SI 2009/2560).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xiv) Energy Labelling/781. Combined washer-driers.

(xiv) Energy Labelling

781. Combined washer-driers.

In the case of a household combined washer-drier (an 'appliance'), even where it is sold for a non-household use, which is electric mains operated and unable to use other energy sources, other than a secondhand appliance, an appliance of which production ceased before 1 August 1997 or in respect of the rating plate or its equivalent affixed for safety purposes to an appliance, the following provisions apply¹:

- 1755 (1) a supplier² of an appliance must provide free of charge to a dealer³ a label in respect of the appliance which must be in the relevant language version and, where it is in English, must comply with the requirements as to labelling⁴ and its energy efficiency and washing performance class⁵ and, in any other case, with the relevant EC provisions⁶;
- 1756 (2) a supplier of an appliance must provide an information notice in the relevant language version and, where it is in English, must comply with the requirements as to the information notice⁷ and its energy efficiency and washing performance class⁸ and, in any other case, with the relevant EC provisions⁹;
- 1757 (3) the supplier is deemed to consent to the publication of the information given on a label or in an information notice¹⁰;
- 1758 (4) the supplier (and no other person) is responsible for the accuracy of the information given on a label or in an information notice¹¹;
- 1759 (5) the supplier must establish technical documentation sufficient to enable the accuracy of the information contained in a label or information notice to be assessed¹²;
- 1760 (6) a dealer who displays or offers for sale an appliance must attach a label to the outside front or top of the appliance so that the label remains clearly visible and not obscured whenever the appliance is displayed¹³;
- 1761 (7) where a person offers an appliance for sale to end-users by means of a printed communication, such as a mail order catalogue, in circumstances which imply that the potential purchaser cannot be expected to see the appliance displayed, the person making such offer must ensure that the printed communication is in the relevant language version and, if it is in English, includes the prescribed information as to mail order and other distance selling¹⁴ and describes the appliance in accordance with the requirements as to energy efficiency and washing performance class¹⁵ and, in any other case, it complies with the relevant EC provisions¹⁶;
- 1762 (8) a person must not display a label, mark, symbol or inscription, other than a label, mark, symbol or inscription displayed under an EC or national environmental labelling scheme, which relates to the energy consumption of an appliance and which does not comply with these requirements, if the label, mark, symbol or inscription would be taken to comply with these provisions or would be likely to mislead or confuse¹⁷;

1763 (9) it is the duty of every local weights and measures authority to enforce the above provisions within its area¹⁸.

1 See the Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624, regs 2, 3(1)-(3). The Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624, do not apply in relation to: (1) an appliance supplied by a supplier, whether to a dealer or another person, before 1 February 1998; (2) any printed communication within the meaning of reg 12 (as amended) (see the text and notes 14-16 infra) distributed to potential purchasers before 1 February 1998; or (3) the display of appliances before 1 February 1998: reg 15. The Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624, implement in part EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) and EC Commission Directive 96/60 (OJ L266, 18.10.96, p 1) (see PARA 393 ante).

2 For these purposes, 'supplier' means the manufacturer of an appliance or his authorised representative in the European Community or the person who places an appliance on the Community market: Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624, reg 2.

3 For these purposes, 'dealer' means a retailer or other person who offers for sale, displays or sells appliances to end-users: *ibid* reg 2. 'Sale' includes hire and hire purchase; and related expressions are to be construed accordingly: reg 2 (amended by SI 2001/3142).

4 *Ie* the requirements in the Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624, reg 4(2), Sch 1.

5 *Ie* the requirements in *ibid* reg 4(2), Sch 4.

6 See *ibid* reg 4(1), (2) (reg 4(1) substituted by SI 2001/3142). Where the dealer requests labels from the supplier, the supplier must ensure that the requested labels are delivered promptly: Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624, reg 4(3). A supplier may choose his own system for delivery of labels: reg 4(4).

7 *Ie* the requirements in *ibid* reg 5(2), Sch 2.

8 *Ie* the requirements in *ibid* reg 5(2), Sch 4.

9 See *ibid* reg 5(1), (2). Where the supplier provides a product brochure, the brochure must contain an information notice: reg 5(3). Where a product brochure is not provided by the supplier, the supplier must provide an information notice with any other literature provided with the appliance: reg 5(4).

10 See *ibid* reg 6.

11 See *ibid* reg 7 (substituted by SI 2001/3142).

12 See the Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624, reg 8(1). The technical documentation must include: (1) the name and address of the supplier; (2) a general description of the appliance, sufficient for it to be identified; (3) information, including drawings as relevant, on the main design features of the appliance and, in particular, items which appreciably affect its energy consumption; (4) the results of design calculations carried out, where these are relevant; (5) reports of relevant measurement tests carried out on the appliance in accordance with the test procedures of the harmonised standards; (6) test reports, where available, including those carried out by relevant notified organisations as defined under other Community legislation; (7) where values are derived from those obtained for similar models, the same information for those models; and (8) operating instructions, if any: reg 8(2). For the purposes of reg 8(1), (2), the supplier may use documentation already required on the basis of relevant Community legislation: reg 8(3). The supplier must make the technical documentation available for inspection by enforcement authorities for a period ending five years after the appliance has ceased to be manufactured: reg 8(4). The supplier must furnish promptly to an enforcement authority such of the technical documentation as the authority requires pursuant to reg 14(2), Sch 5 para 9 (power of enforcement authority to require technical information): reg 8(5).

13 See *ibid* reg 9 (amended by SI 2001/3142).

14 *Ie* the information specified in the Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624, reg 12, Sch 3.

15 *Ie* the requirements in *ibid* reg 12, Sch 4.

16 See *ibid* reg 12 (amended by SI 2001/3142).

17 See the Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624, reg 13(1), (2).

18 See *ibid* regs 2, 14(1). As to offences, enforcement of the Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624 (as amended), and other matters see reg 14(2), Sch 5 (amended by virtue of the Enterprise Act 2002 s 2; and by SI 2001/3142; SI 2003/1398). Nothing in the Energy Information (Combined Washer-driers) Regulations 1997, SI 1997/1624 (as amended) authorises a local weights and measures authority in Scotland to bring proceedings in Scotland for an offence: reg 14(3). As to local weights and measures authorities see PARA 398 ante.

UPDATE

781 Combined washer-driers

NOTE 18--SI 1997/1624 Sch 5 further amended: SI 2008/1277, SI 2009/2559.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xiv) Energy Labelling/782. Dishwashers.

782. Dishwashers.

In the case of a household dishwasher which is electric mains operated and unable to use other energy sources (a 'regulated dishwasher'), the following provisions apply¹:

- 1764 (1) a supplier² of a regulated dishwasher must provide free of charge to a dealer³ a label in the relevant language version which complies, where it is in English, with the requirements as to labelling⁴ and its energy efficiency and washing performance class⁵ and, in any other case, with the relevant EC provisions⁶;
- 1765 (2) a supplier of a regulated dishwasher must provide an information notice in the relevant language version which complies, where it is in English, with the requirements as to the information notice⁷ and its energy efficiency and cleaning and drying performance class⁸ and, in any other case, with the relevant EC provisions⁹;
- 1766 (3) the supplier is deemed to consent to the publication of the information given on a label or in an information notice¹⁰;
- 1767 (4) only the supplier is responsible for the accuracy of the information given on a label which he supplies to a dealer or in an information notice¹¹;
- 1768 (5) before a regulated dishwasher is placed on the Community market, the supplier must have established technical documentation sufficient to enable the accuracy of the information contained in a label or information notice to be assessed¹²;
- 1769 (6) a dealer who displays a regulated dishwasher to end-users must attach a label to the outside front or top of the dishwasher so that the label remains clearly visible and not obscured whenever the dishwasher is displayed¹³;
- 1770 (7) where a person offers a regulated dishwasher for sale by means of a printed communication, such as a mail order catalogue, in circumstances which imply that the potential purchaser¹⁴ cannot be expected to see the dishwasher displayed, that person must ensure that the printed communication is in the relevant language version and, if it is in English, includes the prescribed information as to mail order and other distance selling¹⁵ and describes the dishwasher in accordance with the requirements as to its energy efficiency and washing performance class¹⁶ and, in any other case, it complies with the relevant EC provisions¹⁷;

- 1771 (8) a person must not display a label, mark, symbol or inscription, other than a label, mark, symbol or inscription displayed under an EC or national environmental labelling scheme, which relates to the energy consumption of a regulated dishwasher and which does not comply with these requirements, if the label, mark, symbol or inscription would be taken to comply with these provisions or would be likely to mislead or confuse¹⁸;
- 1772 (9) it is the duty of every local weights and measures authority to enforce the above provisions within its area¹⁹.

1 See the Energy Information (Dishwashers) Regulations 1999, SI 1999/1676, regs 2, 3(1). The regulations do not apply: (1) to secondhand dishwashers; (2) to dishwashers of which production ceased before 7 March 1999; or (3) or in respect of the rating plate or its equivalent affixed for safety purposes to a dishwasher: see reg 3(2). Nothing in the regulations applies to: (a) the supply, whether to a dealer or another person, of a regulated dishwasher; (b) any printed communication within the meaning of reg 10 (see head (7) in the text) distributed to potential purchasers; or (c) the display of any regulated dishwasher, before 31 July 1999: reg 13. The regulations implement in part EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) and EC Commission Directive 97/17 (OJ L118, 7.5.97, p 1) (amended by EC Commission Directive 1999/9 (OJ L56, 4.3.99, p 46)) (see PARA 393 ante).

2 For these purposes, 'supplier' means the manufacturer of a regulated dishwasher or his authorised representative in the European Community or the person who places the dishwasher on the Community market: Energy Information (Dishwashers) Regulations 1999, SI 1999/1676, reg 2.

3 For these purposes, 'dealer' means a retailer or other person who offers for sale, displays or sells a regulated dishwasher to end-users: *ibid* reg 2. 'Sale' includes hire and hire purchase: reg 2.

4 *Ie* the requirements in *ibid* reg 4(2), Sch 1.

5 *Ie* the requirements in *ibid* reg 4(2), Sch 4.

6 See *ibid* reg 4(1), (2). Where the dealer requests labels from the supplier, the supplier must ensure that the requested labels are delivered promptly: reg 4(3). A supplier may choose his own system for delivery of labels: reg 4(4).

7 *Ie* the requirements in *ibid* reg 5(2), Sch 2.

8 *Ie* the requirements in *ibid* reg 5(2), Sch 4.

9 See *ibid* reg 5(1), (2). Where the supplier provides a product brochure, the brochure must contain an information notice: reg 5(3). Where a product brochure is not provided by the supplier, the supplier must provide an information notice with any other literature provided with the dishwasher: reg 5(4).

10 See *ibid* reg 6.

11 See *ibid* reg 7.

12 See *ibid* reg 8(1). The technical documentation must include: (1) the name and address of the supplier; (2) a general description of the regulated dishwasher, sufficient for it to be identified; (3) information, including drawings as relevant, on the main design features of the dishwasher and, in particular, items which appreciably affect its energy consumption; (4) the results of design calculations carried out, where these are relevant; (5) reports of relevant measurement tests carried out on the regulated dishwasher in accordance with the test procedures of the harmonised standards; (6) test reports, where available, including those carried out by relevant notified organisations as defined under other Community legislation; (7) where values are derived from those obtained for similar models, the same information for those models; and (8) operating instructions, if any: reg 8(2). For the purposes of reg 8(1), (2), the supplier may use documentation already required on the basis of relevant Community legislation: reg 8(3). The supplier must make the technical documentation available for inspection by enforcement authorities for a period ending five years after the regulated dishwasher has ceased to be manufactured: reg 8(4). The supplier must furnish promptly to an enforcement authority such of the technical documentation as the authority requires pursuant to reg 12(3), Sch 5 para 6 (power of enforcement authority to require technical information): reg 8(5).

13 See *ibid* reg 9.

14 For these purposes, 'purchase' includes acquire on hire or hire purchase: *ibid* reg 2.

15 le the requirements in ibid reg 10, Sch 3.

16 le the requirements of ibid reg 10, Sch 4.

17 See ibid reg 10 (amended by SI 2001/3142).

18 See the Energy Information (Dishwashers) Regulations 1999, SI 1999/1676, reg 11(1), (2).

19 See ibid reg 12(1). As to offences, enforcement of the Energy Information (Dishwashers) Regulations 1999, SI 1999/1676 (as amended), and other matters see reg 12(3), Sch 5 (amended by virtue of the Enterprise Act 2002 s 2; and by SI 2001/3142; SI 2003/1398). Nothing in the Energy Information (Dishwashers) Regulations 1999, SI 1999/1676 (as amended) authorises a local weights and measures authority in Scotland to bring proceedings in Scotland for an offence: reg 12(2). As to local weights and measures authorities see PARA 398 ante.

UPDATE

782 Dishwashers

NOTE 19--SI 1999/1676 Sch 5 further amended: SI 2008/1277, SI 2009/2559.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xiv) Energy Labelling/783. Household air conditioners.

783. Household air conditioners.

In the case of electric mains operated household air conditioners, whether used in heating mode or for space cooling, which are air cooled air conditioners, water cooled air conditioners, liquid chilling packages, or air/air, water/air, air/water and water/water heat pumps with electrically driven compressors (a 'regulated household air conditioner'), the following provisions apply, notwithstanding that they are sold or displayed for non-household use¹:

1773 (1) no supplier² is to place on the market a regulated household air conditioner unless he has established technical documentation sufficient to enable the accuracy of the information contained in a label³ or information notice to be assessed⁴; and the supplier must make the technical documentation available for inspection by enforcement authorities⁵ for a period ending five years after the last regulated household air conditioner of the model has been manufactured⁶;

1774 (2) a supplier placing on the market regulated household air conditioners must supply free of charge to a dealer a label which complies in all respects with the requirements as to labelling⁷ and energy efficiency classification⁸; and where the dealer requests labels from the supplier, the supplier must ensure that the requested labels are delivered promptly⁹;

1775 (3) a supplier of a regulated household air conditioner must provide an information notice, which must be in the relevant language version¹⁰ and comply with the requirements as to information notices¹¹ and energy efficiency classification¹²;

1776 (4) the supplier is deemed to consent to the publication of the information given on a label or in an information notice¹³;

1777 (5) the supplier must ensure that the information in an information notice or on a label which he supplies to a dealer is accurate¹⁴;

1778 (6) a dealer who displays a regulated household air conditioner to end-users must attach the appropriate label¹⁵ to the outside front or top of the air conditioner

- so that the label remains clearly visible and is not obscured whenever the air conditioner is displayed¹⁶;
- 1779 (7) where a person offers a regulated household air conditioner for sale by means of a communication¹⁷, that person must ensure that the communication is in the relevant language version, and includes the information specified for an information notice¹⁸ and describes the air conditioner in accordance with the energy efficiency classification¹⁹;
- 1780 (8) a person must not display any label, mark, symbol or inscription, other than a label, mark, symbol or inscription displayed under an EC or national environmental labelling scheme, which relates to the energy consumption of a regulated household air conditioner and which does not comply with the regulatory requirements, if such display is likely to mislead or confuse²⁰;
- 1781 (9) it is the function of every enforcement authority to enforce the above provisions within its area²¹.

1 See the Energy Information (Household Air Conditioners) Regulations 2003, SI 2003/750, regs 2(2), 3(1), (4)-(5). The regulations apply to factory-made units which can be ducted; in the case of units consisting of several parts, the regulations apply only to those designed and supplied as a complete package; units having two or more indoor sections connected to a single outdoor unit (multiple split system air conditioners or heat pumps) are excluded from the scope of the regulations; the regulations do not apply to continuously variable control units; in relation to liquid chilling packages, the regulations apply only to cooling mode (and not to heating mode); and without prejudice to reg 3(4), the regulations do not apply to installations for use in industrial processes: reg 3(2). The regulations do not apply to: (1) appliances that can also use other energy sources; (2) air-to-water and water-to-water appliances; or (3) units with an output (cooling power) greater than 12 kW: see reg 3(3).

Nothing in the Energy Information (Household Air Conditioners) Regulations 2003, SI 2003/750, applies to the rating plate or its equivalent affixed for safety purposes to a regulated household air conditioner: reg 4(1). There is no obligation on any person to label or provide information notices in accordance with the regulations in respect of models of household air conditioners of which production ceased before 1 January 2003, but if an appliance has been labelled or an information notice provided in respect of it, the regulations will apply: reg 4(2). There is no obligation on any person to label or provide information notices in accordance with the regulations in respect of secondhand household air conditioners; but if a secondhand appliance sold or displayed by a dealer is labelled or an information notice is provided in respect of it, the regulations apply to the extent that they impose obligations on the dealer: reg 4(3). The regulations do not impose obligations on a supplier or dealer in relation to a household air conditioner which the supplier or dealer has reasonable grounds to believe is for use by an end user in a country outside the European Community: regs 2(2), 4(4). 'Dealer' means a retailer or other person who offers for sale, displays or sells regulated household air conditioners to end-users; 'information notice' means a standard table of information relating to a regulated household air conditioner; and 'sale' includes hire and hire-purchase, and related expressions are to be construed accordingly: reg 2(2).

The Energy Information (Household Air Conditioners) Regulations 2003, SI 2003/750, implement in part EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) and EC Commission Directive 2002/31 (OJ L86, 3.4.2002, p 26).

2 For these purposes, 'supplier' means the manufacturer of a regulated household air conditioner or his authorised representative in the Community or the person who places the regulated household air conditioner on the Community market: Energy Information (Household Air Conditioners) Regulations 2003, SI 2003/750, reg 2(2).

3 'Label' means a label relating to a regulated household air conditioner which contains information on its consumption of energy (whether or not it also contains other information): *ibid* reg 2(2).

4 *Ibid* reg 6(1). The technical documentation must include: (1) the name and address of the supplier; (2) a general description of the model, sufficient for it to be unequivocally and easily identified; (3) information (including drawings as relevant) on the main design features of the air conditioner and, in particular, items which appreciably affect its energy consumption; (4) the results of design calculations carried out, where these are relevant; (5) reports of relevant measurement tests carried out on the air conditioner in accordance with the test procedures of the harmonised standards; (6) test reports, where available, including those carried out by relevant notified organisations as defined under Community legislation other than EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) and EC Commission Directive 2002/31 (OJ L86, 3.4.2002, p 26); (7) where values are derived from those obtained for similar models, the same information for those models; and (8) operating instructions, if any: Energy Information (Household Air Conditioners) Regulations 2003, SI 2003/750, regs 2(1),

6(2). 'The harmonised standards' means EN 255-1 and EN 814-1: reg 2(2). For the purposes of reg 6(1), (2), the supplier may use documentation already required on the basis of relevant Community legislation: reg 6(4). Where the information relating to a particular model combination has been obtained by calculation on the basis of design, extrapolation from other combinations or both, the documentation must include details of such calculations, extrapolations or both, as the case may require, and of tests undertaken to verify the accuracy of the calculations undertaken (details of the mathematical model for calculating performance of split systems, and of measurements taken to verify this model): reg 6(3).

The information required by regs 6-9 is, where applicable, to be obtained by measurements made in accordance with the harmonised standards (reg 5(1)), and information obtained otherwise is to be taken for the purposes of the regulations not to meet the relevant requirement (reg 5(2)).

5 'Enforcement authority' means a local weights and measures authority within the meaning of the Weights and Measures Act 1985 s 69 (as amended) (see PARA 398 ante): Energy Information (Household Air Conditioners) Regulations 2003, SI 2003/750, reg 2(2).

6 Ibid reg 6(5).

7 Ie the requirements in ibid reg 7(2), Sch 1.

8 Ie the requirements in ibid reg 7(2), Sch 3.

9 Ibid reg 7(1)-(3), (5). A supplier may choose his own system for delivery of labels: reg 7(4).

10 As to provision for the equivalent in other Community languages of the terms in English given in ibid Schs 1, 2 see reg 13, Sch 4.

11 Ie the requirements in ibid reg 8(2), Sch 2.

12 Ibid reg 8(1). As to the requirements as to energy efficiency classification see reg 8(2), Sch 3. Where the supplier provides a product brochure, the brochure must contain an information notice, and the supplier must provide the product brochure with each air conditioner free of charge: reg 8(3). Where the supplier does not provide a product brochure, he must provide an information notice free of charge with the air conditioner, with any other literature provided: reg 8(4).

13 Ibid reg 9.

14 Ibid reg 10(1). This is without prejudice to any right of action which any person may have apart from the Energy Information (Household Air Conditioners) Regulations 2003, SI 2003/750, whether against the supplier, dealer or any other person arising from any inaccuracy of information in an information notice or a label: reg 10(2). Unless there is evidence to the contrary, labels and information notices are deemed to comply with the provisions of the regulations: reg 15.

15 Ie the label supplied by the supplier in accordance with ibid reg 7 or, where the supply is in another member state, in accordance with the EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) art 3(1).

16 Energy Information (Household Air Conditioners) Regulations 2003, SI 2003/750, regs 2(1)(b), 11.

17 'Communication', as a means by way of which appliances are offered for sale, means a printed or written communication or other means whereby the potential customer cannot be expected to see the appliance displayed, such as a written offer, a mail order catalogue, advertisements on the internet or other electronic media: ibid reg 2(2).

18 Ie the information in ibid Sch 2.

19 Ibid reg 12. The information required is the information in Sch 3.

20 Ibid reg 14.

21 Ibid reg 16(1). As to offences, enforcement of the Energy Information (Household Air Conditioners) Regulations 2003, SI 2003/750, and other related matters see reg 16(3), Sch 5. Nothing in the regulations authorises an enforcement authority in Scotland to bring proceedings for an offence: reg 16(2).

UPDATE

783 Household air conditioners

TEXT AND NOTES--SI 2003/750 replaced: Energy Information (Household Air Conditioners) (No 2) Regulations 2005, SI 2005/1726 (amended by SI 2009/2559).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xiv) Energy Labelling/784. Household electric ovens.

784. Household electric ovens.

In the case of electric mains operated household electric ovens including ovens which are part of larger appliances (a 'regulated household electric oven'), except for ovens that can also use other energy sources, ovens (being ovens which do not fall within the scope of the harmonised standard¹) of a specified description² or portable ovens³, the following provisions apply, notwithstanding that such ovens are sold or displayed for non-household use⁴:

- 1782 (1) no supplier⁵ is to place on the market a regulated household electric oven unless he has established technical documentation sufficient to enable the accuracy of the information contained in a label⁶ or information notice to be assessed⁷; and the supplier must make the technical documentation available for inspection by enforcement authorities⁸ for a period ending five years after the last regulated household electric oven of the model has been manufactured⁹;
- 1783 (2) a supplier placing on the market regulated household electric ovens must supply free of charge to a dealer a label which complies in all respects with the requirements as to labelling¹⁰ and energy efficiency classification¹¹; and where the dealer requests labels from the supplier, the supplier must ensure that the requested labels are delivered promptly¹²;
- 1784 (3) a supplier of a regulated household electric oven must provide an information notice, which must be in the relevant language version¹³ and comply with the requirements as to information notices¹⁴ and energy efficiency classification¹⁵;
- 1785 (4) the supplier is deemed to consent to the publication of the information given on a label or in an information notice¹⁶;
- 1786 (5) the supplier must ensure that the information in an information notice or on a label which he supplies to a dealer is accurate¹⁷;
- 1787 (6) a dealer who displays a regulated household electric oven to end-users must attach the appropriate label¹⁸ on the door of the appliance so that the label remains clearly visible and is not obscured whenever the electric oven is displayed¹⁹;
- 1788 (7) where a person offers a regulated household electric oven (including a built-in oven for an integrated kitchen) for sale by means of a communication²⁰, that person must ensure that the communication is in the relevant language version, and includes the information specified in respect of mail order and other distance selling²¹ and describes the electric oven in accordance with the energy efficiency classification²²;
- 1789 (8) a person must not display any label, mark, symbol or inscription, other than a label, mark, symbol or inscription displayed under an EC or national environmental labelling scheme, which relates to the energy consumption of a regulated household electric oven and which does not comply with the regulatory requirements, if such display is likely to mislead or confuse²³;
- 1790 (9) it is the function of every enforcement authority to enforce the above provisions within its area²⁴.

1 'The harmonised standard' means EN 50304:2001: Energy Information (Household Electric Ovens) Regulations 2003, SI 2003/751, reg 2(2).

2 Ie as set out in ibid reg 3(3), namely ovens of the following descriptions: (1) microwave ovens and microwave combination ovens; (2) small cavity ovens (ie ovens with the following dimensions related to useable volume: both width and depth less than 250mm, or height less than 120mm); or (3) ovens without adjustable temperature control: reg 3(3).

3 Ie appliances other than fixed appliances, having a mass of less than 18 kg, provided they are not designed for built-in installations: ibid reg 3(2)(c).

4 See ibid regs 2(2), 3(1), (2), (4), (5).

Nothing in the Energy Information (Household Electric Ovens) Regulations 2003, SI 2003/751, applies to the rating plate or its equivalent affixed for safety purposes to a household electric oven: reg 4(1). The regulations apply to the hot steam function of a regulated household electric oven (notwithstanding that the harmonised standard does not apply) (reg 3(6)), but except as so provided, nothing in the regulations applies to the energy consumption of the steam functions of a regulated household electric oven (reg 4(2)). Nothing in the regulations applies to the heating functions of a regulated household electric oven other than the conventional heating function (that is to say, where food is cooked by radiation and natural convection only) and forced air circulation (that is to say, heat transmission of the food by forced air convection, ie circulating the air with the help of a fan): reg 4(3).

There is no obligation on any person to label or provide information notices in accordance with the regulations in respect of models of household electric oven of which production has ceased before 1 January 2003, but if an appliance has been labelled or an information notice provided in respect of it, the regulations will apply: reg 4(4). There is no obligation on any person to label or provide information notices in accordance with the regulations in respect of secondhand household electric ovens; but if a secondhand appliance sold or displayed by a dealer is labelled or an information notice is provided in respect of it, the regulations apply to the extent that they impose obligations on the dealer: reg 4(5). The regulations do not impose obligations on a supplier or dealer in relation to a household electric oven which the supplier or dealer has reasonable grounds to believe is for use by an end user in a country outside the European Community: see regs 2(2), 4(6). 'Dealer' means a retailer or other person who offers for sale, displays or sells regulated household electric ovens to end-users; 'information notice' means a standard table of information relating to a regulated household electric oven; and 'sale' includes hire and hire-purchase, and related expressions are to be construed accordingly: reg 2(2).

The Energy Information (Household Electric Ovens) Regulations 2003, SI 2003/751, implement in part EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) and EC Commission Directive 2002/40 (OJ L128, 15.5.2002, p 45).

5 For these purposes, 'supplier' means the manufacturer of a regulated household electric oven or his authorised representative in the Community or the person who places the regulated household electric oven on the Community market: Energy Information (Household Electric Ovens) Regulations 2003, SI 2003/751, reg 2(2).

6 'Label' means a label relating to a regulated household electric oven which contains information on its consumption of energy (whether or not it also contains other information): ibid reg 2(2).

7 Ibid reg 6(1). The technical documentation must include: (1) the name and address of the supplier; (2) a general description of the model, sufficient for it to be unequivocally and easily identified; (3) information (including drawings as relevant) on the main design features of the electric oven and, in particular, items which appreciably affect its energy consumption; (4) the results of design calculations carried out, where these are relevant; (5) reports of relevant measurement tests carried out on the electric oven in accordance with the test procedures of the harmonised standards; (6) test reports, where available, including those carried out by relevant notified organisations as defined under Community legislation other than EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) and EC Commission Directive 2002/40 (OJ L128, 15.5.2002, p 45); (7) where values are derived from those obtained for similar models, the same information for those models; and (8) operating instructions, if any: Energy Information (Household Electric Ovens) Regulations 2003, SI 2003/751, regs 2(1), 6(2). For the purposes of reg 6(1), (2), the supplier may use documentation already required on the basis of relevant Community legislation: reg 6(3).

The information required by regs 6-9 is, where applicable, to be obtained by measurements made in accordance with the harmonised standards (reg 5(1)), and information obtained otherwise is to be taken for the purposes of the regulations not to meet the relevant requirement (reg 5(2)).

8 'Enforcement authority' means a local weights and measures authority within the meaning of the Weights and Measures Act 1985 s 69 (as amended) (see PARA 398 ante): Energy Information (Household Electric Ovens) Regulations 2003, SI 2003/751, reg 2(2).

9 Ibid reg 6(4).

10 Ie the requirements in ibid reg 7(2), Sch 1.

11 Ie the requirements in ibid reg 7(2), Sch 4.

12 Ibid reg 7(1)-(3), (5). A supplier may choose his own system for delivery of labels: reg 7(4). In the case of a multi cavity oven each cavity must have its own label except a cavity which does not fall within the scope of the harmonised standards as described in reg 3(3) (see note 2 supra): reg 7(2).

13 As to provision for the equivalent in other Community languages of the terms in English given in ibid Schs 1-3 see reg 13, Sch 5.

14 Ie the requirements in ibid reg 8(2), Sch 2.

15 Ibid reg 8(1). As to the requirements as to energy efficiency classification see reg 8(2), Sch 4. Where the supplier provides a product brochure, the brochure must contain an information notice, and the supplier must provide the product brochure with each electric oven free of charge: reg 8(3). Where the supplier does not provide a product brochure, he must provide an information notice free of charge with the electric oven, with any other literature provided: reg 8(4).

16 Ibid reg 9.

17 Ibid reg 10(1). This is without prejudice to any right of action which any person may have apart from the Energy Information (Household Electric Ovens) Regulations 2003, SI 2003/751, whether against the supplier, dealer or any other person arising from any inaccuracy of information in an information notice or a label: reg 10(2). Unless there is evidence to the contrary, labels and information notices are deemed to comply with the provisions of those regulations: reg 15.

18 Ie the label supplied by the supplier in accordance with ibid reg 7 or, where the supply is in another member state, in accordance with EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) art 3(1).

19 Energy Information (Household Electric Ovens) Regulations 2003, SI 2003/751, regs 2(1)(b), 11(1). In the case of a multi-cavity oven each cavity must have its own label except a cavity which does not fall within the scope of the harmonised standards as described in reg 3(3) (see note 2 supra): reg 11(2).

20 'Communication', as a means by way of which appliances are offered for sale, means a printed or written communication or other means whereby the potential customer cannot be expected to see the appliance displayed, such as a written offer, a mail order catalogue, advertisements on the internet or other electronic media: ibid reg 2(2).

21 Ie the information in ibid Sch 3.

22 Ibid reg 12. The information required is the information in Sch 4.

23 Ibid reg 14.

24 Ibid reg 16(1). As to offences, enforcement of the Energy Information (Household Electric Ovens) Regulations 2003, SI 2003/751, and other related matters see reg 16(3), Sch 6. Nothing in the regulations authorises an enforcement authority in Scotland to bring proceedings for an offence: reg 16(2).

UPDATE

784 Household electric ovens

NOTE 24--SI 2003/751 Sch 6 further amended: SI 2008/1277, SI 2009/2559.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xiv) Energy Labelling/785. Lamps.

785. Lamps.

In the case of any household electric lamp¹ or any household fluorescent lamp² (a 'regulated lamp'), except where marketed or commercialised as part of a product, the primary purpose of which is not illuminative but, subject to that, even when marketed for non-household use, other than:

- 1791 (1) a lamp with a luminous flux of more than 6,500 lumens;
- 1792 (2) a lamp with an input power of less than four watts;
- 1793 (3) a reflector lamp;
- 1794 (4) a lamp marketed or commercialised primarily for use with other energy sources, such as batteries;
- 1795 (5) a lamp marketed or commercialised primarily for the production of light outside the visible range of 400 to 800 nanometres;
- 1796 (6) a secondhand lamp; or
- 1797 (7) a lamp of which production ceased before 31 March 1998,

the following provisions apply, save that, where such lamp can be taken apart by end-users, those provisions apply to such part of the lamp as emits the light or, where there is more than one such part, they apply to all those parts³:

- 1798 (a) a supplier⁴ must not supply a regulated lamp to a dealer⁵ unless a label is placed or printed on the outside of the individual packaging of the lamp⁶;
 - 1799 (b) a supplier must not provide a product brochure with a regulated lamp unless the brochure contains an information notice⁷;
 - 1800 (c) the supplier is deemed to have given his consent to the publication of the information contained in a label or information notice⁸;
 - 1801 (d) the supplier, and no other person, is responsible for the accuracy of the information contained in a label or information notice⁹;
 - 1802 (e) before a regulated lamp is placed on the Community market, the supplier must have established technical documentation sufficient to enable the accuracy of the information contained in a label or information notice to be assessed¹⁰;
 - 1803 (f) a dealer who displays or offers for sale a regulated lamp must:
- 153
- 223. (i) ensure that there is placed or printed on the outside of the individual packaging of the lamp; or
 - 224. (ii) attach to, or ensure that there is attached to¹¹, the outside of the individual packaging of the lamp,
- 154
- 1804 a label referable to the lamp in question¹²;
 - 1805 (g) where any person offers a regulated lamp for sale by means of a printed communication, such as a catalogue, in circumstances that imply that the potential customer cannot be expected to see the lamp displayed, that person must include, or ensure that there is included, in the printed communication, or otherwise provide, or ensure that there is provided:
- 155
- 225. (i) a copy of the label referable to the lamp; or
 - 226. (ii) a statement containing the prescribed information¹³ and presented in the specified order¹⁴;
- 156
- 1806 (h) a person must not display any label, mark, symbol or inscription, other than a label, mark, symbol or inscription displayed under an EC or national environmental labelling scheme, which relates to the energy consumption of a

- regulated lamp if it does not comply with these requirements and is likely to mislead or confuse¹⁵;
- 1807 (i) it is the duty of every local weights and measures authority to enforce the above provisions within its area¹⁶.

1 For these purposes, 'household electric lamp' means a filament and integral compact fluorescent lamp supplied directly from the mains: Energy Information (Lamps) Regulations 1999, SI 1999/1517, reg 2(1).

2 For these purposes, 'household fluorescent lamp' includes a linear and non-integral compact fluorescent lamp: *ibid* reg 2(1).

3 See *ibid* regs 2(1), 3(1), (2). Nothing in the Energy Information (Lamps) Regulations 1999, SI 1999/1517 (as amended) applies to: (1) the supply, whether to a dealer or another person, of a regulated lamp; (2) the distribution of any product brochure or printed communication; or (3) the display of any regulated lamp, before 31 December 2000: reg 13. The Energy Information (Lamps) Regulations 1999, SI 1999/1517 (as amended) implement in part EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) and EC Commission Directive 98/11 (OJ L71, 10.3.98, p 1) (see PARA 393 ante).

4 For these purposes, 'supplier' means the manufacturer of a regulated lamp or his authorised representative in the European Community or the person who places the lamp on the Community market: Energy Information (Lamps) Regulations 1999, SI 1999/1517, reg 2(1).

5 For these purposes, 'dealer' means a retailer or other person who offers for sale, displays or sells a regulated lamp to end-users: *ibid* reg 2(1). 'Sale' includes hire and hire purchase: reg 2(1).

6 See *ibid* reg 4(1). Where, however, the packaging is so small that it cannot take a label reduced to 40% (by length) of the size necessary to meet the relevant requirements of reg 4(2), Sch 1, the supplier's duty under reg 4(1) is met if a label is attached to the outside of the individual packaging of the lamp: reg 4(2). Whenever, for the purpose of complying with reg 9(1) (see the text and notes 11-12 *infra*), a dealer sends to his supplier a request for labels, the supplier must supply them free of charge and must ensure that they are delivered promptly but, subject to that, may choose his own system for delivery: reg 4(3).

7 See *ibid* reg 5(1). Where a supplier does not provide a product brochure, he must provide an information notice with each regulated lamp which he supplies; and the notice must be supplied with other literature provided with the lamp (reg 5(2)); but nothing in reg 5(2) requires a supplier who has provided a label with a regulated lamp or its individual packaging to provide a separate information notice with that lamp or its packaging: reg 5(3).

8 See *ibid* reg 6.

9 See *ibid* reg 7.

10 See *ibid* reg 8(1). The technical documentation must include: (1) the name, trade mark and address of the supplier; (2) a general description of the lamp, sufficient for it to be uniquely identified; (3) information, including drawings as relevant, on the main design features of the model and, in particular, those which appreciably affect its energy consumption; (4) the results of design calculations carried out, where these are relevant; (5) reports of relevant measurement tests carried out on the model in accordance with the test procedures of the harmonised standards; (6) test reports, where available, including those carried out by relevant notified organisations as defined under other Community legislation; (7) where values are derived from those obtained for similar models, the same information for those models; and (8) operating instructions, if any: reg 8(2). For the purposes of reg 8(1), the supplier may use documentation already required on the basis of relevant Community legislation: reg 8(3). The supplier must make the technical documentation available for inspection by a local weights and measures authority for a period ending five years after the lamp has ceased to be manufactured: reg 8(4). The supplier must furnish promptly to an enforcement authority such of the technical documentation as the authority may, by notice in writing given to the supplier, reasonably require pursuant to reg 12(3), Sch 4 para 6 (power of enforcement authority to require technical information): reg 8(5). As to local weights and measures authorities see PARA 398 ante.

11 *Ie* in a case to which *ibid* reg 4(2) (see note 6 *supra*) applies.

12 See *ibid* reg 9(1). Nothing in reg 9(1)(b) (see head (e)(ii) in the text) requires a dealer to attach a label, or to ensure that a label is attached, to a lamp where he displays a full-size label with the lamp, eg attached to the shelf on which the lamp is displayed: reg 9(2). The dealer must ensure that, throughout the period of the offer or display, the label placed, printed or attached, in accordance with reg 9(1) is neither obscured, nor its visibility reduced, by anything attached to, or placed or printed on, the packaging of the lamp: reg 9(3).

13 le the information specified in *ibid* reg 10(1)(b), Sch 2.

14 See *ibid* reg 10(1). Nothing in reg 10(1)(b) (see head (f)(ii) in the text) requires the inclusion of the information specified in Sch 2 para (d) (average rated life of lamp) where no other information on the life of the lamp is given in the catalogue: reg 10(2).

15 See *ibid* reg 11(1), (2).

16 See *ibid* reg 12(1). As to offences, enforcement of the Energy Information (Lamps) Regulations 1999, SI 1999/1517 (as amended), and other matters see reg 12(3), Sch 4 (amended by virtue of the Enterprise Act 2002 s 2; and by SI 2001/3142; SI 2003/1398). Nothing in the Energy Information (Lamps) Regulations 1999, SI 1999/1517 (as amended) authorises a local weights and measures authority in Scotland to bring proceedings in Scotland for an offence: reg 12(2).

UPDATE

785 Lamps

NOTE 16--SI 1999/1517 Sch 4 further amended: SI 2008/1277, SI 2009/2559.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xiv) Energy Labelling/786. Refrigerators and freezers.

786. Refrigerators and freezers.

In the case of a household refrigerator, frozen food storage cabinet, food freezer (a 'regulated appliance'), and a combination, whether or not sold or displayed for non-household uses, which is electric mains operated¹, the following provisions apply²:

1808 (1) a supplier³ is not to place on the Community market a regulated appliance unless he has established technical documentation sufficient to enable the accuracy of the information contained in a label or information sheet⁴ to be assessed⁵, and the supplier must make the technical documentation available for inspection by enforcement authorities⁶ for a period ending five years after the last regulated appliance of the model has been manufactured⁷;

1809 (2) any supplier placing on the Community market a regulated appliance must supply free of charge to a dealer⁸ a label complying with the requirements as to labelling⁹ and the energy efficiency class indicated must be determined in accordance with the prescribed¹⁰ requirements¹¹;

1810 (3) a supplier of a regulated appliance must provide an information sheet, which must be in the relevant language version and conform to the requirements as to content and form¹², the appliance's category¹³ and its energy efficiency class¹⁴ as specified¹⁵;

1811 (4) it is the duty¹⁶ of a supplier to ensure that the information in an information sheet or on a label which he supplies to a dealer is accurate¹⁷;

1812 (5) the supplier is deemed to consent to the publication of the information given on a label or in an information sheet¹⁸;

1813 (6) a dealer who displays a regulated appliance must attach the label provided by the supplier for that appliance to the outside front or top of the appliance so that the label remains clearly visible and not obscured whenever the appliance is displayed¹⁹;

1814 (7) where a person offers an appliance for sale by means of a communication²⁰, that person must ensure that the communication is in the

relevant language, includes the specified information²¹ as to mail order and other distance selling and describes the appliance in accordance with the provisions as to categories of appliance²² and energy efficiency class²³; and where other information is provided, if it is required to be contained in an information sheet, it must be included with the information specified above in the required²⁴ form and order²⁵;

1815 (8) a person must not display any label, mark, symbol or inscription, other than a label, mark, symbol or inscription displayed under a Community or national environmental labelling scheme, which relates to the energy consumption of an appliance and which does not comply with these requirements, if such display is likely to mislead or confuse²⁶;

1816 (9) it is the duty of every enforcement authority to enforce the above provisions within its area²⁷.

1 The Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, do not apply to: (1) appliances that may also use other energy sources such as batteries; (2) secondhand appliances; (3) appliances placed on the Community market before 1 July 2004; or (4) the rating plate or its equivalent affixed for safety purposes to an appliance: see regs 3(2), 4(1). In the Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, except reg 6(3), a reference to the Community includes a reference to the European Economic Area: see reg 2(2). As to the European Economic Area see PARA 386 note 1 ante.

2 See *ibid* regs 2(2), 3, 4(1). The Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, implement in part EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) and EC Commission Directive 94/2 (OJ L45, 17.2.94, p 1) (as amended) (see PARA 393 ante). Where a regulated appliance is placed on the Community market on or before 30 December 2004, the use of labels, information sheets or communications relating thereto, in respect of which the requirements of the Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, are not complied with is permitted, provided that the provisions of the Energy Information (Refrigerators and Freezers) Regulations 1994, SI 1994/3076 (revoked) are complied with: Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, reg 16. The provisions of the Energy Information (Refrigerators and Freezers) Regulations 1994, SI 1994/3076 (revoked) continue to apply to an appliance placed on the Community market before 1 July 2004, or to a regulated appliance placed on the Community market on or after 1 July 2004 but before 31 December 2004 where the information required to be provided was obtained by measurements made in accordance with EN 153: 1990: Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, reg 17(2).

3 For these purposes, 'supplier' means the manufacturer or his authorised representative in the Community or the person who places the product on the Community market: *ibid* reg 2(2).

4 'Information sheet' means a standard table of information relating to the appliance in question: *ibid* reg 2(2).

5 *Ibid* reg 6(1). The technical documents referred to must include: (1) the name and address of the suppliers; (2) a general description of the appliance, sufficient for it to be identified; (3) information, including drawings as relevant, on the main design features of the model and in particular items which appreciably affect its energy consumption; (4) reports of relevant measurement tests carried out under the harmonised standards; (5) details of such calculations, extrapolations or both, as the case may be, and of tests undertaken to verify the accuracy of the calculations undertaken (details of the mathematical model for calculating performance and of measurements taken to verify this model) where the information relating to a particular model combination has been obtained by calculation on the basis of design, extrapolation from other combinations or both; and (6) operating instructions, if any: reg 6(2). 'The harmonised standards' means EN 153:1995: Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, reg 2(2). For the purposes of reg 6(1), (2), the supplier may use documentation already required on the basis of relevant Community legislation: reg 6(3). There are no obligations on a supplier to establish technical documentation in respect of a household appliance intended for use only in a country outside the Community and which he has reasonable grounds to believe will be used outside the Community: reg 4(2).

The information required by regs 6-9 must be obtained by measurements made in accordance with the harmonised standards: reg 5(1). Where a supplier provides information relating to noise, it must be measured in accordance with EC Council Directive 86/594 (OJ L344, 6.12.86, p 24) on airborne noise emitted by household appliances, and the provisions of the Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, Schs 1- 3 relating to noise information will apply: reg 5(2). Information obtained otherwise than in accordance with reg 5(1), (2) is to be taken for the purposes of the Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, not to meet the relevant requirements: reg 5(3).

6 'Enforcement authority' means a local weights and measures authority within the meaning of the Weights and Measures Act 1985 s 69 (as amended) (see PARA 398 ante): Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, reg 2(2).

7 Ibid reg 6(4).

8 For these purposes, 'dealer' means a retailer or other person who offers for sale, displays or sells household appliances to end-users: ibid reg 2(2). 'Sale' includes hire and hire purchase; and related expressions are to be construed accordingly: reg 2(2).

9 Ie the requirements in ibid reg 7(2), Sch 1.

10 Ie the requirements in ibid reg 7(2), Sch 5.

11 Ibid reg 7(1)-(3). A supplier may choose his own system for delivery of labels: reg 7(4). Where the dealer requests labels from the supplier, the supplier must ensure that the requested labels are delivered promptly: reg 7(5). There are no obligations on a supplier to supply labels in respect of a household appliance intended for use only in a country outside the Community and which he has reasonable grounds to believe will be used outside the Community: reg 4(2).

12 Ie the requirements in ibid reg 8(2)(b), Sch 2.

13 The category of the appliance is to be determined in accordance with ibid reg 8(2)(c), Sch 4 for the purposes of complying with Sch 4 para 1(3): reg 8(2)(c).

14 The energy efficiency class indicated is to be determined in accordance with ibid reg 8(2)(d), Sch 5 for the purposes of complying with Sch 5 para 1(4): reg 8(2)(d).

15 Ibid reg 8(1), (2). Where the supplier provides a product brochure with a regulated appliance, the brochure must contain the information sheet: reg 8(3). Where no brochure is provided with a regulated appliance, the supplier must provide the information sheet with any other literature provided: reg 8(4). There is no obligation on a supplier to supply information sheets in respect of a household appliance intended for use only in a country outside the Community and which he has reasonable grounds to believe will be used outside the Community: reg 4(2).

16 Ie for the purposes of the Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, only.

17 Ibid reg 9(1). This is without prejudice to any right of action which any person may have apart from the Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, whether against the supplier, dealer or any other person arising from any inaccuracy of information in an information sheet or label: reg 9(2).

18 Ibid reg 10.

19 Ibid reg 11. There are no obligations on a dealer to display labels in respect of a household appliance intended for use only in a country outside the Community and which he has reasonable grounds to believe will be used outside the Community: reg 4(3).

20 'Communication', as a means by way of which appliances are offered for sale, means a printed or written communication or other means whereby the potential customer cannot be expected to see the appliance displayed, such as a written offer, a mail order catalogue, advertisements on the internet or other electronic media: ibid reg 2(2).

21 Ie specified in ibid reg 12, Sch 3.

22 Ie specified in ibid reg 12, Sch 4.

23 Ie specified in ibid reg 12, Sch 5.

24 Ie in the form defined and the order specified in ibid reg 12, Sch 2.

25 Ibid reg 12. There are no obligations on any person who offers for sale by way of a communication a household appliance intended for use only in a country outside the Community and which he has reasonable grounds to believe will be used outside the Community: reg 4(4).

26 Ibid reg 13(1), (2). Regulation 13(1) does not apply to a label, mark, symbol or inscription displayed pursuant to the Energy Information (Refrigerators and Freezers) Regulations 1994, SI 1994/3076 (revoked): Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, reg 13(3). Unless there is evidence to the contrary, labels and information sheets are deemed to comply with the provisions of the regulations: reg 14.

27 Ibid reg 15(1). As to offences, enforcement of the Energy Information (Household Refrigerators and Freezers) Regulations 2004, SI 2004/1468, and other related matters see reg 15(3), Sch 6. Nothing in the regulations authorises an enforcement authority in Scotland to bring proceedings for an offence: reg 15(2).

UPDATE

786 Refrigerators and freezers

NOTE 27--SI 2004/1468 Sch 6 further amended: SI 2008/1277, SI 2009/2559.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xiv) Energy Labelling/787. Tumble driers.

787. Tumble driers.

In the case of a household tumble drier (an 'appliance'), which is electric mains operated and unable to use other energy sources, the following provisions apply¹:

- 1817 (1) a supplier² of an appliance must provide free of charge to a dealer³ a label in the relevant language version which complies, where it is in English, with the requirements as to labelling⁴ and its energy efficiency classification⁵ and, in any other case, with the relevant EC provisions⁶;
- 1818 (2) a supplier of an appliance must provide an information notice in the relevant language version which complies, where it is in English, with the requirements as to the information notice⁷ and its energy efficiency classification⁸ and, in any other case, with the relevant EC provisions⁹;
- 1819 (3) the supplier is deemed to consent to the publication of the information given on a label or in an information notice¹⁰;
- 1820 (4) the supplier and no other person is responsible for the accuracy of the information given on a label or in an information notice¹¹;
- 1821 (5) the supplier must establish technical documentation sufficient to enable the accuracy of the information contained in a label or information notice to be assessed¹²;
- 1822 (6) a dealer who displays or offers for sale an appliance must attach a label to the outside front or top of the appliance so that the label remains clearly visible and not obscured whenever the appliance is displayed¹³;
- 1823 (7) where a person offers an appliance for sale to end-users by means of a printed communication, such as a mail order catalogue, in circumstances which imply that the potential purchaser cannot be expected to see the appliance displayed, the person making such offer must ensure that the printed communication is in the relevant language version and, if it is in English, includes the prescribed information as to mail order and other distance selling¹⁴ and describes the appliance in accordance with the requirements as to its energy efficiency classification¹⁵ and, in any other case, it complies with the relevant EC provisions¹⁶;

- 1824 (8) a person must not display a label, mark, symbol or inscription, other than a label, mark, symbol or inscription displayed under an EC or national environmental labelling scheme, which relates to the energy consumption of an appliance and which does not comply with these requirements, if the label, mark, symbol or inscription would be taken to comply with these provisions or would be likely to mislead or confuse¹⁷;
- 1825 (9) it is the duty of every local weights and measures authority to enforce the above provisions within its area¹⁸.

1 See the Energy Information (Tumble Driers) Regulations 1996, SI 1996/601, regs 2, 3(1), (2). The regulations do not apply: (1) to secondhand appliances; (2) to appliances of which production ceased before 1 April 1996; (3) in respect of the rating plate or its equivalent affixed for safety purposes to an appliance; or (4) to combined washer-driers: see reg 3(3). Nor do the regulations apply in relation to: (a) an appliance supplied by a supplier, whether to a dealer or another person, before 30 September 1996; (b) any printed communication within the meaning of reg 12 (as amended) (see the text and notes 14-16 *infra*) distributed to potential purchasers before 30 September 1996; or (c) the display of appliances before 30 September 1996: reg 15. The regulations implement in part EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) and EC Commission Directive 95/13 (OJ L136, 21.6.95, p 28) (see PARA 393 *ante*).

2 For these purposes, 'supplier' means the manufacturer of an appliance or his authorised representative in the European Community or the person who places an appliance on the Community market: Energy Information (Tumble Driers) Regulations 1996, SI 1996/601, reg 2.

3 For these purposes, 'dealer' means a retailer or other person who offers for sale, displays or sells appliances to end-users: *ibid* reg 2 (amended by SI 2001/3142). 'Sale' includes hire and hire purchase; and related expressions are to be construed accordingly: Energy Information (Tumble Driers) Regulations 1996, SI 1996/601, reg 2.

4 *Ie* the requirements in *ibid* reg 4(2), Sch 1.

5 *Ie* the requirements in *ibid* reg 4(2), Sch 4.

6 See *ibid* reg 4(1), (2) (reg 4(1) substituted by SI 2001/3142). Where the dealer requests labels from the supplier, the supplier must ensure that the requested labels are delivered promptly: Energy Information (Tumble Driers) Regulations 1996, SI 1996/601, reg 4(3). A supplier may choose his own system for delivery of labels: reg 4(4).

7 *Ie* the requirements in *ibid* reg 5(2), Sch 2.

8 *Ie* the requirements in *ibid* reg 5(2), Sch 4.

9 See *ibid* reg 5(1), (2). Where the supplier provides a product brochure, the brochure must contain an information notice: reg 5(3). Where a product brochure is not provided by the supplier, the supplier must provide an information notice with any other literature provided with the appliance: reg 5(4).

10 See *ibid* reg 6.

11 See *ibid* reg 7 (substituted by SI 2001/3142).

12 See the Energy Information (Tumble Driers) Regulations 1996, SI 1996/601, reg 8(1). The technical documentation must include: (1) the name and address of the supplier; (2) a general description of the appliance, sufficient for it to be identified; (3) information, including drawings as relevant, on the main design features of the appliance and, in particular, items which appreciably affect its energy consumption; (4) the results of design calculations carried out, where these are relevant; (5) reports of relevant measurement tests carried out on the appliance in accordance with the test procedures of the harmonised standards; (6) test reports, where available, including those carried out by relevant notified organisations as defined under other Community legislation; (7) where values are derived from those obtained for similar models, the same information for those models; and (8) operating instructions, if any: reg 8(2). For the purposes of reg 8(1), (2), the supplier may use documentation already required on the basis of relevant Community legislation: reg 8(3). The supplier must make the technical documentation available for inspection by enforcement authorities for a period ending five years after the appliance has ceased to be manufactured: reg 8(4). The supplier must furnish promptly to an enforcement authority such of the technical documentation as the authority requires pursuant to reg 14(2), Sch 5 para 9: reg 8(5).

13 See *ibid* reg 9 (amended by SI 2001/3142).

14 le the information specified in the Energy Information (Tumble Driers) Regulations 1996, SI 1996/601, reg 12, Sch 3.

15 le the requirements in ibid reg 12, Sch 4.

16 See ibid reg 12 (amended by SI 2001/3142).

17 See the Energy Information (Tumble Driers) Regulations 1996, SI 1996/601, reg 13(1), (2).

18 See ibid regs 2, 14(1). As to offences, enforcement of the Energy Information (Tumble Driers) Regulations 1996, SI 1996/601 (as amended), and other matters see reg 14(2), Sch 5 (amended by virtue of the Enterprise Act 2002 s 2; and by SI 2001/3142; SI 2003/1398). Nothing in the Energy Information (Tumble Driers) Regulations 1996, SI 1996/601 (as amended) authorises a local weights and measures authority in Scotland to bring proceedings in Scotland for an offence: reg 14(3). As to local weights and measures authorities see PARA 398 ante.

UPDATE

787 Tumble driers

NOTE 18--SI 1996/601 Sch 5 further amended: SI 2008/1277, SI 2009/2559.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xiv) Energy Labelling/788. Washing machines.

788. Washing machines.

In the case of a household washing machine (an 'appliance'), which is electric mains operated and unable to use other energy sources, the following provisions apply¹:

- 1826 (1) a supplier² of an appliance must provide free of charge to a dealer³ a label in the relevant language version, which must comply, where it is in English, with the requirements as to labelling⁴ and performance classification⁵ and, in any other case, with the relevant EC provisions⁶;
- 1827 (2) a supplier of an appliance must provide an information notice in the relevant language version which complies, where it is in English, with the requirements as to the information notice⁷ and its performance classification⁸ and, in any other case, with the relevant EC provisions⁹;
- 1828 (3) the supplier is deemed to consent to the publication of the information given on a label or in an information notice¹⁰;
- 1829 (4) the supplier and no other person is responsible for the accuracy of the information given on a label or in an information notice¹¹;
- 1830 (5) the supplier must establish technical documentation sufficient to enable the accuracy of the information contained in a label or information notice to be assessed¹²;
- 1831 (6) a dealer who displays or offers for sale an appliance must attach a label to the outside front or top of the appliance so that the label remains clearly visible and not obscured whenever the appliance is displayed¹³;
- 1832 (7) where a person offers an appliance for sale to end-users by means of a printed communication, such as a mail order catalogue, in circumstances which imply that the potential purchaser cannot be expected to see the appliance displayed, the person making such offer must ensure that the printed communication is in the relevant language version and, if it is in English, includes

- the prescribed information as to mail order and other distance selling¹⁴ and describes the appliance in accordance with the requirements as to performance classification¹⁵ and, in any other case, it complies with the relevant EC provisions¹⁶;
- 1833 (8) a person must not display a label, mark, symbol or inscription, other than a label, mark, symbol or inscription displayed under an EC or national environmental labelling scheme, which relates to the energy consumption of an appliance and which does not comply with these requirements, if the label, mark, symbol or inscription would be taken to comply with these provisions or would be likely to mislead or confuse¹⁷;
- 1834 (9) it is the duty of every local weights and measures authority to enforce the above provisions within its area¹⁸.

1 See the Energy Information (Washing Machines) Regulations 1996, SI 1996/600, regs 2, 3(1), (2). The Energy Information (Washing Machines) Regulations 1996, SI 1996/600 (as amended) do not apply: (1) to secondhand appliances; (2) appliances of which production ceased before 1 April 1996; (3) in respect of the rating plate or its equivalent affixed for safety purposes to an appliance; (4) to machines with no spin capacity; (5) to machines with separate washing and spin-drying vessels (such as twin tubs); (6) to combined washer-driers: see reg 3(3) (amended by SI 1997/803). Until 30 June 1998, the regulations did not apply to machines with no internal means to heat water: see the Energy Information (Washing Machines) Regulations 1996, SI 1996/600, reg 3(3) (as so amended). Nor do the regulations apply in relation to: (a) an appliance supplied by a supplier, whether to a dealer or another person, before 30 September 1996; (b) any printed communication within the meaning of reg 12 (as amended) (see the text and notes 14-16 infra) distributed to potential purchasers before 30 September 1996; or (c) the display of appliances before 30 September 1996: reg 15. The regulations implement in part EC Council Directive 92/75 (OJ L297, 13.10.92, p 16) and EC Commission Directive 95/12 (OJ L297, 13.10.92, p 16) (as amended) (see PARA 393 ante).

2 For these purposes, 'supplier' means the manufacturer of an appliance or his authorised representative in the European Community or the person who places an appliance on the Community market: Energy Information (Washing Machines) Regulations 1996, SI 1996/600, reg 2.

3 For these purposes, 'dealer' means a retailer or other person who offers for sale, displays or sells appliances to end-users: *ibid* reg 2 (amended by SI 2001/3142). 'Sale' includes hire and hire purchase; and related expressions are to be construed accordingly: Energy Information (Washing Machines) Regulations 1996, SI 1996/600, reg 2.

4 *Ie* the requirements in *ibid* reg 4(2), Sch 1.

5 *Ie* the requirements in *ibid* reg 4(2), Sch 4.

6 See *ibid* reg 4(1), (2) (reg 4(1) substituted by SI 2001/3142). Where the dealer requests labels from the supplier, the supplier must ensure that the requested labels are delivered promptly: Energy Information (Washing Machines) Regulations 1996, SI 1996/600, reg 4(3). A supplier may choose his own system for delivery of labels: reg 4(4).

7 *Ie* the requirements in *ibid* reg 5(2), Sch 2.

8 *Ie* the requirements in *ibid* reg 5(2), Sch 4.

9 See *ibid* reg 5(1), (2). Where the supplier provides a product brochure, the brochure must contain an information notice: reg 5(3). Where a product brochure is not provided by the supplier, the supplier must provide an information notice with any other literature provided with the appliance: reg 5(4).

10 See *ibid* reg 6.

11 See *ibid* reg 7 (substituted by SI 2001/3142).

12 See the Energy Information (Washing Machines) Regulations 1996, SI 1996/600, reg 8(1). The technical documentation must include: (1) the name and address of the supplier; (2) a general description of the appliance, sufficient for it to be identified; (3) information, including drawings as relevant, on the main design features of the appliance and, in particular, items which appreciably affect its energy consumption; (4) the results of design calculations carried out, where these are relevant; (5) reports of relevant measurement tests carried out on the appliance in accordance with the test procedures of the harmonised standards; (6) test reports, where available, including those carried out by relevant notified organisations as defined under other Community legislation; (7) where values are derived from those obtained for similar models, the same

information for those models; and (8) operating instructions, if any: reg 8(2). For the purposes of reg 8(1), (2), the supplier may use documentation already required on the basis of relevant Community legislation: reg 8(3). The supplier must make the technical documentation available for inspection by enforcement authorities for a period ending five years after the appliance has ceased to be manufactured: reg 8(4). The supplier must furnish promptly to an enforcement authority such of the technical documentation as the authority requires pursuant to reg 14(2), Sch 5 para 9: reg 8(5).

13 See *ibid* reg 9 (amended by SI 2001/3142).

14 *Ie* the information specified in the Energy Information (Washing Machines) Regulations 1996, SI 1996/600, reg 12, Sch 3.

15 *Ie* the requirements in *ibid* reg 12, Sch 4.

16 See *ibid* reg 12 (amended by SI 2001/3142).

17 See the Energy Information (Washing Machines) Regulations 1996, SI 1996/600, reg 13(1), (2).

18 See *ibid* reg 14(1). As to offences, enforcement of the Energy Information (Washing Machines) Regulations 1996, SI 1996/600 (as amended), and other matters see reg 14(2), Sch 5 (amended by virtue of the Enterprise Act 2002 s 2; and by SI 2001/3142; SI 2003/1398). Nothing in the Energy Information (Washing Machines) Regulations 1996, SI 1996/600 (as amended) authorises a local weights and measures authority in Scotland to bring proceedings in Scotland for an offence: reg 14(3). As to local weights and measures authorities see PARA 398 *ante*.

UPDATE

788 Washing machines

NOTE 18--SI 1996/600 Sch 5 further amended: SI 2008/1277, SI 2009/2559.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xv) Estate Agency/A. IN GENERAL/789. Control of estate agents.

(xv) Estate Agency

A. IN GENERAL

789. Control of estate agents.

There are statutory controls on persons engaged in estate agency work in respect of standards of competence¹ and dealings with clients and clients' moneys².

The Office of Fair Trading (the 'OFT') may prohibit unfit persons from engaging in estate agency work³. Where a person is convicted of any criminal offence, or a judgment is given against him in any civil proceedings in the United Kingdom, the court may make arrangements to bring the conviction or judgment to the OFT's attention if it appears to the court that having regard to the functions of the OFT it would be expedient to do so and that without such arrangements the conviction or judgment might not be brought to the attention of the OFT⁴.

1 See AGENCY VOL 1 (2008) PARA 239 *et seq*. As to undesirable practices see PARA 790 *post*. The subject matter of the Estate Agents Act 1979 is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2)(b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C7, Pt III para 5. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

2 See AGENCY vol 1 (2008) PARA 245 et seq.

3 See AGENCY vol 1 (2008) PARA 243.

4 See the Enterprise Act 2002 s 231(1), (2): and COMPETITION vol 18 (2009) PARA 360. Offences under the Estate Agents Act 1979 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xv) Estate Agency/A. IN GENERAL/790. Undesirable practices.

790. Undesirable practices.

The following practices in relation to estate agency work¹ are undesirable²:

1835 (1) any failure by an estate agent³:

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227. (a) to make disclosure of his personal interest⁴ promptly⁵ and in writing⁶;

228. (b) to disclose to his client⁷ promptly and in writing that he himself has, or is seeking to acquire, a beneficial interest in the land⁸ or in the proceeds of sale of any interest in the land or he knows that any connected person⁹ has, or is seeking to acquire, a beneficial interest in the land or in the proceeds of sale of any interest in land¹⁰;

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1836 (2) any of the following acts or omissions relating to the arrangement and performance of services¹¹:

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229. (a) discrimination against a prospective purchaser by an estate agent on the grounds that that purchaser will not be, or is unlikely to be, accepting services¹²;

230. (b) in cases where an estate agent has introduced a prospective purchaser to his client and that purchaser has made an offer¹³, failure by the estate agent to forward¹⁴ to his client promptly and in writing at all stages before contracts for the disposal of the interest in the land have been exchanged, an accurate list of services, provided that an application from the prospective purchaser for services has been received by the estate agent or a connected person or (in the case where the estate agent or a connected person would derive a financial benefit from the provision of the service) by another person, and the estate agent knows that such an application has been received and that it is an application for services, being services in connection with the prospective purchaser's acquisition of the interest in the land or his use or enjoyment of it, or with his disposal of an interest in land which he has to make in order to make that acquisition or which is the result of that acquisition, and that application has not been refused¹⁵;

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1837 (3) any misdescription or omission relating to any of the following matters:

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231. (a) the making by an estate agent, knowingly or recklessly¹⁶ and orally or in writing, of any misrepresentation as to the existence of, or details relating to, any offer¹⁷ for the interest in the land¹⁸ or as to the existence or status of any prospective purchaser¹⁹ of an interest in land²⁰;

232. (b) the failure by an estate agent to forward²¹ to his client promptly and in writing accurate details, other than those of a description which the client has

indicated in writing he does not wish to receive, of any offer²² the estate agent has received from a prospective purchaser in respect of an interest in the land²³.

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1 For these purposes, 'estate agency work' has the meaning given in the Estate Agents Act 1979 s 1(1): Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2). The Estate Agents Act 1979 applies to things done by any person in the course of a business, including a business in which he is employed, pursuant to instructions received from another person ('the client') who wishes to dispose of or acquire an interest in land:

46 (1) for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to acquire or, as the case may be, dispose of such an interest; and

47 (2) after such an introduction has been effected in the course of that business, for the purpose of securing the disposal or, as the case may be, the acquisition of that interest,

and in the Estate Agents Act 1979 the expression 'estate agency work' refers to things so done to which the Act applies: s 1(1). As to the things to which the Act does not apply see s 1(2)-(4); and AGENCY vol 1 (2008) PARA 241.

2 Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 2.

3 For these purposes, 'estate agent' means any person who in the course of a business, including one in which he is employed, engages in estate agency work and includes cases where he is negotiating on his own behalf: *ibid* art 1(2).

4 *Ie* as required by the Estate Agents Act 1979 s 2(1): see AGENCY vol 1 (2008) PARA 240.

5 For these purposes, 'promptly' means within as short a period as is reasonably practicable in the circumstances, from the moment when what is to be done can reasonably be done: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2).

6 *Ibid* art 2(a), Sch 1 para 1.

7 For these purposes, 'client' means a person on whose behalf an estate agent acts: *ibid* art 1(2).

8 For these purposes, 'interest in land' means any of the interests referred to in the Estate Agents Act 1979 s 2 (see AGENCY vol 1 (2008) PARA 240); and references to an 'interest in land' are references to the particular interest in land of which the estate agent is engaged to secure the disposal or acquisition: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2).

9 For these purposes, 'connected person', in relation to an estate agent, means any of the following: (1) his employer or principal; (2) any employee or agent of his; or (3) any associate of his or of any person mentioned in head (1) or head (2) *supra*: *ibid* art 1(2). 'Associate' includes a business associate and otherwise has the meaning given by the Estate Agents Act 1979 s 32(2)-(6): see s 32(1); applied by the Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2). A person is an associate of another if he is the spouse or civil partner or a relative of that other or of a business associate of that other: Estate Agents Act 1979 s 32(2) (prospectively amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 63(1), (2)). 'Relative' means brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant; references to a spouse include a former spouse and a reputed spouse; references to a civil partner include a former civil partner; and, for these purposes, a relationship is established as if an illegitimate child or stepchild of a person were the legitimate child of the relationship in question: Estate Agents Act 1979 s 32(3) (prospectively amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 63(1), (3)). As to when a body corporate is an associate of another body corporate see the Estate Agents Act 1979 s 32(4). As to when an unincorporated association is an associate of another unincorporated association see s 32(5). As to when a partnership is an associate of another partnership see s 32(6); and AGENCY vol 1 (2008) PARA 242.

10 Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 1 para 2.

11 For these purposes, 'services' means any service for consideration provided, or to be provided, to a prospective purchaser by an estate agent or a connected person, or (in a case where the estate agent or connected person would derive a financial benefit from the provision of the service) by another person, and which is such as would ordinarily be made available to a prospective purchaser in connection with his acquisition of an interest in land or his use or enjoyment of it, including the provision to that purchaser of banking and insurance services and financial assistance and securing the disposal for that purchaser of an interest in land if that disposal is one which has to be made in order for him to be able to make the acquisition he is proposing or is one which is a result of that acquisition: *ibid* art 1(2). 'Financial benefit' includes

commission and any performance-related bonus (art 1(2)); and 'purchaser' means a person to whom an interest in land is transferred or in whose favour it is created (art 1(2)).

12 Ibid art 2(b), Sch 2 para 1.

13 For these purposes, 'offer' includes a conditional offer: ibid Sch 2 para 2.

14 For these purposes, 'forward' means dispatch to the client by hand, post or fax at the address or to the number given by the client to the estate agent, which dispatch may be made by the person by whom the service is being, or is to be, provided: ibid Sch 2 para 2.

15 Ibid Sch 2 para 2.

16 For these purposes, a misrepresentation is made recklessly if it is made regardless of whether it is true or false, whether or not the estate agent has reasons for believing that it might be false: ibid art 2(c), Sch 3 para 3(a).

17 For these purposes, and for the purposes of ibid Sch 3 para 2 (see the text and notes 21-23 infra), 'offer' includes any conditional offer, but does not include offers of a description which the client has indicated in writing to the estate agent need not be forwarded to him: Sch 3 para 3(b).

18 The right of an auctioneer to bid at an auction in accordance with the Sale of Land by Auction Act 1867 s 6 (see AUCTION vol 2(3) (Reissue) PARA 242) is not, however, affected: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 3 para 3(c).

19 For these purposes, the 'status of any prospective purchaser' includes the financial standing of that purchaser and his ability to exchange contracts expeditiously: ibid Sch 3 para 3(d).

20 Ibid Sch 3 para 1.

21 For these purposes, 'forward' means dispatch to the client by hand, post or fax at the address or to the number given by the client to the estate agent: ibid Sch 3 para 3(e).

22 See note 17 supra.

23 Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 3 para 2.

UPDATE

790 Undesirable practices

NOTE 9--Amendments made by Civil Partnership Act 2004 Sch 27 para 63 now in force: SI 2005/3175. In Estate Agents Act 1979 s 32(3) after 'former civil partner' add 'and a reputed civil partner': SI 2005/3129.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xv) Estate Agency/B. FALSE OR MISLEADING STATEMENTS ABOUT PROPERTY MATTERS/(A) In general/791. Offence of property misdescription.

B. FALSE OR MISLEADING STATEMENTS ABOUT PROPERTY MATTERS

(A) IN GENERAL

791. Offence of property misdescription.

Where a false¹ or misleading statement² about a prescribed matter³ is made in the course of an estate agency business⁴ or a property development business⁵, otherwise than in providing conveyancing services⁶, the person by whom the business is carried on is guilty of an offence⁷.

Where the making of the statement is due to the act or default of an employee, the employee is guilty of an offence, and he may be proceeded against and punished whether or not proceedings are taken against his employer⁸.

No contract is void or unenforceable, and no right of action in civil proceedings in respect of any loss arises, by reason only of the commission of such an offence⁹.

1 For these purposes, 'false' means false to a material degree: Property Misdescriptions Act 1991 s 1(5)(a). Cf the Trade Descriptions Act 1968 s 3(1); and PARA 479 ante.

2 For these purposes, a statement is misleading if, though not false, what a reasonable person may be expected to infer from it, or from any omission from it, is false: Property Misdescriptions Act 1991 s 1(5)(b). A statement may be made by pictures or any other method of signifying meaning as well as by words, and, if made by words, it may be made orally or in writing: s 1(5)(c).

3 For the meaning of 'prescribed matter' see PARA 792 post.

4 For these purposes, a statement is made in the course of an estate agency business if, but only if, the making of the statement is a thing done as mentioned in the Estate Agents Act 1979 s 1(1) (see PARA 790 note 1 ante; and AGENCY vol 1 (2008) PARA 240) and the Act either applies to it or would apply to it but for s 1(2)(a) (exception for things done in the course of a profession by a practising solicitor or employee: see AGENCY vol 1 (2008) PARA 241): Property Misdescriptions Act 1991 s 1(5)(e).

5 For these purposes, a statement is made in the course of a property development business if, but only if, it is made: (1) in the course of a business, including a business in which the person making the statement is employed, concerned wholly or substantially with the development of land; or (2) for the purpose of, or with a view to, disposing of an interest in land consisting of or including a building or part of a building constructed or renovated in the course of the business: *ibid* s 1(5)(f). Any reference to disposing of or acquiring an interest in land under s 1 or under the Estate Agents Act 1979 s 1 is to be construed in accordance with s 2 (see AGENCY vol 1 (2008) PARA 240): Property Misdescriptions Act 1991 s 1(6)(a).

6 For these purposes, 'conveyancing services' means the preparation of any transfer, conveyance, writ, contract or other document in connection with the disposal or acquisition of an interest in land, and services ancillary to that, but does not include anything done as mentioned in the Estate Agents Act 1979 s 1(1)(a) (see AGENCY vol 1 (2008) PARA 240): Property Misdescriptions Act 1991 s 1(5)(g).

7 *Ibid* s 1(1), (3). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 1(1), (3). As to the statutory maximum see PARA 401 note 31 ante. All offences under the Property Misdescriptions Act 1991 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante. As to the defence of due diligence see PARA 793 post; as to offences by bodies corporate see PARA 794 post; as to time limits for prosecutions see PARA 795 post; and as to enforcement see PARAS 796-800 post.

Statements under the Property Misdescriptions Act 1991 s 1(1) must be as to existing facts and not mere promises for the future. If a property developer makes a statement to a prospective purchaser concerning its intention to build houses to a specific design, but the houses, when built, are materially different from the specification, the developer has made a false or misleading statement contrary to s 1(1): *Lewin v Barratt Homes Ltd* [2000] 03 EG 132, DC (purchasers were shown a picture of a house of a certain design and a show house of the same design, both pictures being materially different from the houses which were subsequently built; the statements made by the developer contained by implication a statement of a present fact, ie that the developer, in its dealings with the purchasers, was intending and able to build houses to the design shown to the prospective purchasers).

There is to be paid out of money provided by Parliament any increase attributable to the Property Misdescriptions Act 1991 in the sums payable out of such money under any other Act: s 6.

8 *Ibid* s 1(2), (3). An employee guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 1(2), (3).

9 *Ibid* s 1(4).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xv) Estate Agency/B. FALSE OR MISLEADING STATEMENTS ABOUT PROPERTY MATTERS/(A) In general/792. Meaning of 'prescribed matter'.

792. Meaning of 'prescribed matter'.

'Prescribed matter' means any matter relating to land which is specified in an order made by the Secretary of State¹. The matters so prescribed are:

- 1838 (1) location or address;
- 1839 (2) aspect, view, outlook or environment;
- 1840 (3) availability and nature of services, facilities or amenities;
- 1841 (4) proximity to any services, places, facilities or amenities;
- 1842 (5) accommodation, measurements or sizes;
- 1843 (6) fixtures and fittings;
- 1844 (7) physical or structural characteristics, form of construction or condition;
- 1845 (8) fitness for any purpose or strength of any buildings or other structures on land or of land itself;
- 1846 (9) treatments, processes, repairs or improvements or the effects thereof;
- 1847 (10) conformity or compliance with any scheme, standard, test or regulations or the existence of any guarantee;
- 1848 (11) survey, inspection, investigation, valuation or appraisal by any person or the results thereof;
- 1849 (12) the grant or giving of any award or prize for design or construction;
- 1850 (13) history, including the age, ownership or use of land or any building or fixture and the date of any alterations thereto;
- 1851 (14) the person by whom any building (or part of a building), fixture or component was designed, constructed, built, produced, treated, processed, repaired, reconditioned or tested;
- 1852 (15) the length of time during which land has been available for sale either generally or by or through a particular person;
- 1853 (16) price, other than the price at which accommodation or facilities are available and are to be provided by means of the creation or disposal of an interest in a new dwelling² and previous price;
- 1854 (17) tenure or estate;
- 1855 (18) length of any lease or of the unexpired term of any lease and the terms and conditions of a lease;
- 1856 (19) amount of any ground rent, rent or premium and frequency of any review;
- 1857 (20) amount of any rentcharge;
- 1858 (21) where all or any part of any land is let to a tenant or is subject to a licence, particulars of the tenancy or licence, including any rent, premium or other payment due and frequency of any review;
- 1859 (22) amount of any service or maintenance charge or liability for common repairs;
- 1860 (23) council tax payable in respect of a dwelling³ or the basis on which that tax is calculated;
- 1861 (24) rates payable in respect of a non-domestic hereditament⁴ or the basis or any part of the basis on which those rates are calculated;
- 1862 (25) existence or nature of any planning permission or proposals for development, construction or change of use;
- 1863 (26) the passing or rejection of any plans of proposed building work⁵ and the giving of any completion certificate⁶;

- 1864 (27) application of any statutory provision which restricts the use of land or which requires it to be preserved or maintained in a specified manner;
- 1865 (28) existence or nature of any restrictive covenants, or of any restrictions on resale, restrictions on use, or pre-emption rights;
- 1866 (29) easements, servitudes or wayleaves; and
- 1867 (30) existence and extent of any public or private right of way⁷.

1 Property Misdescriptions Act 1991 s 1(5)(d). Such an order may make different provision for different cases and include such supplemental, consequential and transitional provisions as the Secretary of State considers appropriate: s 1(7). The power to make such an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 1(7). In exercise of the power so conferred the Secretary of State made the Property Misdescriptions (Specified Matters) Order 1992, SI 1992/2834, which came into force on 4 April 1993 (art 2). As to the Secretary of State see PARA 15 ante.

2 Ie the creation or disposal of an interest in land in the circumstances specified in the Consumer Protection Act 1987 s 23(1)(a), (b): see PARA 704 heads (1), (2) ante.

3 Ie within the meaning of the Local Government Finance Act 1992 s 3: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 232.

4 Ie within the meaning of the Local Government Finance Act 1988 s 64: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 33.

5 Ie in accordance with the Building Act 1984 s 16 (as amended): see BUILDING vol 4(2) (2002 Reissue) PARA 329.

6 Ie in accordance with the Building Regulations 2000, SI 2000/2531, reg 17: see PARA 752 ante; and BUILDING vol 4(2) (2002 Reissue) PARA 327.

7 Property Misdescriptions (Specified Matters) Order 1991, SI 1991/2834, art 2, Schedule paras 1-24, 26, 27, 30-33.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xv) Estate Agency/B. FALSE OR MISLEADING STATEMENTS ABOUT PROPERTY MATTERS/(B) Proceedings for Offences/793. Defence of due diligence.

(B) PROCEEDINGS FOR OFFENCES

793. Defence of due diligence.

In proceedings against a person for an offence of property misdescription¹ it is a defence for him to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence². A person is not entitled to rely on the defence of due diligence by reason of his reliance on information given by another unless he shows that it was reasonable in all the circumstances for him to have relied on the information, having regard, in particular, to the steps which he took, and those which might reasonably have been taken, for the purpose of verifying the information, and to whether he had any reason to disbelieve the information³. Where, in any proceedings against a person for an offence of property misdescription, the defence of due diligence involves an allegation that the commission of the offence was due to the act or default of another, or to reliance on information given by another, the person charged is not entitled, without the leave of the court, to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice⁴.

- 1 le an offence under the Property Misdescriptions Act 1991 s 1: see PARA 791 ante.
- 2 Ibid s 2(1). See *Enfield London Borough Council v Castles Estate Agents Ltd* (1996) 73 P & CR 343, DC (inquiries on site by estate agent's employee as to grant of planning permission).
- 3 Property Misdescriptions Act 1991 s 2(2).
- 4 Ibid s 2(3), (4).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xv) Estate Agency/B. FALSE OR MISLEADING STATEMENTS ABOUT PROPERTY MATTERS/(B) Proceedings for Offences/794. Offences by bodies corporate.

794. Offences by bodies corporate.

Where an offence of property misdescription¹ committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of, a director, manager², secretary or other similar officer of the body corporate or a person who was purporting to act in such a capacity, he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly³.

- 1 le an offence under the Property Misdescriptions Act 1991: see PARAS 791 ante, 796, 799 post.
- 2 As to the meaning of 'manager' see PARA 500 note 3 ante.
- 3 Property Misdescriptions Act 1991 s 4(1). Where the affairs of a body corporate are managed by its members, s 4(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 4(2).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xv) Estate Agency/B. FALSE OR MISLEADING STATEMENTS ABOUT PROPERTY MATTERS/(B) Proceedings for Offences/795. Time limits for prosecutions.

795. Time limits for prosecutions.

No proceedings for an offence¹ may be commenced after the end of the period of three years beginning with the date of the commission of the offence or the end of the period of one year beginning with the date of the discovery of the offence by the prosecutor, whichever is the earlier².

For these purposes, a certificate signed by or on behalf of the prosecutor and stating the date on which the offence was discovered by him is conclusive evidence of that fact; and a certificate stating that matter and purporting to be so signed is to be treated as so signed unless the contrary is proved³.

- 1 le an offence under the Property Misdescriptions Act 1991 s 1 (see PARA 791 ante), Schedule para 5(3) (see PARA 799 post), or Schedule para 6 (see PARA 800 post).

2 Ibid s 5(1) (amended by the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) Order 2003, SI 2003/1400, art 7, Sch 5).

3 Property Misdescriptions Act 1991 s 5(2).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xv) Estate Agency/B. FALSE OR MISLEADING STATEMENTS ABOUT PROPERTY MATTERS/(C) Enforcement/796. Enforcement authority.

(C) ENFORCEMENT

796. Enforcement authority.

Every local weights and measures authority¹ in Great Britain is an enforcement authority for the purposes of the Property Misdescriptions Act 1991; and it is the duty of each such authority to enforce the provisions of the Act within its area².

1 As to local weights and measures authorities see PARA 398 ante.

2 Property Misdescriptions Act 1991 s 3, Schedule para 1(1). As to the requirement to give notice of prosecution to the Office of Fair Trading see PARA 791 note 7 ante. As to restrictions on the disclosure of information obtained by an enforcement authority in the exercise of its functions under the Property Misdescriptions Act 1991 see PARA 401 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xv) Estate Agency/B. FALSE OR MISLEADING STATEMENTS ABOUT PROPERTY MATTERS/(C) Enforcement/797. Power to require production of books and documents.

797. Power to require production of books and documents.

If a duly authorised officer of an enforcement authority¹ has reasonable grounds for suspecting that an offence of property misdescription² has been committed, he may:

- 1868 (1) require a person carrying on or employed in a business to produce any book or document relating to the business and take copies of it or any entry in it; or
- 1869 (2) require such a person to produce in a visible and legible documentary form or in a form from which it can readily be produced in a visible and legible form any information so relating which is stored in any electronic form and take copies of it,

for the purpose of ascertaining whether such an offence has been committed³.

Such an officer may inspect any goods for the purpose of ascertaining whether such an offence has been committed⁴.

If such an officer has reasonable grounds for believing that any documents or goods may be required as evidence in proceedings for such an offence, he may seize and detain them⁵; and an officer so seizing any documents or goods in the exercise of that power must inform the person from whom they are seized⁶.

The powers of an officer under these provisions may be exercised by him only at a reasonable hour and on production, if required, of his credentials⁷.

Nothing in these provisions:

- 1870 (a) requires a person to produce a document if he would be entitled to refuse to produce it in proceedings in a court on the ground that it is the subject of legal professional privilege or authorises the taking possession of a document which is in the possession of a person who would be so entitled⁸;
- 1871 (b) requires a person to answer any question or give any information if to do so might incriminate him⁹.

- 1 As to enforcement authorities see PARA 796 ante.
- 2 Ie an offence under the Property Misdescriptions Act 1991 s 1: see PARA 791 ante.
- 3 Ibid s 3, Schedule para 3(1) (amended by virtue of the Criminal Justice and Police Act 2001 s 70, Sch 2 para 20).
- 4 Property Misdescriptions Act 1991 Schedule para 3(2).
- 5 Ibid Schedule para 3(3).
- 6 Ibid Schedule para 3(4).
- 7 Ibid Schedule para 3(5).
- 8 Ibid Schedule para 3(6).
- 9 Ibid Schedule para 8.

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798. Power to enter premises.

A duly authorised officer of an enforcement authority¹ may, at a reasonable hour and on production, if required, of his credentials, enter any premises² for the purpose of ascertaining whether an offence of property misdescription³ has been committed⁴.

If a justice of the peace is satisfied by sworn information in writing:

- 1872 (1) that any relevant⁵ books, documents or goods are on, or that any relevant information contained in a computer is available from, any premises and that production or inspection is likely to disclose the commission of an offence of property misdescription or that such an offence has been, is being or is about to be committed on any premises; and
- 1873 (2) any of the following conditions is met:
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- 233. (a) that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant has been given to the occupier; or
- 234. (b) that an application for admission, or the giving of such a notice, would defeat the object of the entry; or

235. (c) that the premises are unoccupied or that the occupier is temporarily absent and it might defeat the object of the entry to await his return,
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he may by warrant under his hand, which continues in force for a period of one month, authorise an officer of an enforcement authority to enter the premises, if need be by force⁶. An officer so entering any premises may take with him such other persons as may appear to him necessary⁷. On leaving premises which he has entered by virtue of such a warrant, an officer must, if the premises are unoccupied or the occupier is temporarily absent, leave the premises as effectively secured against trespassers as he found them⁸.

Nothing in these provisions requires a person to answer any question or give any information if to do so might incriminate him⁹.

1 As to enforcement authorities see PARA 796 ante.

2 For these purposes, 'premises' includes any place, including any vehicle, ship or aircraft, except premises used only as a dwelling: Property Misdescriptions Act 1991 s 3, Schedule para 4(9).

3 It is an offence under ibid s 1: see PARA 791 ante.

4 Ibid Schedule para 4(1).

5 For these purposes, 'relevant', in relation to books, documents, goods or information, means books, documents, goods or information which, under ibid Schedule para 3 (see PARA 797 ante), a duly authorised officer may require to be produced or may inspect: Schedule para 4(4).

6 Ibid Schedule para 4(2), (3), (5)(a), (6).

7 Ibid Schedule para 4(7).

8 Ibid Schedule para 4(8).

9 Ibid Schedule para 8.

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799. Obstruction of authorised officers.

Any person who:

- 1874 (1) intentionally obstructs an officer of an enforcement authority¹ acting in pursuance of his statutory powers²;
- 1875 (2) without reasonable cause fails to comply with a requirement made of him by such an officer³; or
- 1876 (3) without reasonable excuse fails to give an officer of an enforcement authority acting in pursuance of his statutory powers⁴ any other assistance or information which the officer may reasonably require of him for the purpose of the performance of the officer's functions⁵,

is guilty of an offence⁶.

If a person, in giving any such information as is mentioned in head (3) above, makes a statement which he knows is false in a material particular or recklessly makes a statement which is false in a material particular, he is guilty of an offence⁷.

- 1 As to enforcement authorities see PARA 796 ante.
- 2 Ie acting in pursuance of the Property Misdescriptions Act 1991 s 3, Schedule: see PARAS 796-798 ante.
- 3 Ie under ibid Schedule para 3(1): see PARA 797 ante.
- 4 See note 2 supra.
- 5 Ie under the Property Misdescriptions Act 1991 Schedule: see PARAS 796-798 ante.
- 6 Ibid Schedule para 5(1), (2). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see Schedule para 5(1), (2). As to the standard scale see PARA 498 note 3 ante. As to offences by bodies corporate see PARA 794 ante.
- 7 Ibid Schedule para 5(3), (4). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see Schedule para 5(3), (4). As to the statutory maximum see PARA 401 note 31 ante. As to time limits for prosecutions see PARA 795 ante.

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800. Impersonation of authorised officers.

If a person who is not a duly authorised officer of an enforcement authority¹ purports to act as such², he is guilty of an offence³.

- 1 As to enforcement authorities see PARA 796 ante.
- 2 Ie under the Property Misdescriptions Act 1991 s 3, Schedule: see PARAS 796-798 ante.
- 3 Ibid Schedule para 6(1), (2). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see Schedule para 6(1), (2). As to the statutory maximum see PARA 401 note 31 ante. As to offences by bodies corporate see PARA 794 ante. As to time limits for prosecutions see PARA 795 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xvi) Explosives/801. Explosives.

(xvi) Explosives

801. Explosives.

Explosives may not be hawked, sold or exposed for sale on any highway or other public places¹. Gunpowder exceeding 500 grams in weight may not be sold or exposed for sale unless substantially packed and properly marked². Moreover, the sale of any specially dangerous explosives may be prohibited by Order in Council³; and in accordance with this power the sale

of many types of explosives is prohibited except to purchasers who are holders of police certificates and certain mine and quarry employees⁴.

1 See the Explosives Act 1875 ss 30, 39; and EXPLOSIVES vol 17(2) (Reissue) PARA 973. As to the sale of dangerous goods generally see PARA 20 ante; and NEGLIGENCE vol 78 (2010) PARAS 45-50.

2 See ibid s 32 (as amended; prospectively repealed); and EXPLOSIVES vol 17(2) (Reissue) PARA 975. Similar restrictions apply in the case of other explosives: see ss 39, 40(4), (8) (s 40(4) as amended); and EXPLOSIVES vol 17(2) (Reissue) PARA 976.

3 See ibid s 43 (as amended); see EXPLOSIVES vol 17(2) (Reissue) PARA 978.

4 See ibid s 43 (as amended); Order in Council (No 9) dated 27 November 1875 relating to the Sale of Explosive (as amended); the Control of Explosives Regulations 1991, SI 1991/1531 (as amended); the Placing on the Market and Supervision of Transfers of Explosives Regulations 1993, SI 1993/2714; and EXPLOSIVES vol 17(2) (Reissue) PARAS 967, 976, 978, 981. Other Orders in Council prohibit the sale of certain types of fireworks: see EXPLOSIVES vol 17(2) (Reissue) PARA 978. It is an offence to sell fireworks if the maker's name or the address of his factory has been removed or obliterated: see PARA 50 ante; and EXPLOSIVES vol 17(2) (Reissue) PARA 980. Ammunition and firearms may not generally be sold except to the holder of a firearm certificate: see PARA 52 ante.

UPDATE

801 Explosives

NOTE 3--Order in Council (No 9) dated 27 November 1875 revoked: SI 2005/1082.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xvii) Financial Services/802. In general.

(xvii) Financial Services

802. In general.

The Financial Services and Markets Act 2000 regulates (inter alia):

- 1877 (1) the carrying on of regulated activities¹;
- 1878 (2) the official listing of securities²;
- 1879 (3) business transfers³;
- 1880 (4) the activities of authorised persons⁴;
- 1881 (5) collective investment schemes⁵;
- 1882 (6) recognised investment exchanges and clearing houses⁶;
- 1883 (7) Lloyd's of London⁷; and
- 1884 (8) the provision of financial services by members of the professions⁸.

It also provides for the Financial Ombudsman Service⁹ and the Financial Services Compensation Scheme¹⁰.

1 See the Financial Services and Markets Act 2000 Pts 2-5 (ss 19-71); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 80 et seq.

- 2 See *ibid* Pt 6 (ss 72-103); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 385 et seq. Offers of unlisted securities are regulated by the Public Offers of Securities Regulations 1995, SI 1995/1537 (as amended): see COMPANIES.
- 3 See the Financial Services and Markets Act 2000 Pt 7 (ss 104-117); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 590 et seq.
- 4 See *ibid* Pt 12 (ss 178-192); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 377 et seq.
- 5 See *ibid* Pt 17 (ss 235-284); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603 et seq.
- 6 See *ibid* Pt 18 (ss 285-313) (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 684 et seq.
- 7 See *ibid* Pt 19 (ss 314-324); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 741 et seq.
- 8 See *ibid* Pt 20 (ss 325-333); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 749 et seq.
- 9 See *ibid* Pt 16 (ss 225-234); para 437 ante; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 575 et seq.
- 10 See *ibid* Pt 15 (ss 212-224); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 583 et seq.

UPDATE

802 In general

NOTE 2--SI 1995/1537 revoked: SI 2005/1433.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xviii) Food/803. Sale of unsafe food.

(xviii) Food

803. Sale of unsafe food.

It is an offence at common law knowingly to sell or expose for sale by way of trade articles of food or drink which are corrupt and unfit and dangerous for human food¹.

Any person² who:

- 1885 (1) sells³ for human consumption⁴ to the purchaser's prejudice any food⁵ which is not of the nature or substance or quality demanded by the purchaser⁶;
- 1886 (2) gives with any food sold by him for human consumption, or displays with any food offered or exposed by him for sale or in his possession for the purpose of sale for human consumption, a label, whether or not attached to or printed on the wrapper or container, which falsely describes the food or is likely to mislead as to the nature or substance or quality of the food⁷;
- 1887 (3) publishes, or is a party to the publication of, an advertisement (not being a label given or displayed by him as mentioned in head (2) above) which falsely describes any food or is likely to mislead as to the nature or substance or quality of the food⁸;
- 1888 (4) sells, or offers or exposes for sale for human consumption or has in his possession for the purpose of sale for human consumption any food the

- presentation of which is likely to mislead as to the nature or substance or quality of the food⁹;
- 1889 (5) renders any food injurious to health by means of any of the following operations, namely:
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- 236. (a) adding any article or substance to the food;
 - 237. (b) using any article or substance as an ingredient in the preparation of the food;
 - 238. (c) abstracting any constituent from the food; and
 - 239. (d) subjecting the food to any other process or treatment,
 - 240. with intent that it is to be sold for human consumption¹⁰;
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- 1890 (6) sells for human consumption, or offers, exposes or advertises for sale for such consumption, or has in his possession for the purpose of such sale or of preparation for such sale, or deposits with, or consigns to, any other person for the purpose of such sale or of preparation for such sale, any food which fails to comply with food safety requirements¹¹,

is guilty of an offence¹².

1 See FOOD vol 18(2) (Reissue) PARA 382.

2 See *Nottingham City Council v Wolverhampton and Dudley Breweries* [2003] EWHC 2847 (Admin), [2004] QB 1275, [2004] 1 All ER 1352 (where alcohol was sold in breach of the Food Safety Act 1990 s 14, both the brewery and licensee licensed to sell could be found liable under the Act).

3 For these purposes, the supply of food, otherwise than on sale, in the course of a business, and any other thing which is done with respect to food and is specified in a ministerial order, is deemed to be a sale of the food: Food Safety Act 1990 s 2(1).

4 For these purposes, any food commonly used for human consumption is, if sold or offered, exposed or kept for sale, presumed, until the contrary is proved, to have been sold or, as the case may be, to have been or to be intended for sale for human consumption: *ibid* s 3(1), (2). Any food commonly used for human consumption which is found on premises used for the preparation, storage or sale of that food and any article or substance which is found on premises used for the preparation, storage or sale of that food, is presumed, until the contrary is proved, to be intended for sale, or for manufacturing food for sale, for human consumption: s 3(1), (3).

5 For these purposes, 'food' means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans; it includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment; it does not include: (1) feed; (2) live animals unless they are prepared for placing on the market for human consumption; (3) plants prior to harvesting; (4) medicinal products; (5) cosmetics; (6) tobacco and tobacco products; (7) narcotic or psychotropic substances; and (8) residues and contaminants: *ibid* s 1(1) (amended by the Food Safety Act 1990 (Amendment) Regulations 2004, SI 2004/2990, regs 2, 3).

6 See the Food Safety Act 1990 s 14; and FOOD vol 18(2) (Reissue) PARA 360.

7 See *ibid* s 15(1), (5); and FOOD vol 18(2) (Reissue) PARA 372.

8 See *ibid* s 15(2), (5); and FOOD vol 18(2) (Reissue) PARA 372.

9 See *ibid* s 15(3), (5); and FOOD vol 18(2) (Reissue) PARA 372.

10 See *ibid* s 7 (as amended); and FOOD vol 18(2) (Reissue) PARA 282.

11 See *ibid* s 8; and FOOD vol 18(2) (Reissue) PARA 283.

12 As to the time limit for prosecutions see *ibid* s 34; and FOOD vol 18(2) (Reissue) PARA 459. As to the punishment of offences see s 35 (as amended); and FOOD vol 18(2) (Reissue) PARA 468. As to offences by bodies corporate see s 36; and FOOD vol 18(2) (Reissue) PARA 460.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xviii) Food/804. Food safety.

804. Food safety.

Regulations may make:

- 1891 (1) provision for requiring, prohibiting or regulating the presence in food¹ or food sources² of any specified substance, or any substance of any specified class, and generally for regulating the composition of food;
 - 1892 (2) provision for securing that food is fit for human consumption and meets such microbiological standards, whether going to the fitness of the food or otherwise, as may be specified by or under the regulations;
 - 1893 (3) provision for requiring, prohibiting or regulating the use of any process or treatment in the preparation of food;
 - 1894 (4) provision for securing the observance of hygienic conditions and practices in connection with the carrying out of commercial operations with respect to food and food sources;
 - 1895 (5) provision for imposing requirements or prohibitions as to, or otherwise regulating, the labelling, marking, presenting or advertising of food, and the descriptions which may be applied to food;
 - 1896 (6) such other provision with respect to food or food sources, including, in particular, provision for prohibiting or regulating the carrying out of commercial operations with respect to food or food sources, as appears to be necessary or expedient:
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- 241. (a) for the purpose of securing that food complies with food safety requirements or in the interests of the public health; or
 - 242. (b) for the purpose of protecting or promoting the interests of consumers³,
- 168

and, in making such regulations, regard must be had to the desirability of restricting, so far as practicable, the use of substances of no nutritional value as foods or as ingredients of foods⁴.

Provision may also be made by regulations:

- 1897 (i) for securing the observance of hygienic conditions and practices in connection with the carrying out of commercial operations with respect to contact materials which are intended to come into contact with food intended for human consumption;
- 1898 (ii) for imposing requirements or prohibitions as to, or otherwise regulating, the labelling, marking or advertising of such materials, and the descriptions which may be applied to them; and
- 1899 (iii) otherwise for prohibiting or regulating the carrying out of commercial operations with respect to such materials⁵.

1 For these purposes, references to food are to be construed as references to food intended for sale for human consumption: Food Safety Act 1990 s 16(5)(a).

2 For these purposes, references to food sources are to be construed as references to food sources from which food intended for human consumption is intended to be derived: *ibid* s 16(5)(b).

3 See *ibid* s 16(1); and FOOD vol 18(2) (Reissue) PARA 289. Without prejudice to the generality of s 16(1), regulations under s 16(1) may make any such provision as is mentioned in s 16(3), Sch 1: see s 16(3); and FOOD.

Consumer safety in general is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2)(b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C7. That reservation does not, however, extend to the subject matter of the Food Safety Act 1990 s 16 (see the Scotland Act 1998 Sch 5 Pt II head C para C7, Pt III para 5); and thus the Scottish Parliament has legislative competency in relation to food safety.

4 See the Food Act 1990 s 16(4); and FOOD.

5 See *ibid* s 16(2); and FOOD.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xix) Goods Advertised as made by, or sold for the Benefit of, Blind or otherwise Disabled Persons/805. In general.

(xix) Goods Advertised as made by, or sold for the Benefit of, Blind or otherwise Disabled Persons

805. In general.

It is unlawful, in selling any goods or exchanging any article or thing for any other article or thing or soliciting orders for goods of any description in the course of a business carried on by any person, for any representation that, or implying that, blind or otherwise disabled persons¹, or any description of such persons:

1900 (1) are employed in the production, preparation or packing of the goods, article or thing; or

1901 (2) benefit, otherwise than as users of the goods, article or thing, from the sale of the goods or the exchange of the article or thing or the carrying on of the business,

to be made in the course of visits from house² to house, or by post or by telephone; and any person who contravenes these provisions is guilty of an offence³.

These provisions do not apply where the business is being carried on:

1902 (a) by a local authority⁴;

1903 (b) by a company, association or body providing facilities under the Disabled Persons (Employment) Act 1944⁵; or

1904 (c) by any body of persons exempted by the Secretary of State⁶, being a body appearing to him to be carrying on business without profit to its members,

or where the person carrying on the business is substantially disabled⁷ and all goods, articles or things with respect to which the representation is made were produced by his own labour⁸.

1 For these purposes, the reference to blind or otherwise disabled persons is a reference to persons under any disability, whether physical or mental, attributable to illness, injury, imperfect development or congenital deformity: Trading Representations (Disabled Persons) Act 1958 s 4(1).

2 For these purposes, 'house' includes a place of business: *ibid* s 1(5).

3 Ibid s 1(1) (amended by the Trading Representations (Disabled Persons) (Amendment) Act 1972 s 1(1); and the Magistrates' Courts Act 1980 s 32(2)). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to a fine not exceeding the prescribed sum: see the Trading Representations (Disabled Persons) Act 1958 s 1(1) (as so amended). As to the prescribed sum see PARA 498 note 2 ante.

A local authority (see note 4 infra) may institute proceedings for an offence under s 1 (as amended): s 1(3). Where an offence under s 1 (as amended) which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he, as well as the body corporate, is deemed to be guilty of that offence and is liable to be proceeded against and punished accordingly: s 1(4). As to the meaning of 'manager' see PARA 500 note 3 ante.

4 For these purposes, 'local authority' means, in relation to England, the council of a county other than a metropolitan county, or of a district or London borough or the Common Council of the City of London and, in relation to Wales, the council of a county or county borough: ibid s 1(5) (amended by the Local Government Act 1972 ss 251, 272(1), Sch 29 para 44(2), Sch 30; the Local Government Act 1985 s 102(2), Sch 17; and the Local Government (Wales) Act 1994 s 66(6), Sch 16 para 13).

5 In providing facilities under the Disabled Persons (Employment) Act 1944 s 15 (as amended) in pursuance of arrangements under s 15(2) (as amended): see EMPLOYMENT vol 39 (2009) PARA 538.

6 In exempted from the operation of the Trading Representations (Disabled Persons) Act 1958 s 1(1) (as amended): see the text and notes 1-3 supra. As to the Secretary of State see PARA 15 ante.

7 For these purposes, the reference to substantially disabled persons is a reference to persons substantially handicapped, whether permanently or not, by any disability, whether physical or mental, attributable to illness, injury, imperfect development or congenital deformity: ibid s 4(2).

8 Ibid s 1(2) (amended by the Trading Representations (Disabled Persons) (Amendment) Act 1972 s 1(2); and the Charities Act 1992 s 78(2), Sch 7).

UPDATE

805 In general

TEXT AND NOTES--Trading Representations (Disabled Persons) Act 1958 repealed: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xx) Hallmarking/806. In general.

(xx) Hallmarking

806. In general.

Any person who, in the course of a trade or business:

- 1905 (1) applies to an unhallmarked article¹ a description indicating that it is wholly or partly made of gold, silver or platinum; or
- 1906 (2) supplies, or offers to supply, an unhallmarked article to which such a description is applied,

is guilty of an offence unless, in the case of a description, it is a permitted description² or, in the case of an article, it is exempt³.

In any proceedings for such an offence it is a defence for the person charged to prove that, in reliance on information supplied by another person, he believed that the article concerned was one which was exempt from hallmarking and that he could not with reasonable diligence have ascertained that it was not such an article⁴.

It is the duty of every local weights and measures authority to enforce the provisions of the Hallmarking Act 1973 within its area⁵.

1 For the meaning of 'unhallmarked article' see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 474.

2 As to permissible descriptions see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 475.

3 See the Hallmarking Act 1973 s 1; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 467. As to exempted articles see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 476. Notwithstanding the Trade Descriptions Act 1968 s 3(1) (see PARA 479 ante), a trade description which indicates the fineness, whether in parts per 1,000 or otherwise, of any precious metal is a false trade description if that indication is false to any extent or degree, except by understating the fineness: see the Hallmarking Act 1973 s 1(4); and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 477. As to descriptions relating to fineness see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 477.

The regulation of hallmarking is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2)(b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C7. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

4 See the Hallmarking Act 1973 s 1(3), Sch 3 para 6; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 467.

5 See *ibid* s 9(1); and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 485. Certain provisions of the Trade Descriptions Act 1968 apply in relation to the enforcement of the Hallmarking Act 1973: see s 9(1), (3), (4); and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 485. All offences under the Hallmarking Act 1973 are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

UPDATE

806 In general

NOTE 3--Hallmarking Act 1973 s 1(4) repealed, s 1(4A)-(4D) added: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxi) Medicines and Medicinal Products/807. Control of containers, packages and identification of medicinal products.

(xxi) Medicines and Medicinal Products

807. Control of containers, packages and identification of medicinal products.

Regulations may be made:

- 1907 (1) imposing such requirements as are considered necessary or expedient¹ with respect to:

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243. (a) the labelling of containers of medicinal products;
244. (b) the labelling of packages of medicinal products;

245. (c) the display of distinctive marks on containers and packages of medicinal products²;

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1908 (2) leaflets relating to medicinal products which are supplied, or are intended to be supplied, with the products, whether by being enclosed in containers or packages of the products or otherwise³;

1909 (3) prohibiting the sale or supply of medicinal products otherwise than in containers which comply with such requirements as are considered necessary or expedient⁴;

1910 (4) imposing such requirements as are considered necessary or expedient⁵ with respect to any one or more of the following matters, that is to say, the colour of the products, the shape of the products and distinctive marks to be displayed on the products⁶;

1911 (5) imposing such requirements as are considered necessary or expedient with respect to the display on automatic machines of information relating to medicinal products offered or exposed for sale by means of such machines⁷.

1 le for the purposes of: (1) securing that medicinal products are correctly described and readily identifiable; (2) securing that any appropriate warning or other appropriate information or instruction is given, and that false or misleading information is not given, with respect to medicinal products; (3) promoting safety in relation to medicinal products.

2 See the Medicines Act 1968 s 85; and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 152.

3 See ibid s 86 (as amended); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 153.

4 See ibid s 87; and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 154.

5 See note 1 supra.

6 See the Medicines Act 1968 s 88; and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 155.

7 See ibid s 89; and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 156.

UPDATE

807 Control of containers, packages and identification of medicinal products

TEXT AND NOTES--1986 ss 85-89 amended: Veterinary Medicines Regulations 2006, SI 2006/2407.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxi) Medicines and Medicinal Products/808. Sale of unsafe medicinal products.

808. Sale of unsafe medicinal products.

No person is:

1912 (1) to add any substance to, or abstract any substance from, a medicinal product so as to affect injuriously the composition of the product, with intent that the product be sold or supplied in that state; or

1913 (2) to sell or supply, or offer to expose for sale or supply, or have in his possession for the purpose of sale or supply, any medicinal product whose composition has been injuriously affected by the addition or abstraction of any substance¹.

No person is, to the prejudice of the purchaser², to sell any medicinal product which is not of the same nature or quality demanded by the purchaser³; but this prohibition is not to be taken to be contravened:

1914 (a) by reason only that a medicinal product contains some extraneous matter, if it is proved that the presence of that matter was an inevitable consequence of the process of manufacture of the product⁴;

1915 (b) by reason only that a substance has been added to, or abstracted from, the medicinal product, if it is proved that the addition or abstraction was not carried out fraudulently, and did not injuriously affect the composition of the product, and the product was sold having attached to it, or to a container or package in which it was sold, a conspicuous notice of adequate size and legibly printed, specifying the substance added or abstracted⁵.

1 See the Medicines Act 1968 s 63; and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 146.

2 For these purposes, the sale of a medicinal product is not to be taken to be otherwise than to the prejudice of the purchaser by reason only that the purchaser buys the product for the purpose of analysis or examination: *ibid* s 64(2).

3 See *ibid* s 64(1); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 147.

4 See *ibid* s 64(3); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 147.

5 See *ibid* s 64(4); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 147.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxi) Medicines and Medicinal Products/809. Compliance with standards specified in monographs.

809. Compliance with standards specified in monographs.

No person is, in the course of a business carried on by him:

1916 (1) to sell a medicinal product which has been demanded by the purchaser by, or by express reference to, a particular name; or

1917 (2) to sell or supply a medicinal product in pursuance of a prescription given by a practitioner in which the product required is described by, or by express reference to, a particular name,

if that name is a name at the head of the relevant monograph and the product does not comply with the standard specified in that monograph¹.

Nor is any person, in the course of a business carried on by him, to sell or supply a medicinal product which, in the course of that business, has been offered or exposed for sale and has been so offered or exposed for sale by, or by express reference to, a particular name, if that

name is a name at the head of the relevant monograph and the product does not comply with the standard specified in that monograph².

1 See the Medicines Act 1968 s 65(1); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 148.

2 See ibid s 65(2); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 148.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxii) Motor Vehicles and Equipment; Fuel Consumption/A. MOTOR VEHICLES AND EQUIPMENT/810. Unlawful sales of motor vehicles.

(xxii) Motor Vehicles and Equipment; Fuel Consumption

A. MOTOR VEHICLES AND EQUIPMENT

810. Unlawful sales of motor vehicles.

If a person sells, or supplies, or offers to sell or supply, or exposes for sale, a motor vehicle or trailer in an unroadworthy condition, he is guilty of an offence¹. A person is not to be convicted of an offence in respect of the supply of a motor vehicle or trailer if he proves that:

- 1918 (1) it was supplied for export from Great Britain²; or
- 1919 (2) he had reasonable cause to believe that the vehicle or trailer would not be used on a road in Great Britain, or would not be so used until it had been put into a condition in which it might lawfully be so used³.

If any person fits a vehicle part to a vehicle or causes or permits a vehicle part to be fitted to a vehicle in such circumstances that the use of the vehicle on a road would, by reason of that part being fitted to the vehicle, involve a danger of injury to any person or constitute a contravention of or failure to comply with any of the construction and use requirements, he is guilty of an offence⁴. A person is not to be convicted of such an offence if he proves that the vehicle to which the part was fitted was to be exported from Great Britain or that he had reasonable cause to believe that that vehicle would not be used on a road in Great Britain or that it would not be so used until it had been put into a condition in which its use on a road would not constitute a contravention of or a failure to comply with any of the construction and use requirements and would not involve a danger of injury to any person⁵.

If a person supplies, sells or offers to sell or supply a vehicle part or permits a vehicle part to be supplied and has reasonable cause to believe that the part is to be fitted to a motor vehicle, or to a vehicle of a particular class, or to a particular vehicle, he is guilty of an offence if that part could not be fitted to a motor vehicle or, as the case may require, to a vehicle of that class or of a class to which the particular vehicle belongs, except in such circumstances that the use of the vehicle on a road would, by reason of that part being fitted to the vehicle, constitute a contravention of or failure to comply with any of the construction and use requirements or involve a danger of injury to any person⁶. A person is not to be convicted of such an offence if he proves that the part was supplied for export from Great Britain or that he had reasonable cause to believe that it would not be fitted to a vehicle used on a road in Great Britain or that it would not be so fitted until it had been put into such a condition that it could be fitted otherwise than in such circumstances that the use of the vehicle on a road would, by reason of that part being fitted to the vehicle, constitute a contravention of or failure to comply with any of the construction and use requirements or involve a danger of injury to any person⁷.

Nothing in the provisions described above affects the validity of a contract or any rights arising under a contract^a.

1 See the Road Traffic Act 1988 s 75(1), (2), (5); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 694. For these purposes, a motor vehicle or trailer is in an unroadworthy condition if: (1) it is in such a condition that the use of it on a road in that condition would be unlawful by virtue of any provision made by regulations under s 41 (as amended) (regulation of construction, weight, equipment and use of vehicles: see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 260 et seq) as respects brakes, steering gear or tyres or the construction, weight or equipment of vehicles; or (2) it is in such a condition that its use on a road would involve a danger of injury to any person: s 75(3) (amended by the Road Traffic Act 1991 ss 16(1), (2), 83, Sch 8). Offences under the Road Traffic Act 1988 ss 75, 76 (as amended) are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

2 See the Road Traffic Act 1988 s 75(6)(a); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 694.

3 See *ibid* s 75(6)(b); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 694. Section 75(6)(b) does not apply in relation to a person who, in the course of a trade or business: (1) exposes a vehicle or trailer for sale, unless he also proves that he took all reasonable steps to ensure that any prospective purchaser would be aware that its use in its current condition on a road in Great Britain would be unlawful; or (2) offers to sell a vehicle or trailer, unless he also proves that he took all reasonable steps to ensure that the person to whom the offer was made was aware of that fact: s 75(6A) (added by the Road Traffic Act 1991 s 16(1), (5)).

4 See the Road Traffic Act 1988 s 76(1) (amended by the Road Traffic Act 1991 s 48, Sch 4 para 58(1), (2)); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 695. As to the requirement of giving notice of prosecution see note 1 *supra*.

5 See the Road Traffic Act 1988 s 76(2) (amended by the Road Traffic Act 1991 Sch 4 para 58(1), (3)); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 695.

6 See the Road Traffic Act 1988 s 76(3) (amended by the Road Traffic Act 1991 Sch 4 para 58(1), (4)); the Road Traffic Act 1988 s 76(4); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 695.

7 See the Road Traffic Act 1988 s 76(5) (amended by the Road Traffic Act 1991 s 48, Sch 4 para 58(1), (4)); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 695.

8 See the Road Traffic Act 1988 ss 75(7), 76(10); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARAS 694-695.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxii) Motor Vehicles and Equipment; Fuel Consumption/A. MOTOR VEHICLES AND EQUIPMENT/811. Unlawful sale of helmets.

811. Unlawful sale of helmets.

If a person sells or offers for sale, or lets on hire or offers to let on hire, a helmet¹ as a helmet for affording protection to persons on or in motor cycles and the helmet is neither of a prescribed type² nor of an authorised type³ sold or offered for sale subject to any conditions specified in the authorisation, he is guilty of an offence⁴. A person is not, however, to be convicted of such an offence in respect of the sale or offer for sale of a helmet if he proves that it was sold or, as the case may be, offered for sale for export from Great Britain⁵.

1 For these purposes, 'helmet' includes any head-dress: Road Traffic Act 1988 s 17(5).

2 I.e a type prescribed under *ibid* s 17. Regulations may be made prescribing, by reference to shape, construction or any other quality, types of helmet recommended as affording protection to persons on or in motor cycles, or motor cycles of different classes, from injury in the event of accident: s 17(1). As to the

regulations that have been made see the Motor Cycles (Protective Helmets) Regulations 1998, SI 1998/1807; and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARAS 639-640.

3 le a type authorised under regulations made under the Road Traffic Act 1988 s 17.

4 See ibid s 17(2), (5); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 640. As to contraventions of s 17 see s 17(4), Sch 1 (as amended).

5 See ibid s 17(3); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 640.

UPDATE

811 Unlawful sale of helmets

NOTE 2--SI 1998/1807 amended: SI 2008/1277.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxii) Motor Vehicles and Equipment; Fuel Consumption/A. MOTOR VEHICLES AND EQUIPMENT/812. Unlawful sale of head-worn appliances for use on motor cycles.

812. Unlawful sale of head-worn appliances for use on motor cycles.

If a person sells, offers for sale, lets on hire or offers to let on hire an appliance¹ of any such description as is authorised for use by persons on or in motor cycles, or motor cycles of any class, and that appliance is not of a prescribed type² as authorised for such use, he is guilty of an offence³. A person is not, however, to be convicted of such an offence in respect of the sale or offer for sale of an appliance if he proves that it was sold or, as the case may be, offered for sale for export from Great Britain⁴.

1 The Road Traffic Act 1988 s 18 applies to appliances of any description designed or adapted for use: (1) with any headgear; or (2) by being attached to or placed on the head (eg eye protectors or earphones): s 18(7).

2 le a type prescribed under ibid s 18. Regulations may be made prescribing, by reference to shape, construction or any other quality, types of appliance of any description as authorised for use by persons driving or riding, otherwise than in sidecars, on motor cycles of any class specified in the regulations: s 18(1). Such regulations may: (1) impose restrictions or requirements with respect to the circumstances in which appliances of any type prescribed by the regulations may be used; and (2) make different provision in relation to different circumstances: s 18(2). As to the regulations that have been made see the Motor Cycles (Eye Protectors) Regulations 1999, SI 1999/535, implementing in part EC Council Directive 89/686 (OJ L399, 30.12.89, p 18) (amended by EC Council Directive 93/68 (OJ L220, 30.8.93, p 1); EC Council Directive 93/95 (OJ L276, 9.11.93, p 11; European Parliament and Council Directive 96/58 (OJ L236, 18.9.96, p 44)); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 641.

3 See the Road Traffic Act 1988 s 18(4), (8); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 641. As to contraventions of s 18 see s 18(4), Sch 1 (as amended). If a person driving or riding on a motor cycle on a road uses an appliance of any description for which a type is prescribed under s 18 and the appliance is not of a type so prescribed or is otherwise used in contravention of regulations under s 18, he is guilty of an offence: see s 18(3); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 641.

4 See ibid s 18(5); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 641.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR

CIRCUMSTANCES/(xxii) Motor Vehicles and Equipment; Fuel Consumption/A. MOTOR VEHICLES AND EQUIPMENT/813. Unlawful sale of reflectors and tail lamps.

813. Unlawful sale of reflectors and tail lamps.

If a person sells or offers for sale any appliance adapted for use as a reflector or tail lamp to be carried on a vehicle in accordance with the provisions of the Road Traffic Act 1988 or of any regulations made thereunder, not being an appliance which complies with the construction and use requirements applicable to a class of vehicles for which the appliance is adapted, he is guilty of an offence¹.

1 See the Road Traffic Act 1988 s 83; and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 408.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxii) Motor Vehicles and Equipment; Fuel Consumption/A. MOTOR VEHICLES AND EQUIPMENT/814. Safety equipment for children in motor vehicles.

814. Safety equipment for children in motor vehicles.

Regulations may be made prescribing (by reference to shape, construction or any other quality) types of equipment¹ that are recommended as conducive to the safety in the event of accident of prescribed classes of children in prescribed classes of motor vehicles²; and such regulations may make different provision in relation to different circumstances³.

Such regulations may make provision for securing that, when equipment of a type prescribed by the regulations is sold or offered for sale as equipment which is so conducive:

- 1920 (1) appropriate information is provided in relation to it in such manner as may be prescribed; and
- 1921 (2) inappropriate information is not provided in relation to it⁴.

Except in such circumstances as may be prescribed, if a person sells, or offers for sale, or lets on hire or offers to let on hire, equipment of any description for which a type is so prescribed as equipment which is so conducive and that equipment is not of a type so prescribed or is sold or offered for sale in contravention of regulations so made, he is guilty of an offence⁵.

Except in such circumstances as may be prescribed, if a person sells, or offers for sale, or lets on hire or offers to let on hire, equipment of any description for which a type is so prescribed as equipment conducive to the safety in the event of accident of children not of a class prescribed in relation to equipment of that type or of children in motor vehicles not of a class prescribed in relation to equipment of that type, he is guilty of an offence⁶.

A person is not, however, to be convicted of an offence under the above provisions⁷ in respect of the sale or offer for sale of equipment if he proves that it was sold or, as the case may be, offered for sale for export from Great Britain⁸.

1 The Road Traffic Act 1988 s 15A (as added) applies to equipment of any description for use in a motor vehicle consisting of: (1) a restraining device for a child or for a carry-cot; or (2) equipment designed for use by a child in conjunction with any description of restraining device: s 15A(8) (s 15A added by the Motor Vehicles (Safety Equipment for Children) Act 1991 s 1).

- 2 See the Road Traffic Act 1988 s 15A(1) (as added: see note 1 supra); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 638. At the date at which this volume states the law no such regulations had been made.
- 3 See ibid s 15A(7) (as added: see note 1 supra); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 638.
- 4 See ibid s 15A(2) (as added: see note 1 supra); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 638.
- 5 See ibid s 15A(3), (9) (as added: see note 1 supra); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 638.
- 6 See ibid s 15A(4), (9) (as added: see note 1 supra); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 638.
- 7 le under ibid s 15A(3) or (4) (as added): see the text and notes 5-6 supra.
- 8 See ibid s 15A(5) (as added: see note 1 supra); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 638.

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B. FUEL CONSUMPTION

815. Passenger car fuel consumption.

Orders may be made in relation to passenger cars:

- 1922 (1) requiring fuel consumption to be determined by means of officially approved tests; and
- 1923 (2) providing for test results, showing the consumption of different classes or descriptions of cars in standard conditions, to be recorded in official fuel economy certificates and published in the specified manner¹.

As from a date appointed by such an order in relation to any class or description of car:

- 1924 (a) no person is, in the course of a business, to deal in or offer for sale new cars of that class or description unless the relevant official tests have been carried out;
- 1925 (b) every person who issues material to the general public with a view to promoting sales of cars of that class or description, especially advertisements, technical specifications, sales brochures and the like, must, if the material contains any statement about fuel consumption, include specified information as to the results of the relevant official tests;
- 1926 (c) every manufacturer or, in the case of imported cars, importer of cars of that class or description must secure that any manual or handbook compiled with a view to a copy of it being issued to any first purchaser of such a car includes specified information as to the results of the relevant official tests;
- 1927 (d) every person who, in the course of a business, deals in or offers for sale new cars of that class or description must make available for inspection by his customers at any place where he causes such cars to be offered for sale, or regularly transacts business with customers relating to the sale of such cars, specified information as to the results of officially approved tests on all cars which have been subjected to the tests, including not only cars which he deals in or offers for sale but also those which he does not; and

1928 (e) no person is, with a view to promoting the sale of new cars of that class or description, to display such a car on premises where he carries on a business unless the car has affixed to it, so as to be clearly visible to those to whom the car is displayed, a label in specified form containing specified information including the results of the relevant official tests and the fact that the results of officially approved tests on other cars are available for inspection by customers².

1 See the Energy Act 1976 s 15(1); and the Passenger Car Fuel Consumption Order 1983, SI 1983/1486 (amended by SI 1996/1132; SI 1997/2971; SI 2001/3523). See also FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 608.

2 See the Energy Act 1976 s 15(3).

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(xxiii) Nurses Agencies

816. In general.

Provision is made for the registration and inspection of establishments and agencies, including nurses agencies¹, under the Care Standards Act 2000²; and the conduct of nurses agencies is regulated by regulations made under that Act³.

Each agency must prepare a statement of purpose in relation to specified matters⁴ and a service user's guide to the agency⁵. The agency must be carried on in a manner which is consistent with the statement of purpose, and the persons carrying on and managing the agency must comply with provisions as to fitness, and provide satisfactory information in relation to specified matters⁶. The agency must be conducted in accordance with requirements as to care, competence and skill, and the registered manager must undertake from time to time such training as is appropriate to ensure that he has the experience and skills necessary for managing the agency⁷.

All nurses supplied by the agency must comply with particular standards of fitness as to character, qualifications and skills⁸. Where the agency is acting as an employment business, the registered person must prepare and implement policies and procedures in relation to specified areas⁹. In addition, there are requirements as to staffing¹⁰, the provision of information to service users¹¹, record keeping¹² and complaints procedure¹³. The premises must be suitable for the purpose of achieving the aims and objectives of the agency set out in the statement of purpose¹⁴. There are requirements as to the financial management of agencies¹⁵.

A breach of certain regulations¹⁶ may found an offence; but in England no prosecution may be brought unless a notice has been given which sets out in what respect a regulation has been contravened or not complied with, and what action (if any) is considered necessary in order to comply with the regulation and by when compliance is required¹⁷.

1 As to nurses agencies see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 786 et seq.

2 See the Care Standards Act 2000 Pts I, II (ss 1-42) (as amended).

3 In relation to England, the Nurses Agencies Regulations 2002, SI 2002/3212 (as amended), and in relation to Wales, the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527 (as amended). See MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 786 et seq.

4 See the matters set out in the Nurses Agencies Regulations 2002, SI 2002/3212, Sch 1; and the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, Sch 1: see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 789.

5 See the Nurses Agencies Regulations 2002, SI 2002/3212, regs 4, 5; the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, regs 4, 5; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 789.

6 See the Nurses Agencies Regulations 2002, SI 2002/3212, regs 7-9; the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, regs 7-9; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 790-791. The matters on which information is required are those specified in the Nurses Agencies Regulations 2002, SI 2002/3212, Sch 2 and the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, Sch 2 (information required in respect of registered providers and managers of an agency and nurses responsible for selecting nurses for supply to service users).

7 See the Nurses Agencies Regulations 2002, SI 2002/3212, reg 10; the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, reg 10; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 792.

8 See the Nurses Agencies Regulations 2002, SI 2002/3212, reg 12 (as amended); the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, reg 12 (as amended); and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 794.

9 See the Nurses Agencies Regulations 2002, SI 2002/3212, reg 13; the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, reg 13; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 795.

10 See the Nurses Agencies Regulations 2002, SI 2002/3212, reg 14 (as amended); the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, reg 14; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 796.

11 See the Nurses Agencies Regulations 2002, SI 2002/3212, reg 16 (as amended); the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, reg 16; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 797.

12 See the Nurses Agencies Regulations 2002, SI 2002/3212, reg 17, Sch 4; the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, reg 17, Sch 4; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 795.

13 See the Nurses Agencies Regulations 2002, SI 2002/3212, reg 18; the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, reg 18; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 795.

14 See the Nurses Agencies Regulations 2002, SI 2002/3212, reg 20; the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, reg 20; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 789.

15 See the Nurses Agencies Regulations 2002, SI 2002/3212, reg 21; the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, reg 21; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 799.

16 See the Nurses Agencies Regulations 2002, SI 2002/3212, regs 4-6, 11-23; and the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, regs 4-23.

17 See the Nurses Agencies Regulations 2002, SI 2002/3212, reg 27; the Nurses Agencies (Wales) Regulations 2003, SI 2003/2527, reg 27; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 802.

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(xxiv) Package Travel etc

A. IN GENERAL

817. Application of provisions.

The Package Travel, Package Holidays and Package Tours Regulations 1992¹ apply to packages sold or offered for sale in the territory of the United Kingdom². For these purposes, 'package' means the pre-arranged³ combination of at least two of the following components when sold or

offered⁴ for sale at an inclusive price and when the service covers a period of more than 24 hours or includes overnight accommodation:

- 1929 (1) transport;
- 1930 (2) accommodation;
- 1931 (3) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package⁵.

1 The Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended); see PARA 818 et seq post. The Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) implement EC Council Directive 90/314 (OJ L158, 23.6.90, p 59) (see PARA 393 ante), which does not apply to travel: (1) comprising student exchanges of a period of about six months' or one year's duration; (2) the purpose of which is attendance by the student at an educational establishment in the host country in order to familiarise himself with its people and culture; and (3) during which the student stays with a host family as if he were a member thereof free of charge: Case C-237/97 *Administrative proceedings concerning AFS Intercultural Programs Finland ry* [1999] ECR I-825, ECJ. See also PARA 393 note 13 ante.

The subject matter of the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2)(b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C7, Pt III para 5. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

As to enforcement of the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) see the Enterprise Act 2002 Pt 8 (ss 210-236) (as amended); and COMPETITION vol 18 (2009) PARAS 339-360.

2 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 3(1). Regulations 4-15 (as amended) (see PARA 819 et seq post) apply to packages so sold or offered for sale on or after 31 December 1992 (reg 3(2)); and regs 16-22 (as amended) (see PARA 829 et seq post) apply to contracts which, in whole or in part, remain to be performed on 31 December 1992 (reg 3(3)).

3 See *Keppel-Palmer v Exsus Travel Ltd* [2003] EWHC 3529, [2003] All ER (D) 183 (Jun).

4 For these purposes, 'offer' includes an invitation to treat, whether by means of advertising or otherwise; and cognate expressions are to be construed accordingly: Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 2(1).

5 Ibid reg 2(1). For these purposes, the submission of separate accounts for different components does not cause the arrangements to be other than a package; and the fact that a combination is arranged at the request of the consumer and in accordance with his specific instructions, whether modified or not, does not of itself cause it to be treated as other than pre-arranged: reg 2(1). In the definition of 'contract' (see PARA 818 note 4 post) 'consumer' means the person who takes or agrees to take the package ('the principal contractor'), and elsewhere means, as the context requires, the principal contractor, any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee'): reg 2(2).

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B. INFORMATION TO BE PROVIDED

818. Descriptive matter not to be misleading.

No organiser¹ or retailer² is to supply to a consumer³ any descriptive matter concerning a package, the price of a package or any other conditions applying to the contract⁴ which contains any misleading information⁵. If an organiser or retailer is in breach of these provisions,

he is liable to compensate the consumer for any loss which the consumer suffers in consequence⁶.

1 For these purposes, 'organiser' means the person who, otherwise than occasionally, organises packages and sells or offers them for sale, whether directly or through a retailer (see note 2 infra): Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 2(1). For the meaning of 'package' see PARA 817 ante.

2 For these purposes, 'retailer' means the person who sells or offers for sale the package put together by the organiser: ibid reg 2(1).

3 For the meaning of 'consumer' see PARA 817 note 5 ante.

4 For these purposes, 'contract' means the agreement linking the consumer to the organiser or to the retailer, or to both, as the case may be: Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 2(1).

5 Ibid reg 4(1).

6 Ibid reg 4(2).

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819. Requirements as to brochures.

No organiser¹ is to make available a brochure² to a possible consumer³ unless it indicates in a legible, comprehensible and accurate manner the price and adequate information about the following matters:

- 1932 (1) the destination and the means, characteristics and categories of transport used;
- 1933 (2) the type of accommodation, its location, category or degree of comfort and its main features⁴ and, where the accommodation is to be provided in a member state⁵, its approval or tourist classification under the rules of that member state;
- 1934 (3) the meals which are included in the package;
- 1935 (4) the itinerary;
- 1936 (5) general information about passport and visa requirements which apply for nationals of the member state or states in which the brochure is made available and health formalities required for the journey and the stay;
- 1937 (6) either the monetary amount or the percentage of the price which is to be paid on account and the timetable for payment of the balance;
- 1938 (7) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation;
- 1939 (8) the arrangements, if any, which apply if consumers are delayed at the outward or homeward points of departure;
- 1940 (9) the arrangements for security for money paid over and for the repatriation of the consumer in the event of insolvency,

in respect of the packages offered for sale in the brochure to the extent that those matters are relevant to the packages so offered⁶. An organiser who contravenes this requirement is guilty of an offence⁷.

No retailer⁸ is to make available to a possible consumer a brochure which he knows or has reasonable cause to believe does not comply with the above requirements⁹. A retailer who contravenes this requirement is guilty of an offence¹⁰.

Where a brochure was first made available to consumers generally before 31 December 1992, no liability arises under the above provisions in respect of an identical brochure being made available to a consumer at any time¹¹.

No contract is void or unenforceable, and no right of action in civil proceedings in respect of any loss arises, by reason only of the commission of an offence under these provisions¹².

The particulars in the brochure¹³ constitute implied warranties¹⁴ for the purposes of any contract¹⁵ to which the particulars relate¹⁶.

1 For the meaning of 'organiser' see PARA 818 note 1 ante.

2 For these purposes, 'brochure' means any brochure in which packages are offered for sale: Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 2(1). For the meaning of 'package' see PARA 817 ante.

3 For the meaning of 'consumer' see PARA 817 note 5 ante.

4 The expression 'main features' is to be read in the context of, and in relation to, the entire package offered: *Inspirations East Ltd v Dudley Metropolitan Borough Council* (1997) 162 JP 800, DC (inaccurate information in holiday brochure as regards access for disabled persons to hotel and to swimming pool).

5 For these purposes, 'member state' means a member state of the European Community or another state in the European Economic Area: Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 2(1) (amended by SI 1995/1648). As to the European Economic Area see PARA 386 note 1 ante.

6 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 5(1), Sch 1 (amended by SI 1998/1208).

7 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 5(3). An organiser guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: see reg 5(3). As to the standard scale see PARA 498 note 3 ante. As to the time limit for bring a prosecution under reg 5(3) see PARA 837 post. As to the defence of due diligence see PARA 835 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 836 post.

8 For the meaning of 'retailer' see PARA 818 note 2 ante.

9 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 5(2).

10 Ibid reg 5(3). A retailer guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: see reg 5(3).

11 Ibid reg 5(4).

12 Ibid reg 27.

13 Ie whether or not they are required by ibid reg 5(1) (see the text and notes 1-6 supra) to be included in the brochure.

14 Where it is provided in the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) that a term, whether so described or whether described as a condition or warranty, is implied in the contract, it is so implied irrespective of the law which governs the contract: reg 28.

15 For the meaning of 'contract' see PARA 818 note 4 ante.

16 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 6(1). Regulation 6(1) does not apply: (1) in relation to information required to be included by virtue of Sch 1 para 9 (see head (9) in the text); or (2) where the brochure contains an express statement that changes may be made in the particulars contained in it before a contract is concluded and changes in the particulars so contained are clearly communicated to the consumer before a contract is concluded: reg 6(2). Nor does reg 6(1) apply when the consumer and the other party to the contract agree after the contract has been made that the particulars in the brochure, or some of those particulars, should not form part of the contract: reg 6(3). For these purposes, 'the other party to the contract' means the party, other than the consumer, to the contract, ie the organiser or the retailer, or both, as the case may be: reg 2(1).

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820. Information to be provided before contract is concluded.

Before a contract¹ is concluded, the other party to the contract² must provide the intending consumer³ with the following information in writing or in some other appropriate form:

- 1941 (1) general information about passports and visa requirements which apply to nationals of the member state³ or states concerned who purchase the package⁴ in question, including information about the length of time it is likely to take to obtain the appropriate passports and visas;
- 1942 (2) information about health formalities required for the journey and the stay; and
- 1943 (3) the arrangements for security for the money paid over and, where applicable, for the repatriation of the consumer in the event of insolvency⁵.

If the intending consumer is not provided with the information required by, and in accordance with, these provisions, the other party to the contract is guilty of an offence⁶.

No contract is void or unenforceable, and no right of action in civil proceedings in respect of any loss arises, by reason only of the commission of an offence under these provisions⁷.

1 For the meaning of 'contract' see PARA 818 note 4 ante.

2 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

3 For the meaning of 'member state' see PARA 819 note 5 ante.

4 For the meaning of 'package' see PARA 817 ante.

5 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 7(1), (2).

6 Ibid reg 7(3). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: see reg 7(3). As to the standard scale see PARA 498 note 3 ante. As to the time limit for bring a prosecution under reg 7 see PARA 837 post. As to the defence of due diligence see PARA 835 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 836 post.

7 Ibid reg 27.

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CIRCUMSTANCES/(xxiv) Package Travel etc/B. INFORMATION TO BE PROVIDED/821. Information to be provided in good time.

821. Information to be provided in good time.

The other party to the contract¹ must in good time before the start of the journey provide the consumer² with the following information in writing or in some other appropriate form:

- 1944 (1) the times and places of intermediate stops and transport connections and particulars of the place to be occupied by the traveller (for example, cabin or berth on a ship, or sleeper compartment on a train);
- 1945 (2) the name, address and telephone number of the representative of the other party to the contract in the locality where the consumer is to stay or, if there is no such representative, of any agency in that locality on whose assistance a consumer in difficulty would be able to call, or, if there is no such representative or agency, a telephone number or other information which will enable the consumer to contact the other party to the contract during the stay; and
- 1946 (3) in the case of a journey or stay abroad by a child under the age of 16 on the day when the journey or stay is due to start, information enabling direct contact to be made with the child or the person responsible at the place where he is to stay; and
- 1947 (4) except where the consumer is required as a term of the contract to take out an insurance policy in order to cover the cost of cancellation by the consumer or the cost of assistance, including repatriation, in the event of accident or illness, information about an insurance policy which the consumer may, if he wishes, take out in respect of the risk of those costs being incurred³.

If the consumer is not provided with the above information in accordance with these requirements, the other party to the contract is guilty of an offence⁴.

No contract is void or unenforceable, and no right of action in civil proceedings in respect of any loss arises, by reason only of the commission of an offence under these provisions⁵.

1 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

2 For the meaning of 'consumer' see PARA 817 note 5 ante.

3 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 8(1), (2).

4 Ibid reg 8(3). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: see reg 8(3). As to the standard scale see PARA 498 note 3 ante. As to the time limit for bring a prosecution under reg 8 see PARA 837 post. As to the defence of due diligence see PARA 835 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 836 post.

5 Ibid reg 27.

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C. THE CONTRACT

822. Contents and form of contract.

The other party to the contract¹ must ensure that:

- 1948 (1) depending on the nature of the package² being purchased, the contract³ contains at least the following elements:
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- 246. (a) the travel destination or destinations and, where periods of stay are involved, the relevant periods, with dates;
 - 247. (b) the means, characteristics and categories of transport to be used and the dates, times and points of departure and return;
 - 248. (c) where the package includes accommodation, its location, its tourist category or degree of comfort, its main features and, where the accommodation is to be provided in a member state⁴, its compliance with the rules of that member state;
 - 249. (d) the meals which are included in the package;
 - 250. (e) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation;
 - 251. (f) the itinerary;
 - 252. (g) visits, excursions or other services which are included in the total price agreed for the package;
 - 253. (h) the name and address of the organiser⁵, the retailer⁶ and, where appropriate, the insurer;
 - 254. (i) the price of the package; if the price may be revised in accordance with the term which may be included in the contract⁷, an indication of the possibility of such price revisions; and an indication of any dues, taxes or fees chargeable for certain services (such as landing, embarkation or disembarkation fees at ports and airports and tourist taxes) where such costs are not included in the package;
 - 255. (j) the payment schedule and method of payment;
 - 256. (k) special requirements which the consumer has communicated to the organiser or retailer when making the booking and which both have accepted;
 - 257. (l) the periods within which the consumer⁸ must make any complaint about the failure to perform, or the inadequate performance of, the contract;
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- 1949 (2) all the terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer and are communicated to the consumer before the contract is made; and
- 1950 (3) a written copy of these terms is supplied to the consumer⁹.

It is an implied condition of the contract that the other party to the contract complies with these provisions¹⁰.

Head (2) above does not apply when the interval between the time when the consumer approaches the other party to the contract with a view to entering into a contract and the time of departure under the proposed contract is so short that it is impracticable to comply with head (2) above¹¹.

1 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

2 For the meaning of 'package' see PARA 817 ante.

3 For the meaning of 'contract' see PARA 818 note 4 ante.

4 For the meaning of 'member state' see PARA 819 note 5 ante.

5 For the meaning of 'organiser' see PARA 818 note 1 ante.

6 For the meaning of 'retailer' see PARA 818 note 2 ante.

7 le under the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 11: see PARA 824 post.

8 For the meaning of 'consumer' see PARA 817 note 5 ante.

9 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 9(1), Sch 2.

10 Ibid reg 9(3). Where it is provided in the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) that a term, whether so described or whether described as a condition or warranty, is implied in the contract, it is so implied irrespective of the law which governs the contract: reg 28.

11 Ibid reg 9(2).

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D. CHANGES SUBSEQUENT TO THE MAKING OF THE CONTRACT

823. Transfer of bookings.

In every contract¹ there is an implied term² that, where the consumer³ is prevented from proceeding with the package⁴, the consumer may transfer his booking to a person who satisfies all the conditions applicable to the package, provided that the consumer gives reasonable notice to the other party to the contract⁵ of his intention to transfer before the date when departure is due to take place⁶.

Where a transfer is made in accordance with the term so implied, the transferor and the transferee are jointly and severally liable to the other party to the contract for payment of the price of the package, or, if part of the price has been paid, for payment of the balance, and for any additional costs arising from such transfer⁷.

1 For the meaning of 'contract' see PARA 818 note 4 ante.

2 Where it is provided in the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) that a term, whether so described or whether described as a condition or warranty, is implied in the contract, it is so implied irrespective of the law which governs the contract: reg 28.

3 For the meaning of 'consumer' see PARA 817 note 5 ante.

4 For the meaning of 'package' see PARA 817 ante.

5 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

6 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 10(1).

7 Ibid reg 10(2).

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CIRCUMSTANCES/(xxiv) Package Travel etc/D. CHANGES SUBSEQUENT TO THE MAKING OF THE CONTRACT/824. Price revision.

824. Price revision.

Any term in a contract¹ to the effect that the prices laid down in the contract may be revised is void and of no effect unless the contract provides for the possibility of upward or downward revision and satisfies the following conditions:

- 1951 (1) that the contract states precisely how the revised price is to be calculated;
- 1952 (2) that the contract provides that price revisions are to be made solely to allow for variations in:
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- 258. (a) transportation costs, including the cost of fuel;
- 259. (b) dues, taxes or fees chargeable for services such as landing taxes or embarkation or disembarkation fees at ports and airports; or
- 260. (c) the exchange rates applied to the particular package².
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Notwithstanding any terms of a contract:

- 1953 (i) no price increase may be made in a specified period which must not be less than 30 days before the departure date stipulated; and
- 1954 (ii) as against an individual consumer³ liable under the contract, no price increase may be made in respect of variations which would produce an increase of less than 2 per cent, or such greater percentage as the contract may specify ('non-eligible variations'), and the non-eligible variations must be left out of account in the calculation⁴.

1 For the meaning of 'contract' see PARA 818 note 4 ante.

2 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 11(1), (2). For the meaning of 'package' see PARA 817 ante.

3 For the meaning of 'consumer' see PARA 817 note 5 ante.

4 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 11(3).

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825. Significant alterations to essential terms.

In every contract¹ there are implied terms² to the effect that:

- 1955 (1) where the organiser³ is constrained before the departure to alter significantly an essential term of the contract, such as the price, so far as he is permitted to do so⁴, he will notify the consumer⁵ as quickly as possible in order to enable the consumer to take appropriate decisions and, in particular, to withdraw

from the contract without penalty or to accept a rider to the contract specifying the alterations made and their impact on the price; and
 1956 (2) the consumer will inform the organiser or the retailer⁶ of his decision as soon as possible⁷.

1 For the meaning of 'contract' see PARA 818 note 4 ante.

2 Where it is provided in the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) that a term, whether so described or whether described as a condition or warranty, is implied in the contract, it is so implied irrespective of the law which governs the contract: reg 28.

3 For the meaning of 'organiser' see PARA 818 note 1 ante.

4 le by the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 11: see PARA 824 ante.

5 For the meaning of 'consumer' see PARA 817 note 5 ante.

6 For the meaning of 'retailer' see PARA 818 note 2 ante.

7 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 12. Where a tour organiser or retailer makes changes in the tour or holiday and relies on a contractual provision entitling him to do so 'where necessary', the word 'necessary' will be construed in a restrictive way: *Williams v Travel Promotions Ltd (t/a Voyages Jules Verne)* (1998) Times, 9 March, CA.

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826. Withdrawal by the consumer; cancellation by the organiser.

The following terms are implied¹ in every contract² and apply where the consumer³ withdraws from the contract pursuant to the term implied in it⁴ or where the organiser⁵, for any reason other than the fault of the consumer, cancels the package⁶ before the agreed date of departure⁷.

The consumer is entitled:

1957 (1) to take a substitute package of equivalent or superior quality if the other party to the contract⁸ is able to offer him such a substitute; or

1958 (2) to take a substitute package of lower quality if the other party to the contract is able to offer him one and to recover from the organiser the difference in price between the price of the package purchased and that of the substitute package; or

1959 (3) to have repaid to him as soon as possible all the moneys paid by him under the contract⁹.

The consumer is entitled, if appropriate, to be compensated by the organiser for non-performance of the contract except where:

1960 (a) the package is cancelled because the number of persons who agree to take it is less than the minimum required and the consumer is informed of the cancellation in writing within the period indicated in the description of the package; or

1961 (b) the package is cancelled by reason of unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised¹⁰.

1 Where it is provided in the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) that a term, whether so described or whether described as a condition or warranty, is implied in the contract, it is so implied irrespective of the law which governs the contract: reg 28.

2 For the meaning of 'contract' see PARA 818 note 4 ante.

3 For the meaning of 'consumer' see PARA 817 note 5 ante.

4 le by the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 12(a): see PARA 825 head (1) ante.

5 For the meaning of 'organiser' see PARA 818 note 1 ante.

6 For the meaning of 'package' see PARA 817 ante.

7 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 13(1).

8 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

9 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 13(2).

10 Ibid reg 13(3). Overbooking is not to be regarded as a circumstance falling within reg 13(3)(b) (see head (b) in the text): reg 13(4).

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E. FAILURE TO PERFORM THE CONTRACT

827. Significant proportion of services not provided.

The following terms are implied¹ in every contract² and apply where, after departure, a significant proportion of the services contracted for is not provided or the organiser³ becomes aware that he will be unable to procure a significant proportion of the services to be provided⁴.

The organiser will make suitable alternative arrangements, at no extra cost to the consumer⁵, for the continuation of the package⁶ and will, where appropriate, compensate the consumer for the difference between the services to be supplied under the contract and those actually supplied⁷.

If it is impossible to make such arrangements⁸, or these are not accepted by the consumer for good reasons, the organiser will, where appropriate, provide the consumer with equivalent transport back to the place of departure or to another place to which the consumer has agreed and will, where appropriate, compensate the consumer⁹.

1 Where it is provided in the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) that a term, whether so described or whether described as a condition or warranty, is implied in the contract, it is so implied irrespective of the law which governs the contract: reg 28.

2 For the meaning of 'contract' see PARA 818 note 4 ante.

- 3 For the meaning of 'organiser' see PARA 818 note 1 ante.
- 4 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 14(1).
- 5 For the meaning of 'consumer' see PARA 817 note 5 ante.
- 6 For the meaning of 'package' see PARA 817 ante.
- 7 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 14(2).
- 8 le as described in ibid reg 14(2): see the text and notes 5-7 supra.
- 9 Ibid reg 14(3).

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828. Liability of the other party to the contract for proper performance of obligations under the contract.

The other party to the contract¹ is liable to the consumer² for the proper performance of the obligations under the contract³, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services; but this does not affect any remedy or right of action which that other party may have against those other suppliers of services⁴.

The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services because:

- 1962 (1) the failures which occur in the performance of the contract are attributable to the consumer;
- 1963 (2) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or
- 1964 (3) such failures are due to:
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261. (a) unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or
262. (b) an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall⁵.
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In the case of damage arising from the non-performance or improper performance of the services involved in the package⁶, the contract may provide for compensation to be limited in accordance with the international conventions which govern such services⁷.

In the case of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the contract may include a term limiting the amount of compensation which will be paid to the consumer, provided that the limitation is not unreasonable⁸.

The following terms are implied⁹ in every contract¹⁰:

- 1965 (i) in the circumstances described in heads (2) and (3) above, the other party to the contract will give prompt assistance to a consumer in difficulty¹¹;
- 1966 (ii) if the consumer complains about a defect in the performance of the contract, the other party to the contract, or his local representative, if there is one, will make prompt efforts to find appropriate solutions¹².

The contract must clearly and explicitly oblige the consumer to communicate at the earliest opportunity, in writing or any other appropriate form, to the supplier of the services concerned and to the other party to the contract any failure which he perceives at the place where the services concerned are supplied¹³.

1 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

2 For the meaning of 'consumer' see PARA 817 note 5 ante.

3 For the meaning of 'contract' see PARA 818 note 4 ante.

4 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 15(1). Without prejudice to reg 15(3), (4) (see the text and notes 6-8 infra), liability under reg 15(1) and reg 15(2) (see the text and note 5 infra) cannot be excluded by any contractual term: reg 15(5).

5 Ibid reg 15(2). See also note 4 supra. The consumer has the burden of proving improper performance: *Hone v Going Places Leisure Travel Ltd* [2001] EWCA Civ 947, [2001] All ER (D) 102 (Jun). See also *Lee v Airtours Holidays Ltd* [2004] 1 Lloyd's Rep 683.

6 For the meaning of 'package' see PARA 817 ante.

7 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 15(3).

8 Ibid reg 15(4).

9 Where it is provided in the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) that a term, whether so described or whether described as a condition or warranty, is implied in the contract, it is so implied irrespective of the law which governs the contract: reg 28.

10 Ibid reg 15(6).

11 Ibid reg 15(7).

12 Ibid reg 15(8).

13 Ibid reg 15(9).

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F. SECURITY FOR PROPER PERFORMANCE OF THE CONTRACT

829. Security in the event of insolvency.

The other party to the contract¹ must at all times be able to provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer² in the event of insolvency³.

Save to the extent that the package⁴ is covered by measures adopted or retained by the member state⁵ where he is established⁶ or the package is one in respect of which he is required to hold a licence⁷ or the package is one covered by the arrangements into which he has entered⁸, the other party to the contract must at least ensure that there are in force the relevant arrangements⁹ or, if that party is acting otherwise than in the course of business, arrangements such as are described in¹⁰ any of the relevant arrangements¹¹.

Any person who contravenes these provisions is guilty of an offence¹².

No contract is void or unenforceable, and no right of action arises, by reason only of the commission of an offence under these provisions¹³.

1 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

2 For the meaning of 'consumer' see PARA 817 note 5 ante.

3 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 16(1); and see Joined Cases C-178, 179, 188-190/94 *Dillenkofer v Germany* [1996] All ER (EC) 917, [1996] ECR I-4845, ECJ; Case C-364/96 *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* [1998] All ER (EC) 183, [1998] ECR I-2949, ECJ (cases cited in PARA 393 note 13 ante).

4 For the meaning of 'package' see PARA 817 ante.

5 For the meaning of 'member state' see PARA 819 note 5 ante.

6 Ie for the purpose of implementing EC Council Directive 90/314 (OJ L158, 23.6.90, p 59) art 7.

7 The Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) refer to a licence under the Civil Aviation (Air Travel Organisers' Licensing) Regulations 1972, SI 1972/223, but these regulations have been revoked: see now the Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995, SI 1995/1054; and AIR LAW vol 2 (2008) PARA 127 et seq.

8 The Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) refer to arrangements entered into for the purposes of the Civil Aviation (Air Travel Organisers' Licensing) Regulations 1972, SI 1972/223, but these regulations have been revoked: see now the Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995, SI 1995/1054; and AIR LAW vol 2 (2008) PARA 127 et seq.

9 Ie the arrangements described in the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 17 (as amended) (see PARA 830 post), reg 18 (as amended) (see PARA 831 post), reg 19 (see PARA 832 post) or reg 20 (see PARA 833 post).

10 Ie as described in ibid reg 17 (as amended), reg 18 (as amended), reg 19, reg 20 or reg 21 (see PARA 834 post).

11 Ibid reg 16(2).

12 Ibid reg 16(3). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: see reg 16(3). As to the standard scale see PARA 498 note 3 ante. As to the time limit for bring a prosecution under reg 16 see PARA 837 post. As to the defence of due diligence see PARA 835 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 836 post.

A person is not guilty of an offence under reg 16(3) by reason only that arrangements such as are mentioned in reg 16(2) (see the text and notes 4-11 supra) are not in force in respect of any period before 1 April 1993 unless money paid over is not refunded when it is due or the consumer is not repatriated in the event of insolvency: reg 16(4).

13 Ibid reg 27.

CIRCUMSTANCES/(xxiv) Package Travel etc/F. SECURITY FOR PROPER PERFORMANCE OF THE CONTRACT/830. Bonding.

830. Bonding.

The other party to the contract¹ must ensure that a bond, which must not be expressed to be in force for a period exceeding 18 months, is entered into by an authorised institution² under which the institution binds itself to pay to an approved body³ of which that other party is a member a sum calculated as follows in the event of the insolvency of that other party⁴. That sum is such sum as may reasonably be expected to enable all moneys paid over by consumers⁵ under or in contemplation of contracts⁶ for relevant packages⁷ which have not been fully performed⁸ to be repaid and must not in any event be a sum which is less than the minimum sum, that is to say a sum which represents:

- 1967 (1) not less than 25 per cent of all the payments which the other party to the contract estimates that he will receive under or in contemplation of contracts for relevant packages in the 12-month period from the date of entry into force of the bond; or
- 1968 (2) the maximum amount of all the payments which the other party to the contract expects to hold at any one time, in respect of contracts which have not been fully performed,

whichever sum is the smaller⁹.

Before a bond is so entered into, the other party to the contract must inform the approved body of which he is a member of the minimum sum which he proposes for the above purposes; and it is the duty of the approved body to consider whether such sum is sufficient and, if it does not consider that this is the case, it is the duty of the approved body so to inform the other party to the contract and to inform him of the sum which, in the opinion of the approved body, is sufficient for that purpose¹⁰. Where an approved body has so informed the other party to the contract of a sum¹¹, the minimum sum¹² is that sum¹³.

1 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

2 For these purposes, 'authorised institution' means a person authorised under the law of a member state, of the Channel Islands or of the Isle of Man, to carry on the business of entering into bonds of the kind required by the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 17 (as amended): reg 17(7) (amended by SI 1995/1648). For the meaning of 'member state' see PARA 819 note 5 ante.

3 For these purposes, 'approved body' means a body which is for the time being approved by the Secretary of State for the purposes of the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 17 (as amended): reg 17(7). As to the Secretary of State see PARA 15 ante.

4 Ibid reg 17(1), (2).

5 For the meaning of 'consumer' see PARA 817 note 5 ante.

6 For the meaning of 'contract' see PARA 818 note 4 ante.

7 For the meaning of 'package' see PARA 817 ante.

8 For these purposes, a contract is to be treated as having been fully performed if the package or, as the case may be, the part of the package has been completed irrespective of whether the obligations under the contract have been properly performed for the purposes of the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 15 (see PARA 828 ante): reg 16(5).

9 Ibid reg 17(3), (4).

10 Ibid reg 17(5).

- 11 le pursuant to *ibid* reg 17(5): see the text and note 10 *supra*.
- 12 le for the purposes of *ibid* reg 17(3), (4): see the text and notes 5-9 *supra*.
- 13 *Ibid* reg 17(6).

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831. Bonding where approved body has reserve fund or insurance.

The other party to the contract¹ must ensure that a bond, which must not be expressed to be in force for a period exceeding 18 months, is entered into by an authorised institution², under which the institution agrees to pay to an approved body (having a reserve fund or insurance cover)³ of which that other party is a member a sum calculated as follows in the event of the insolvency of that other party⁴. That sum is such sum as may be specified by the approved body as representing the lesser of:

- 1969 (1) the maximum amount of all the payments which the other party to the contract expects to hold at any one time in respect of contracts which have not been fully performed; or
- 1970 (2) the minimum sum, that is to say a sum which represents not less than 10 per cent of all the payments which the other party to the contract estimates that he will receive under or in contemplation of contracts for relevant packages in the 12-month period from the date of entry⁵.

1 For the meaning of 'the other party to the contract' see PARA 819 note 16 *ante*.

2 For these purposes, 'authorised institution' has the meaning given to that expression by the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 17(7) (as amended) (see PARA 830 note 2 *ante*): reg 18(7).

3 For these purposes, 'approved body' means a body which is for the time being approved by the Secretary of State for the purposes of *ibid* reg 18 (as amended); and no such approval is to be given unless the conditions mentioned in reg 18(6) (as amended) are satisfied in relation to it: reg 18(5). A body may not be approved for the purposes of reg 18 (as amended) unless: (1) it has a reserve fund or insurance cover with an insurer authorised in respect of such business in a member state, the Channel Islands or the Isle of Man, of an amount in each case which is designed to enable all moneys paid over to a member of the body of consumers under or in contemplation of contracts for relevant packages which have not been fully performed to be repaid to those consumers in the event of the insolvency of the member; and (2) where it has a reserve fund, it agrees that the fund will be held by persons and in a manner approved by the Secretary of State: reg 18(6) (amended by SI 1995/1648). For the meaning of 'member state' see PARA 819 note 5 *ante*; for the meaning of 'consumer' see PARA 817 note 5 *ante*; for the meaning of 'contract' see PARA 818 note 4 *ante*; for the meaning of 'package' see PARA 817 *ante*; and for the meaning of 'fully performed' see PARA 830 note 8 *ante*. As to the Secretary of State see PARA 15 *ante*.

4 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 18(1), (2).

5 *Ibid* reg 18(3), (4). For these purposes, 'date of entry' means the date of entry referred to in reg 18(1) (see the text and notes 1-4 *supra*): reg 18(4).

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CIRCUMSTANCES/(xxiv) Package Travel etc/F. SECURITY FOR PROPER PERFORMANCE OF THE CONTRACT/832. Insurance.

832. Insurance.

The other party to the contract¹ must have insurance under one or more appropriate policies² with an insurer authorised in respect of such business in a member state³ under which the insurer agrees to indemnify consumers⁴, who must be insured persons under the policy, against the loss of money paid over by them under or in contemplation of contracts⁵ for packages⁶ in the event of the insolvency of the contractor⁷.

The other party to the contract must ensure that it is a term of every contract with a consumer that the consumer acquires the benefit of a policy of a kind mentioned above in the event of the insolvency of the other party to the contract⁸.

1 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

2 For these purposes, 'appropriate policy' means one which does not contain a condition which provides, in whatever terms, that no liability is to arise under the policy, or that any liability so arising is to cease: (1) in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy; (2) in the event of the policy holder not making payments under or in connection with other policies; or (3) unless the policy holder keeps specified records or provides the insurer with or makes available to him information therefrom: Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 19(3).

3 For the meaning of 'member state' see PARA 819 note 5 ante.

4 For the meaning of 'consumer' see PARA 817 note 5 ante.

5 For the meaning of 'contract' see PARA 818 note 4 ante.

6 For the meaning of 'package' see PARA 817 ante.

7 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 19(1).

8 Ibid reg 19(2).

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G. MONEYS PAID UNDER THE CONTRACT

833. Moneys in trust.

The other party to the contract¹ must ensure that all moneys paid over by a consumer² under or in contemplation of a contract³ for a relevant package⁴ are held in the United Kingdom by a person as trustee for the consumer until the contract has been fully performed or any sum of money paid by the consumer in respect of the contract has been repaid to him or has been forfeited on cancellation by the consumer⁵. The costs of administering such a trust must be paid for by the other party to the contract⁶. Any interest which is earned on the moneys so held by the trustee must be held for the other party to the contract and is payable to him on demand⁷.

Where there is produced to the trustee a statement signed by the other party to the contract to the effect that:

- 1971 (1) a contract for a package the price of which is specified in that statement has been fully performed⁸;
- 1972 (2) the other party to the contract has repaid to the consumer a sum of money specified in that statement which the consumer has paid in respect of a contract for a package; or
- 1973 (3) the consumer has on cancellation forfeited a sum of money specified in that statement which he had paid in respect of a contract for a relevant package,

the trustee must release to the other party to the contract the sum specified in the statement⁹. Where, however, the trustee considers it appropriate to do so, he may require the other party to the contract to provide further information or evidence of the matters mentioned in heads (1) to (3) above before he releases any sum to that other party¹⁰. If the other party to the contract makes a false statement¹¹, he is guilty of an offence¹². No contract is void or unenforceable, and no right of action arises, by reason only of the commission of such an offence¹³.

In the event of the insolvency of the other party to the contract, the moneys held in trust by the trustee¹⁴ must be applied to meet the claims of consumers who are creditors of that other party in respect of contracts for packages in respect of which the arrangements were established and which have not been fully performed and, if there is a surplus after those claims have been met, it forms part of the estate of that insolvent other party for the purposes of insolvency law¹⁵. If, however, the moneys held in trust by the trustee¹⁶ are insufficient to meet the claims of consumers¹⁷, payments to those consumers must be made by the trustee on a *pari passu* basis¹⁸.

1 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

2 For the meaning of 'consumer' see PARA 817 note 5 ante.

3 For the meaning of 'contract' see PARA 818 note 4 ante.

4 For the meaning of 'package' see PARA 817 ante.

5 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 20(1).

6 Ibid reg 20(2).

7 Ibid reg 20(3).

8 For the meaning of 'fully performed' see PARA 830 note 8 ante.

9 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 20(4).

10 Ibid reg 20(5).

11 *Ie* under *ibid* reg 20(4): see the text and notes 8-9 *supra*.

12 *Ibid* reg 22(1), (3). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: see reg 22(1), (3). As to the standard scale see PARA 498 note 3 ante. As to the time limit for bring a prosecution under reg 22 see PARA 837 post. As to the defence of due diligence see PARA 835 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 836 post.

13 *Ibid* reg 27.

14 *Ie* pursuant to *ibid* reg 20(1): see the text and notes 1-5 *supra*.

15 Ibid reg 20(6).

16 See note 14 supra.

17 See as described in the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 20(6): see the text and notes 14-15 supra.

18 Ibid reg 20(7).

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834. Moneys in trust where the other party to the contract is acting otherwise than in the course of business.

The other party to the contract¹ must ensure that all moneys paid over by a consumer² or in contemplation of a contract³ for a relevant package⁴ are held in the United Kingdom by a person as trustee for the consumer for the purpose of paying for the consumer's package⁵. The costs of administering such a trust must be paid for out of the moneys held in trust and the interest earned on those moneys⁶.

Where there is produced to the trustee a statement signed by the other party to the contract to the effect that:

1974 (1) the consumer has previously paid over a sum of money specified in that statement in respect of a contract for a package and that sum is required for the purpose of paying for a component, or part of a component, of the package;

1975 (2) the consumer has previously paid over a sum of money specified in that statement in respect of a contract for a package and the other party to the contract has paid that sum in respect of a component, or part of a component, of the package;

1976 (3) the consumer requires the repayment to him of a sum of money specified in that statement which was previously paid over by the consumer in respect of a contract for a package; or

1977 (4) the consumer has on cancellation forfeited a sum of money specified in that statement which he had paid in respect of a contract for a package,

the trustee must release to the other party to the contract the sum specified in the statement⁷. Where, however, the trustee considers it appropriate to do so, he may require the other party to the contract to provide further information or evidence of the matters mentioned in heads (1) to (4) above before he releases to that other party any sum from the moneys held in trust for the consumer⁸. If the other party to the contract makes a false statement⁹, he is guilty of an offence¹⁰. If the other party to the contract applies moneys released to him on the basis of a statement made by him under head (1) or head (3) above for a purpose other than that mentioned in the statement, he is guilty of an offence¹¹. No contract is void or unenforceable, and no right of action arises, by reason only of the commission of such an offence¹².

In the event of the insolvency of the other party to the contract and of contracts for packages not being fully performed¹³, whether before or after the insolvency, the moneys held in trust by the trustee¹⁴ must be applied to meet the claims of consumers who are creditors of that other party in respect of amounts paid over by them and remaining in the trust fund after deductions

have been made in respect of amounts released to that other party¹⁵ and, if there is a surplus after those claims have been met, it must be divided amongst those consumers pro rata¹⁶. If, however, the moneys held in trust by the trustee¹⁷ are insufficient to meet such claims of consumers¹⁸, payments to those consumers must be made by the trustee on a pari passu basis¹⁹.

Any sums remaining after all the packages in respect of which the arrangements were established have been fully performed must be dealt with as provided in the arrangements or, in default of such provision, may be paid to the other party to the contract²⁰.

1 For the meaning of 'the other party to the contract' see PARA 819 note 16 ante.

2 For the meaning of 'consumer' see PARA 817 note 5 ante.

3 For the meaning of 'contract' see PARA 818 note 4 ante.

4 For the meaning of 'package' see PARA 817 ante.

5 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 21(1).

6 Ibid reg 21(2).

7 Ibid reg 21(3).

8 Ibid reg 21(4).

9 Ie under ibid reg 21(3): see the text and notes 7-8 supra.

10 Ibid reg 22(1), (3). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: see reg 22(1), (3). As to the standard scale see PARA 498 note 3 ante. As to the time limit for bring a prosecution under reg 22 see PARA 837 post. As to the defence of due diligence see PARA 835 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 836 post.

11 Ibid reg 22(2), (3). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: see reg 22(2), (3).

12 Ibid reg 27.

13 For the meaning of 'fully performed' see PARA 830 note 8 ante.

14 Ie pursuant to the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 21(1): see the text and notes 1-5 supra.

15 Ie pursuant to ibid reg 21(3): see the text and note 7 supra.

16 Ibid reg 21(5).

17 See note 14 supra.

18 Ie as described in the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 21(5): see the text and notes 13-16 supra.

19 Ibid reg 21(6).

20 Ibid reg 21(7).

H. PROCEEDINGS FOR OFFENCES

835. Defence of due diligence.

In proceedings against any person for an offence¹ it is a defence for a person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence². Where in any proceedings against any person for such an offence the defence of due diligence involves an allegation that the commission of the offence was due to the act or default of another or to reliance on information given by another, that person is not entitled, without the leave of the court, to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time he serves it³.

A person is not entitled so to rely on the defence of due diligence by reason of his reliance on information supplied by another, unless he shows that it was reasonable in all the circumstances for him to have relied on the information, having regard, in particular, to the steps which he took, and those which might reasonably have been taken, for the purpose of verifying the information and to whether he had any reason to disbelieve the information⁴.

1 I.e. an offence under the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 5 (see PARA 819 ante), reg 7 (as amended) (see PARA 820 ante), reg 8 (see PARA 821 ante), reg 16 (see PARA 829 ante) or reg 22 (see PARAS 833-834 ante).

2 Ibid reg 24(1).

3 Ibid reg 24(2), (3).

4 Ibid reg 24(4).

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836. Liability of persons other than the principal offender; offences by bodies corporate.

Where the commission by any person of an offence¹ is due to an act or default committed by some other person in the course of any business of his, the other person is guilty of the offence and may be proceeded against and punished accordingly, whether or not proceedings are taken against the first-mentioned person².

Where a body corporate is guilty of an offence³ in respect of any act or default which is shown to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager⁴, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly⁵.

1 is an offence under the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 5 (see PARA 819 ante), reg 7 (as amended) (see PARA 820 ante), reg 8 (see PARA 821 ante), reg 16 (see PARA 829 ante) or reg 22 (see PARAS 833-834 ante).

2 Ibid reg 25(1). In proceedings for an offence under reg 5 (see PARA 819 ante) by virtue of reg 25(1) committed by the making available of a brochure, it is a defence for the person charged to prove that he is a person whose business it is to publish or arrange for the publication of brochures and that he received the brochure for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to an offence: reg 25(5).

3 is guilty of an offence under ibid reg 5 (see PARA 819 ante), reg 7 (as amended) (see PARA 820 ante), reg 8 (see PARA 821 ante), reg 16 (see PARA 829 ante) or reg 22 (see PARAS 833-834 ante), including where it is so guilty by virtue of reg 25(1) (see the text and notes 1-2 supra).

4 As to the meaning of 'manager' see PARA 500 note 3 ante.

5 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 25(2). Where the affairs of a body corporate are managed by its members, reg 25(2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: reg 25(3).

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837. Time limits for prosecutions.

No proceedings for an offence¹ may be commenced after the end of the period of three years beginning with the date of the commission of the offence or the end of the period of one year beginning with the date of the discovery of the offence by the prosecutor, whichever is the earlier².

For these purposes, a certificate signed by or on behalf of the prosecutor and stating the date on which the offence was discovered by him is conclusive evidence of that fact; and a certificate stating that matter and purporting to be so signed is to be treated as so signed unless the contrary is proved³.

1 is an offence under the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 5 (see PARA 819 ante), reg 7 (as amended) (see PARA 820 ante), reg 8 (see PARA 821 ante), reg 16 (see PARA 829 ante), reg 22 (see PARAS 833-834 ante), Sch 3 para 5(3) (see PARA 841 post) or Sch 3 para 6 (see PARA 842 post).

2 Ibid reg 26(1).

3 Ibid reg 26(2).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxiv) Package Travel etc/I. ENFORCEMENT/838. Enforcement authority.

I. ENFORCEMENT

838. Enforcement authority.

Every local weights and measures authority¹ in Great Britain is an enforcement authority for the purposes of certain of the provisions relating to package travel, package holidays and package tours²; and it is the duty of each such authority to enforce those provisions within its area³.

1 As to local weights and measures authorities see PARA 398 ante.

2 le for the purposes of the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 5 (see PARA 819 ante), reg 7 (as amended) (see PARA 820 ante), reg 8 (see PARA 821 ante), reg 16 (see PARA 829 ante) or reg 22 (see PARAS 833-834 ante).

3 Ibid reg 23, Sch 3 para 1(1). Offences under the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 (as amended) are specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxiv) Package Travel etc/I. ENFORCEMENT/839. Power to require production of books and documents.

839. Power to require production of books and documents.

If a duly authorised officer of an enforcement authority¹ has reasonable grounds for suspecting that an offence² has been committed, he may:

1978 (1) require a person whom he believes on reasonable grounds to be engaged in the organisation or retailing of packages³ to produce any book or document relating to the activity and take copies of it or any entry in it; or

1979 (2) require such a person to produce in a visible and legible documentary form any information so relating which is contained in a computer, and take copies of it,

for the purpose of ascertaining whether such an offence has been committed⁴.

Such an officer may inspect any goods for the purpose of ascertaining whether such an offence has been committed⁵.

If such an officer has reasonable grounds for believing that any documents or goods may be required as evidence in proceedings for such an offence, he may seize and detain them⁶; and an officer so seizing any documents or goods must inform the person from whom they are seized⁷.

The powers of an officer under these provisions may be exercised by him only at a reasonable hour and on production, if required, of his credentials⁸.

Nothing in these provisions:

1980 (a) requires a person to produce a document if he would be entitled to refuse to produce it in proceedings in a court on the ground that it is the subject of legal professional privilege⁹; or

1981 (b) authorises the taking possession of a document which is in the possession of a person who would be so entitled¹⁰;

1982 (c) requires a person to answer any question or give any information if to do so might incriminate him¹¹.

- 1 As to enforcement authorities see PARA 838 ante.
- 2 ie an offence under the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 5 (see PARA 819 ante), reg 7 (as amended) (see PARA 820 ante), reg 8 (see PARA 821 ante), reg 16 (see PARA 829 ante) or reg 22 (see PARAS 833-834 ante).
- 3 For the meaning of 'package' see PARA 817 ante.
- 4 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 23, Sch 3 paras 1(1), 3(1). As to the power to enter premises see PARA 840 post; and as to offences relating to the obstruction of an officer see PARA 841 post.
- 5 Ibid Sch 3 para 3(2).
- 6 Ibid Sch 3 para 3(3).
- 7 Ibid Sch 3 para 3(4).
- 8 Ibid Sch 3 para 3(5).
- 9 Ibid Sch 3 para 3(6)(a).
- 10 Ibid Sch 3 para 3(6)(b).
- 11 Ibid Sch 3 para 8.

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840. Power to enter premises.

A duly authorised officer of an enforcement authority¹ may, at a reasonable hour and on production, if required, of his credentials, enter any premises² for the purpose of ascertaining whether an offence³ has been committed⁴.

If a justice of the peace is satisfied by written information on oath that any relevant⁵ books, documents or goods are on, or that any relevant information contained in a computer is available from, any premises, and that production or inspection is likely to disclose the commission of an offence⁶ or that any such offence has been, is being or is about to be committed on any premises, and that any of the following conditions is met:

- 1983 (1) that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant has been given to the occupier;
- 1984 (2) that an application for admission, or the giving of such a notice, would defeat the object of the entry;
- 1985 (3) that the premises are unoccupied; and
- 1986 (4) that the occupier is temporarily absent and it might defeat the object of the entry to await his return,

he may by warrant, which continues in force for a period of one month, authorise an officer of an enforcement authority to enter the premises, if need be by force⁷.

An officer entering any premises by virtue of these provisions may take with him such other persons as may appear to him necessary⁸.

On leaving premises which he has entered by virtue of such a warrant, an officer must, if the premises are unoccupied or the occupier is temporarily absent, leave the premises as effectively secured against trespassers as he found them⁹.

Nothing in these provisions requires a person to answer any question or give any information if to do so might incriminate him¹⁰.

1 As to enforcement authorities see PARA 838 ante.

2 For these purposes, 'premises' includes any place, including any vehicle, ship or aircraft, except premises used only as a dwelling: Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 23, Sch 3 para 4(9).

3 It is an offence under ibid reg 5 (see PARA 819 ante), reg 7 (as amended) (see PARA 820 ante), reg 8 (see PARA 821 ante), reg 16 (see PARA 829 ante) or reg 22 (see PARAS 833-834 ante).

4 Ibid Sch 3 paras 1(1), 4(1). As to offences relating to the obstruction of an officer see PARA 841 post.

5 For these purposes, 'relevant', in relation to books, documents, goods or information, means books, documents, goods or information which under ibid Sch 3 para 3 (see PARA 839 ante) a duly authorised officer may require to be produced or may inspect: Sch 3 para 4(4).

6 See note 3 supra.

7 Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, Sch 3 paras 1(1), 4(2), (3), (5)(a), (6).

8 Ibid Sch 3 para 4(7).

9 Ibid Sch 3 para 4(8).

10 Ibid Sch 3 para 8.

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841. Obstruction of officers.

If a person:

- 1987 (1) intentionally obstructs an officer of an enforcement authority¹ acting in pursuance of his statutory powers²;
- 1988 (2) without reasonable excuse fails to comply with a requirement made of him to produce books and documents³; or
- 1989 (3) without reasonable excuse fails to give an officer of an enforcement authority acting in pursuance of his statutory powers any other assistance which the officer may reasonably require of him for the purpose of the performance of the officer's statutory functions⁴,

he is guilty of an offence⁵.

If a person, in giving any such information as is mentioned in head (3) above, makes a statement which he knows is false in a material particular or recklessly makes a statement which is false in a material particular, he is guilty of an offence⁶.

- 1 As to enforcement authorities see PARA 838 ante.
- 2 Ie his powers under the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 23, Sch 3: see PARAS 839-840 ante.
- 3 Ie a requirement made under ibid Sch 3 para 3(1): see PARA 839 ante.
- 4 Ie his functions under ibid Sch 3.
- 5 Ibid Sch 3 para 5(1), (2). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see Sch 3 para 5(1), (2). As to the standard scale see PARA 498 note 3 ante.
- 6 Ibid Sch 3 para 5(3). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: see Sch 3 para 5(3). As to the time limit for bringing a prosecution under Sch 3 para 5(3) see PARA 837 ante.

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842. Impersonation of officers.

If a person who is not a duly authorised officer of an enforcement authority¹ purports to act as such², he is guilty of an offence³.

- 1 As to enforcement authorities see PARA 838 ante.
- 2 Ie under the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 23, Sch 3: see PARAS 839-841 ante.
- 3 Ibid Sch 3 para 6(1), (2). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding level 5 on the standard scale: see Sch 3 para 6(1), (2). As to the standard scale see PARA 498 note 3 ante. As to the time limit for bringing a prosecution under Sch 3 para 6 see PARA 837 ante.

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J. LINKS BETWEEN TRAVEL AGENTS AND TOUR OPERATORS

843. Linked travel agents and tour operators.

It is unlawful for a travel agent and a tour operator who are linked¹ to make or carry out an agreement (whenever made) between such linked travel agent and tour operator, or such linked travel agent and another person in its travel group², for the supply or offer to supply by the linked travel agent to a consumer of a foreign package holiday³ organised by the linked tour operator ('the linked supply or offer to supply of foreign package holidays') unless:

- 1990 (1) there is displayed on the front of the linked travel agent's retail premises in a prominent position so that it may be easily read, the name⁴ of the travel agent

- and the name of the travel group of which the travel agent is part together with an explanation of the link between the travel agent and that travel group;
- 1991 (2) there is displayed on the front of every foreign package holiday brochure of the linked tour operator, available to consumers in the linked travel agent's retail premises, in a prominent position so that it may easily be read, a notice stating the name of the travel agent together with an explanation of the link between the tour operator and the travel agent;
- 1992 (3) there is displayed in the linked travel agent's retail premises in a prominent position so that it may easily be read by consumers in those premises, a notice which states the name under which the linked tour operator trades in foreign package holidays through linked travel agents, an explanation of the link between the tour operator and the travel agent and, where the condition specified in head (2) above is required to be satisfied, the fact that the brochures display the requisite notice;
- 1993 (4) there is stated in legible characters on all business stationery⁵ of the linked travel agent used for the purposes of the linked supply or offer to supply of foreign package holidays the name of the travel group of which the travel agent is part together with an explanation of the link between the travel agent and that travel group; and
- 1994 (5) all advertisements made on behalf of the linked travel agent or linked tour operator, which are connected with the linked supply or offer to supply of foreign package holidays and which refer to both the linked travel agent and tour operator, contain a statement explaining the link between them⁶.

The conditions specified in heads (1), (2), (4) and (5) above do not apply where the name of the travel agent and the tour operator are the same or are so similar to each other that members of the public might reasonably conclude from that fact that the travel agent and tour operator are linked⁷.

The provisions described above apply where: (a) the linked travel agent or the travel group of which it is part has a share of the market in travel agents' services exceeding 5 per cent; (b) the linked tour operator or the travel group of which it is part has a share of the market in tour operators' services exceeding 5 per cent; or (c) heads (a) and (b) above are both satisfied⁸.

The Secretary of State⁹ may give directions to any linked travel agent or linked tour operator specified in the directions, or to the holder for the time being of any office specified in the directions in any such travel agent or tour operator so specified to take such steps, within the competence of the travel agent or the tour operator or the holder of the office as may be specified or described in the directions for the purpose of carrying out, or securing compliance with the provisions described above¹⁰, or to do or refrain from doing anything so specified or described which the travel agent or tour operator or holder of the office is required by those provisions to do or refrain from doing¹¹. The Secretary of State may vary or revoke any directions so given¹².

1 For these purposes, 'travel agent' means a person who supplies or offers for supply a foreign package holiday (see note 3 *infra*) organised by a tour operator; and 'tour operator' means a person who, otherwise than occasionally, organises foreign package holidays and supplies or offers them for supply, whether directly or through a travel agent: Foreign Package Holidays (Tour Operators and Travel Agents) Order 2000, SI 2000/2110, art 1(2). 'Travel agent and a tour operator who are linked' means a travel agent and a tour operator who are interconnected bodies corporate, or a travel agent and a tour operator who are the same body corporate; and the expressions 'link', 'linked travel agent' and 'linked tour operator' must be construed accordingly: art 1(2).

2 'Travel group' means a group of interconnected bodies corporate which includes a travel agent and a tour operator, or where a travel agent and a tour operator are the same body corporate, that body corporate: *ibid* art 1(2).

3 For these purposes, 'foreign package holiday' means services, accommodation and facilities provided under a contract, made within the United Kingdom, by a tour operator for a holiday outside the United Kingdom provided transport to or from the United Kingdom and accommodation outside the United Kingdom (whether or not for the duration of the holiday) are included: *ibid* art 1(2). 'Accommodation' means the provision of a place to sleep, including the provision of a site for the erection of a tent or a parking place for a caravan, mobile home or other similar vehicle, but does not include the provision of sleeping accommodation in a means of transport unless that accommodation represents a substantial proportion of the accommodation for the holiday: art 1(2).

4 For these purposes, 'name' means the name under which, as the case may be, the tour operator, travel agent or travel group trade in the United Kingdom with consumers of foreign package holidays: *ibid* art 4(4).

5 For these purposes, 'business stationery' means business letters, invoices and receipts issued in the course of business and written demands for payment of debts arising in the course of business which are used in respect of the linked supply or offer of supply of foreign package holidays to consumers: *ibid* art 4(3).

6 *Ibid* arts 3, 4(1).

7 *Ibid* art 4(2).

8 *Ibid* art 2. Where a travel agent and a tour operator who were not linked become linked after 27 July 2000, art 3 (see the text and notes 1-6 *supra*) does not apply until two months have elapsed from the date on which the travel agent and tour operator became linked: art 5. Where head (a), (b) or (c) in the text becomes satisfied after 27 July 2000, art 3 does not apply until two months have elapsed from the date on which any of those heads were satisfied: art 6.

9 As to the Secretary of State see PARA 15 *ante*.

10 *Ie* the provisions of the Foreign Package Holidays (Tour Operators and Travel Agents) Order 2000, SI 2000/2110, art 3 (see the text and notes 1-6 *supra*).

11 *Ibid* art 7(1).

12 *Ibid* art 7(2).

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(xxv) Packaging

A. IN GENERAL

844. Relevant packaging.

The statutory provisions relating to packaging¹ apply to any packaging², other than:

- 1995 (1) packaging which was used for a given product prior to 31 December 1994³;
and
- 1996 (2) packaging manufactured on or before 31 December 1994, placed on the market in the European Community⁴ on or before 31 December 1999, and which complies with any health and safety requirements or any Act or enactment with which it would have been required to comply for it to be lawfully placed on the market in the United Kingdom on 31 December 1994⁵.

Nothing in the statutory provisions relating to packaging affects the application of existing quality requirements for packaging, including those regarding safety, the protection of health and hygiene of the packed products, existing transport requirements or the European provisions⁶ on hazardous waste⁷.

1 le the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941 (as amended): see PARA 845 et seq post. For the meaning of 'packaging' see PARA 845 post.

2 Ibid reg 3(1).

3 Ibid reg 4(1).

4 For these purposes, a reference to the European Community includes a reference to the European Economic Area; a reference to a member state includes a reference to an EEA state; 'EEA state' means a state which is a contracting party to the EEA Agreement; and 'EEA Agreement' means the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)): see the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(1)(c). As to the European Economic Area and the EEA Agreement see PARA 386 note 1 ante.

5 Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 4(2).

6 le EC Council Directive 91/689 (OJ L377, 31.12.91, p 20): see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 33.

7 Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 3(2).

UPDATE

844 Relevant packaging

TEXT AND NOTES 6, 7--Reference to the European provisions on hazardous waste now to the provisions of the Hazardous Waste (England and Wales) Regulations 2005, SI 2005/894, in relation to England, and to the Hazardous Waste (Wales) Regulations 2005, SI 2005/1806, in relation to Wales: SI 2003/1941 reg 3(2) (amended by SI 2005/894, SI 2005/1806).

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845. Meaning of 'packaging'.

'Packaging' means all products made of any materials of any nature to be used for the containment, protection, handling, delivery and presentation of goods, from raw materials to processed goods, from the producer to the user or the consumer, including non-returnable items used for the same purposes, but only where the products are:

- 1997 (1) sales packaging or primary packaging, that is to say packaging conceived so as to constitute a sales unit to the final user or consumer at the point of purchase;
- 1998 (2) grouped packaging or secondary packaging, that is to say packaging conceived so as to constitute at the point of purchase a grouping of a certain number of sales units whether the latter is sold as such to the final user or consumer or whether it serves only as a means to replenish the shelves at the point of sale, and which can be removed from the product without affecting its characteristics; or
- 1999 (3) transport packaging¹ or tertiary packaging, that is to say packaging conceived so as to facilitate handling and transport of a number of sales units or grouped packagings in order to prevent physical handling and transport damage².

Items are to be considered to be packaging if they fulfil the above definition without prejudice to other functions which the packaging might also perform, unless the item is an integral part of a product and it is necessary to contain, support or preserve that product throughout its lifetime and all elements are intended to be used, consumed and disposed of together³. Items designed and intended to be filled at the point of sale and disposable items sold, filled or designed and intended to be filled at the point of sale are to be considered to be packaging provided they fulfil a packaging function⁴.

Packaging components⁵ and ancillary elements integrated into packaging are to be considered to be part of the packaging into which they are integrated. Ancillary elements hung directly on, or attached to, a product and which perform a packaging function are to be considered to be packaging unless they are an integral part of that product and all elements are intended to be consumed or disposed of together⁶.

1 For these purposes, 'transport packaging' does not include road, rail, ship and air containers: Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(2) (substituted by SI 2004/1188).

2 Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(2) (as substituted: see note 1 supra). Schedule V lists illustrative examples of packaging given in European Parliament and EC Council Directive 2004/12 (OJ L47, 18.2.2004, p 26) Annex, amending European Parliament and EC Council Directive 94/62 (OJ L365, 31.12.94, p 10). Plastic carrier bags handed to customers in shops met the two conditions laid down in European Parliament and EC Council Directive 94/62 (OJ L365, 31.12.94, p 10) art 3.1 and are therefore covered by that Directive: *Plato Plastik Robert Frank GmbH v Caropack Handelsgesellschaft mbH* C341/01 [2004] 3 CMLR 632, ECJ.

3 Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(2) proviso (i) (as substituted: see note 1 supra).

4 Ibid reg 2(2) proviso (ii) (as substituted: see note 1 supra).

5 'Packaging component' means any part of packaging that can be separated by hand or by using simple physical means: ibid reg 2(2).

6 Ibid reg 2(2) proviso (iii) (as substituted: see note 1 supra).

UPDATE

845 Meaning of 'packaging'

TEXT AND NOTE 3--'Consumed and disposed' now 'consumed or disposed': SI 2003/1941 reg 2(2)(i) (amended by SI 2006/1492).

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B. PLACING ON THE MARKET

846. General duty relating to the placing on the market of packaging.

On and after 25 August 2003, no person who is a responsible person¹ is² to place on the market any packaging unless the essential requirements³ have been complied with in relation to it,

provided that placing on the market does not occur, for these purposes, in respect of re-used packaging⁴.

Packaging is to be taken to satisfy the essential requirements:

- 2000 (1) if it satisfies national standards which implement the relevant harmonised standards⁵; or
- 2001 (2) where there are no relevant harmonised standards, if it satisfies national standards of which the texts are communicated⁶ to the EC Commission and which are notified⁶ by the EC Commission to the member states⁷ as being deemed to comply with the essential requirements⁸.

Any person who contravenes or fails to comply with these provisions is guilty of an offence⁹.

1 For these purposes, 'responsible person' means, in relation to packaging, the person who is responsible for packing or filling products into packaging (including, as the case may be, any person presenting himself as being so responsible by affixing to the packed or filled packaging his name, trade mark or other distinctive mark or the person who reconditions the packaging for re-use, except that re-use in itself does not constitute reconditioning of the packaging), or the importer: Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(2). 'Re-use' means any operation by which packaging, which has been conceived and designed to accomplish within its life cycle a minimum number of trips or rotations, is refilled or used for the same purpose for which it was conceived, with or without the support of auxiliary products present on the market enabling the packaging to be refilled, and 're-used packaging' is to be construed accordingly; such re-used packaging will become packaging waste when no longer subject to re-use: reg 2(2). 'Packaging waste' means any packaging or packaging material covered by the definition of waste in EC Council Directive 75/442 (OJ L25.7.75, p 39) art 1 (amended by EC Council Directive 91/156 (OJ L78, 26.3.91, p 32)) (see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 33) but not including production residues (Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(2)); and 'packaging materials' means materials used in the manufacture of packaging and includes raw materials and processed materials prior to their conversion into packaging (reg 2(2)). 'Importer' means an importer into the United Kingdom of packaging which is packed or filled packaging: reg 2(2). For the meaning of 'packaging' see PARA 845 ante.

2 Ie subject to ibid reg 6: see PARA 848 post.

3 For the meaning of 'essential requirements' see PARA 847 post.

4 Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, regs 1, 5(1).

5 For these purposes, 'harmonised standards' means the standards of which the reference number is published in the Official Journal of the European Communities in pursuance of European Parliament and EC Council Directive 94/62 (OJ L365, 31.12.94, p 10) art 9(2)(a): Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, regs 2(1)(a), 5(3).

6 Ie pursuant to European Parliament and EC Council Directive 94/62 (OJ L365, 31.12.94, p 10) art 9(3).

7 As to references for these purposes to a member state see PARA 844 note 4 ante.

8 Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, regs 2(1)(a), 5(2).

9 Ibid regs 9(a), 10(1). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see regs 9(a), 10(1). As to the statutory maximum see PARA 401 note 31 ante. As to the defence of due diligence see PARA 851 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 850 post. As to enforcement see PARA 852 post.

847. Meaning of 'essential requirements'.

The essential requirements on the composition and the re-usable and recoverable nature of packaging¹, including its recyclable nature, are:

2002 (1) the following requirements specific to the manufacturing and composition of packaging:

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263. (a) packaging must be so manufactured that the packaging volume and weight is limited to the minimum adequate amount to maintain the necessary level of safety, hygiene and acceptance for the packed product and for the consumer;

264. (b) packaging must be designed, produced and commercialised in such a way as to permit its re-use² or recovery³, including recycling, and to minimise its impact on the environment when packaging waste or residues from packaging waste management⁴ operations are disposed of;

265. (c) packaging must be so manufactured that the presence of noxious and other hazardous substances and materials as constituents of the packaging material or of any of the packaging components⁵ is minimised with regard to their presence in emissions, ash or leachate when packaging or residues from management operations or packaging waste are incinerated or landfilled;

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2003 (2) the following requirements, specific to the re-usable nature of packaging, which must be simultaneously satisfied:

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266. (a) the physical properties and characteristics of the packaging must enable a number of trips or rotations in normally predictable conditions of use;

267. (b) there must be a possibility of processing the used packaging in order to meet health and safety requirements for the workforce;

268. (c) the requirements specific to recoverable packaging when the packaging is no longer re-used and thus becomes waste must be fulfilled;

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2004 (3) the following requirements specific to the recoverable nature of packaging:

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269. (a) packaging must be manufactured in such a way as to enable the recycling⁶ of a certain percentage of weight of the materials used into the manufacture of marketable products, in compliance with current standards in the European Community; the establishment of this percentage may vary, depending on the type of material of which the packaging is composed;

270. (b) packaging waste processed for the purpose of energy recovery⁷ must have a minimum inferior calorific value to allow optimisation of energy recovery;

271. (c) packaging waste processed for the purpose of composting must be of such a biodegradable nature that it should not hinder separate collection and the composting process or activity into which it is introduced;

272. (d) biodegradable packaging waste must be of such a nature that it is capable of undergoing physical, chemical, thermal or biological decomposition such that most of the finished compost ultimately decomposes into carbon dioxide, biomass and water⁸.

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1 For the meaning of 'packaging' see PARA 845 ante.

2 For the meaning of 're-use' see PARA 846 note 1 ante.

3 For these purposes, 'recovery' means any of the applicable operations provided for in EC Council Directive 75/442 (OJ L194, 25.7.75, p 39) Annex IIB (amended by EC Council Directive 91/156 (OJ L78, 26.3.91, p 32) (see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 33): Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(2).

4 For these purposes, 'packaging waste management' means the management of waste as defined in EC Council Directive 75/442 (OJ L194, 25.7.75, p 39) (see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 33): Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(2).

5 For the meaning of 'packaging component' see PARA 845 note 5 ante.

6 For these purposes, 'recycling' means the reprocessing in a production process of the waste materials for the original purpose or for other purposes, including organic recycling but excluding energy recovery (see note 7 infra): Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(2). 'Organic recycling' means the aerobic (composting) or anaerobic (biomethanisation) treatment, under controlled conditions and using micro-organisms, of the biodegradable parts of packaging waste, which produces stabilised organic residues or methane; but landfill is not to be considered a form of organic recycling: reg 2(2).

7 For these purposes, 'energy recovery' means the use of combustible packaging waste as a means to generate energy through direct incineration with or without other waste but with recovery of the heat: *ibid* reg 2(2).

8 European Parliament and EC Council Directive 94/62 (OJ L365, 31.12.94, p 10) Annex II. The essential requirements are set out in the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(2), Sch I.

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C. CONCENTRATION LEVELS OF REGULATED METALS

848. Concentration levels of regulated metals present in packaging.

No person who is a responsible person¹ is to place packaging² on the market if the sum of the concentration levels of regulated metals³ either in the packaging or in any of its packaging components⁴ exceeds:

- | | | |
|------|-----|--|
| 2005 | (1) | on or after 30 June 1998, 600 parts per million by weight; |
| 2006 | (2) | on or after 30 June 1999, 250 parts per million by weight; |
| 2007 | (3) | on or after 30 June 2001, 100 parts per million by weight ⁵ , |

but the above provisions do not apply to packaging which is made entirely of lead crystal glass⁶.

The above concentration levels do not apply on or before 4 March 2009, to plastic crates or plastic pallets used in product loops which are in a closed and controlled chain⁷, provided the specified requirements⁸ are complied with in relation to that packaging; or on or before 30 June 2006 to glass packaging, provided the specified requirements⁹ are complied with in relation to that packaging¹⁰.

Any person who contravenes or fails to comply with these provisions is guilty of an offence¹¹.

1 For the meaning of 'responsible person' see PARA 846 note 1 ante.

2 For the meaning of 'packaging' see PARA 845 ante.

3 'Regulated metals' means lead, cadmium, mercury or hexavalent chromium or a combination of two or more of those metals, as the case may be: Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(2).

4 For the meaning of 'packaging component' see PARA 845 note 5 ante.

5 Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, regs 2(2), 6(1).

6 Ibid reg 6(2). For these purposes, 'lead crystal glass' has the meaning given by EC Council Directive 69/493 (OJ L326, 29.12.69, p 36) (see PARA 393 ante): Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 6(2).

7 'Product loops which are in a closed and controlled chain' means product loops in which products circulate with a controlled re-use and distribution system and in which the recycled material originates only from these entities in the chain so that the introduction of external material is the minimum which is technically feasible and from which these entities may only be removed in a specially authorised procedure so that return rates are maximised: ibid reg 2(2).

8 Ie the requirements set out in ibid Sch II.

9 Ie the requirements set out in ibid Sch III.

10 Ibid reg 6(3).

11 Ibid regs 9(a), 10(1). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see regs 9(a), 10(1). As to the statutory maximum see PARA 401 note 31 ante. As to the defence of due diligence see PARA 851 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 850 post. As to enforcement see PARA 852 post.

UPDATE

848 Concentration levels of regulated metals present in packaging

TEXT AND NOTES 7-10--Words 'on or before 4 March 2009' omitted: SI 2003/1941 reg 63 (amended by SI 2009/1504).

TEXT AND NOTE 10--The words 'on or before 30 June 2006' are removed: SI 2003/1941 reg 6(3) (amended by SI 2006/1492).

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849. Requirement for technical documentation.

The responsible person¹ must:

2008 (1) at the request of the enforcement authority² submit within 28 days of the date of the request technical documentation or other information showing that packaging³ complies with the essential requirements⁴ and the regulated metals concentration limits⁵;

2009 (2) ensure that he keeps the technical documentation or other information referred to in head (1) above for a period of four years from the date that he places packaging on the market⁶.

The responsible person⁷ must:

- 2010 (a) submit a report as required for the exemption of glass packaging from heavy metal concentration levels⁸ to the enforcement authority; and
- 2011 (b) at the request of the enforcement authority, submit within 28 days of the date of the request the annual declaration of conformity and other information required⁹ in respect of the exemption of glass packaging and plastic crates and pallets from heavy metal concentration levels¹⁰.

Any person who fails to supply or retain technical documentation or other information as required by these provisions is guilty of an offence¹¹.

1 For the meaning of 'responsible person' see PARA 846 note 1 ante.

2 For these purposes, 'enforcement authority' is to be construed in accordance with the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, Sch IV (see PARA 852 post): reg 2(2).

3 For the meaning of 'packaging' see PARA 845 ante.

4 For the meaning of 'essential requirements' see PARA 847 ante.

5 Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 7(1)(a). The regulated metals concentration limits are those set out in reg 6 (see PARA 848 ante): reg 7(1)(a).

6 Ibid reg 7(1)(b).

7 For the purposes of ibid reg 7(2) only, 'responsible person' includes the manufacturer or his authorised representative in the European Community: reg 2(2). As to references for these purposes to the European Community see PARA 844 note 4 ante.

8 Ie under ibid Sch III para 2(a), (b).

9 Ie as set out in ibid Sch II para 2(a), (b) and Sch III para 2(c).

10 Ibid reg 7(2).

11 Ibid regs 9(b), 10(2). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see regs 9(b), 10(2). As to the standard scale see PARA 498 note 3 ante. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 850 post. As to enforcement see PARA 852 post.

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D. OFFENCES

850. Liability of persons other than the principal offender; offences by bodies corporate.

Where the commission by any person of an offence of contravening or failing to comply with the general duty relating to the placing on the market of packaging¹ or the concentration levels of heavy metals present in packaging² or of failing to supply or retain technical documentation or other information³ is due to an act or default committed by some other person in the course

of any business of his, the other person is guilty of the offence and may be proceeded against and punished, whether or not proceedings are taken against the first-mentioned person⁴.

Where a body corporate is guilty of an offence under the statutory provisions relating to packaging⁵ in respect of any act or default which is shown to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager⁶, secretary, or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly⁷.

1 Ie an offence under the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 5: see PARA 846 ante.

2 Ie an offence under ibid reg 6: see PARA 848 ante.

3 Ie an offence under ibid reg 7: see PARA 849 ante.

4 Ibid reg 12(1).

5 Ie guilty of an offence under the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941 (see PARA 844 et seq ante), including where it is so guilty by virtue of reg 12(1) (see the text to notes 1-4 supra).

6 As to the meaning of 'manager' see PARA 500 note 3 ante.

7 Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 12(2). Where the affairs of a body corporate are managed by its members, reg 12(2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: reg 12(3).

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851. Defence of due diligence.

In proceedings against any person for an offence under the statutory provisions relating to packaging¹, it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence². Where in any proceedings against any person for such an offence the defence of due diligence involves an allegation that the commission of the offence was due to the act or default of another or to reliance on information given by another, that person is not, without the leave of the court, entitled to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice in writing giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time he serves it³.

A person is not entitled to rely on the defence of due diligence by reason of his reliance on information supplied by another, unless he shows that it was reasonable in all the circumstances for him to have relied on the information, having regard, in particular, to the steps which he took, and those which might reasonably have been taken, for the purpose of verifying the information and to whether he had any reason to disbelieve the information⁴.

1 Ie an offence under the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 9: see PARAS 846, 848-849 ante.

2 Ibid reg 11(1).

3 Ibid reg 11(2), (3).

4 Ibid reg 12(4).

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E. ENFORCEMENT

852. Enforcement provisions.

It is the duty of every weights and measures authority¹ to enforce the statutory provisions relating to packaging² within its area³.

A weights and measures authority must, whenever the Secretary of State directs, make a report to the Secretary of State on the exercise of the functions exercisable by that authority under the statutory provisions relating to packaging⁴.

1 As to local weights and measures authorities see PARA 398 ante.

2 Ie the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941 (as amended): see PARA 844 et seq ante.

3 Ibid reg 8, Sch IV para 1(a). Nothing in Sch IV authorises any enforcement authority to bring proceedings in Scotland for an offence: Sch IV para 3. For the purposes of providing for the enforcement of the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941 (as amended):

48 (1) the Consumer Protection Act 1987 s 14 (suspension notices: see PARA 549 ante), s 15 (appeals against suspension notices: see PARA 552 ante), s 28 (test purchases: see PARA 556 ante), ss 29, 30 (powers of search etc: see PARA 557 ante), s 31 (powers of customs officer to detain goods: see PARA 559 ante), s 32 (obstruction of authorised officer: see PARA 560 ante), s 33 (appeals against detention of goods: see PARA 561 ante), s 34 (compensation for seizure and detention: see PARA 562 ante), s 35 (recovery of expenses of enforcement: see PARA 563 ante), s 37 (power of Commissioners for Her Majesty's Revenue and Customs to disclose information: see PARA 564 ante), s 44 (service of documents etc: see PARA 531 ante) and s 47 (savings for certain privileges: see PARA 532 ante) apply and in respect of proceedings for contravention thereof as if: (a) references to safety provisions were references to the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941 (as amended); (b) references to goods were references to packaging, as the context may require; (c) in the Consumer Protection Act 1987 s 14(6) for 'six months' there were substituted 'three months'; (d) in ss 28-30, 33-35 the references to any provision made by or under Pt III were omitted; (e) ss 28(3)-(5), 29(4), and 30(7), (8) were omitted (Packaging (Essential Requirements) Regulations 2003, SI 2003/1941, reg 2(1)(b), Sch IV para 2(a) (amended by SI 2004/693); Commissioners for Revenue and Customs Act 2005 s 50);

49 (2) the Consumer Protection Act 1987 s 39 and s 40 apply to offences under s 32 as they are applied to the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941 (as amended), by head (1) supra (reg 2(1)(b), Sch IV para 2(b));

50 (3) a magistrates' court may try an information in respect of an offence committed under the Packaging (Essential Requirements) Regulations 2003, SI 2003/1941 (as amended), if the information is laid within 12 months from the time when the offence is committed (Sch IV para 2(c)).

4 Ibid Sch IV para 4. As to the Secretary of State see PARA 15 ante.

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(xxvi) Pyramid Selling and similar Trading Schemes

853. Regulated trading schemes.

The statutory provisions relating to trading schemes¹ apply, subject to certain exceptions², to any trading scheme if:

- 2012 (1) the prospect is held out to participants³ of receiving payments or other
benefits in respect of any of the following matters:
- 183 273. (a) the introduction by any person of other persons who become participants
in a trading scheme;
- 274. (b) the continued participation of participants in a trading scheme;
- 275. (c) the promotion, transfer or other change of status of participants within a
trading scheme;
- 276. (d) the supply of goods⁴ or services⁵ by any person to or for other persons; and
- 277. (e) the acquisition of goods or services by any person; and
- 184 2013 (2) either or both of the prescribed conditions⁶ is or are fulfilled in relation to
the scheme⁷.

The conditions prescribed are:

- 2014 (i) that: (A) goods or services, or both, are to be provided by the person
promoting the scheme ('the promoter') or, in the case of a scheme promoted by
two or more persons acting in concert ('the promoters'), by one or more of those
persons; and (B) the goods or services so provided are to be supplied to or for other
persons under transactions effected by participants, whether in the capacity of
agents of the promoter or of one of the promoters or in any other capacity, or are
to be used for the purposes of the supply of goods or services to or for other
persons under such transactions⁸;
- 2015 (ii) that goods or services, or both, are to be supplied by the promoter or any
of the promoters to or for persons introduced to him or any of the other promoters,
or an employee or agent of his or theirs, by participants⁹.

For these purposes, a prospect of a kind mentioned in head (1) above is to be treated as being held out to a participant whether it is held out so as to confer on him a legally enforceable right or not¹⁰.

The Secretary of State may by statutory instrument make regulations with regard to the conduct of trading schemes¹¹.

¹ I.e. the Fair Trading Act 1973 Pt XI (ss 118-123) (as amended). For these purposes, 'trading scheme' includes any arrangements made in connection with the carrying on of a business, whether those arrangements are made or recorded wholly or partly in writing or not: s 118(8) (s 118 substituted by the Trading Schemes Act 1996 s 1).

² The Secretary of State may by order made by statutory instrument:

51 (1) disapply the Fair Trading Act 1973 s 118(1)(b) (as substituted) (see head (2) in the text) in relation to a trading scheme of a kind specified in the order; or

52 (2) amend or repeal s 118(6)(a) (see PARA 854 head (1) post),

and no such order, and no order varying or revoking any such order, may so be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House of Parliament: s 118(7) (as substituted: see note 1 supra). As to the Secretary of State see PARA 15 ante.

3 For these purposes, 'participant' means, in relation to a trading scheme, a person, other than the promoter or any of the promoters, participating in the scheme: *ibid* s 118(8) (as substituted: see note 1 supra).

4 For these purposes, 'goods' includes property of any description and a right to, or interest in, property: *ibid* s 118(8) (as substituted: see note 1 supra).

5 For these purposes, any reference to the provision or supply of goods is to be construed as including a reference to the grant or transfer of a right or interest: *ibid* s 118(8) (as substituted: see note 1 supra). Any reference to the provision or supply of goods or services by a person is to be construed as including a reference to the provision or supply of goods or services under arrangements to which that person is a party: s 118(9) (as so substituted).

6 le either or both of the conditions in *ibid* s 118(3), (4) (as substituted): see heads (i), (ii) in the text.

7 *Ibid* s 118(1), (2) (as substituted: see note 1 supra).

8 *Ibid* s 118(3) (as substituted: see note 1 supra).

9 *Ibid* s 118(4) (as substituted: see note 1 supra).

10 *Ibid* s 118(5) (as substituted: see note 1 supra).

11 See *ibid* s 119 (amended by the Trading Schemes Act 1996 s 2(1)). Regulations made by the Secretary of State by statutory instrument may make provision with respect to the issue, circulation or distribution of any form of advertisement, prospectus, circular or notice which contains any information calculated to lead directly or indirectly to persons becoming participants in such a trading scheme, and may prohibit any such advertisement, prospectus, circular or notice from being issued, circulated or distributed unless it complies with such requirements as to the matters to be included or not included in it as may be prescribed by regulations: Fair Trading Act 1973 s 119(1) (as so amended). Such regulations may also prohibit the promoter or any of the promoters of, or any participant in, a trading scheme from: (1) supplying any goods to a participant in the trading scheme; or (2) supplying any training facilities and other services for such a participant; or (3) providing any goods or services under a transaction effected by such a participant; or (4) being a party to any arrangements under which goods or services are supplied or provided as mentioned in heads (1)-(3) supra; or (5) accepting from any such participant any payment, or any undertaking to make a payment, in respect of any goods or services supplied or provided as mentioned in heads (1)-(4) supra or in respect of any goods or services to be so supplied or provided, unless, in any such case, such requirements as are prescribed by the regulations are complied with: s 119(2). The power to make regulations may be exercised so as to make different provision in relation to different descriptions of trading schemes or different descriptions of participants in such trading schemes: see s 119(5). In exercise of the power so conferred the Secretary of State has made the Trading Schemes Regulations 1997, SI 1997/30 (see PARA 855 et seq post), which came into force on 6 February 1997 (see reg 1(1)).

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854. Excluded trading schemes.

The statutory provisions relating to trading schemes¹ do not apply to any trading scheme:

2016 (1) under which the promoter² or any of the promoters² or participants³ is to carry on, or to purport to carry on, a regulated activity⁴; or

2017 (2) which otherwise falls within a description prescribed by regulations made by the Secretary of State by statutory instrument⁵.

The descriptions of trading schemes so prescribed are:

2018 (a) any trading scheme⁶ which is a single tier trading scheme⁷ under which a participant operating at a level immediately below that of the promoter or single participant in the United Kingdom, who introduces another participant to the scheme at that level, does not receive any payment or benefit, or can only receive a single benefit or payment, in respect of the introduction of that participant, such payment or benefit not exceeding £50, and can receive no other benefit or payment in respect of, or flowing directly or indirectly from, the membership or activities of that participant in that or any other trading scheme, unless such other benefit or payment results from:

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278. (i) a sharing of expenses of the operation of the trading scheme;

279. (ii) a share in the annual profits of the trading scheme⁸; or

280. (iii) the sale of the participant's business, being a business in respect of which a registration under the Value Added Tax Act 1994⁹ was in force at the date of sale;

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2019 (b) any trading scheme all of the participants in which are making or have the intention of making taxable supplies in the United Kingdom and are registered for VAT; or

2020 (c) any trading scheme which is a chain letter¹⁰, provided that there is no requirement on the participant to send moneys or other benefits:

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281. (i) to a central address or the promoter of the trading scheme for onward distribution; or

282. (ii) to any person or organisation other than or additional to the person whose name and address are to be deleted from the list when the participant sends the letter to others; or

283. (iii) to an organisation or person for onward transmission to a participant, whether or not that participant is identified on the list,

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2021 and where the promoter does not benefit from the provision of any other service or facilities offered or provided either by him or any other person or organisation to participants¹¹.

1 le the Fair Trading Act 1973 Pt XI (ss 118-123) (as amended). For the meaning of 'trading scheme' see PARA 853 note 1 ante.

2 For the meanings of 'promoter' and 'promoters' see PARA 853 ante.

3 For the meaning of 'participant' see PARA 853 note 3 ante.

4 For this purpose, 'regulated activity' means:

53 (1) dealing in investments as principal and agent;

54 (2) arranging deals in investments;

55 (3) managing investments;

56 (4) safeguarding and administering investments;

57 (5) sending dematerialised instructions;

58 (6) establishing etc a collective investment scheme; and

59 (7) advising on investments,

all of which must be read with the Financial Services and Markets Act 2000 s 22, Sch 2 and any relevant order under s 22 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 84): Fair Trading Act 1973 s 118(6A) (added by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 284(1), (3)).

5 Fair Trading Act 1973 s 118(6) (substituted by the Trading Schemes Act 1996 s 1; and amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 284(2)). In exercise of the power so conferred the Secretary of State has made the Trading Schemes (Exclusion) Regulations 1997, SI 1997/31 (as amended). As to the Secretary of State's power to amend or repeal the Fair Trading Act 1973 s 118(6)(a) (as substituted) (see head (1) in the text) see PARA 853 note 2 ante. As to the Secretary of State see PARA 15 ante.

6 For the meaning of 'trading scheme' for these purposes see PARA 853 note 1 ante; definition applied by the Trading Schemes (Exclusion) Regulations 1997, SI 1997/31, reg 2.

7 For these purposes, 'single tier trading scheme' means a trading scheme the only members of which are the promoter or promoters and one or more participants and under which, in the United Kingdom, either a single promoter or a single participant operates at one level and any other participant or participants of the trading scheme operate at the same level below such promoter or participant: *ibid* reg 2. For the meaning of 'participant' see PARA 853 note 3 ante; definition applied by reg 2.

8 For these purposes, 'annual profit of the trading scheme' means, for each financial year, the net profit of the promoter or promoters of the trading scheme as shown in the accounts of the trading scheme: *ibid* reg 2.

9 As to registration under the Value Added Tax Act 1994 see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 64 et seq.

10 For these purposes, 'chain letter' means any trading scheme under which a letter is sent to participants or prospective participants directly or indirectly instructing or requesting them: (1) to send moneys or other benefits to at least one of the individuals on a list of individuals, shown with their mailing addresses, which is contained in or accompanying that letter; and (2) to carry on the chain by sending copies of the letter to other individuals not on the list and removing from the list any one name and address and adding their own to it: Trading Schemes (Exclusion) Regulations 1997, SI 1997/31, reg 2.

11 *Ibid* reg 3 (amended by SI 1997/1887).

UPDATE

854 Excluded trading schemes

NOTE 4--Also, head (8) operating a multilateral trading facility: Fair Trading Act 1973 s 118(6A) (amended by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No 3) Order 2006, SI 2006/3384).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxvi) Pyramid Selling and similar Trading Schemes/855. Contents of advertisements.

855. Contents of advertisements.

A promoter of, or a participant¹ in, a trading scheme² must not issue, circulate or distribute any advertisement³, other than an advertisement which forms part of a newspaper or magazine or is transmitted by way of a radio or television broadcast, which contains information likely to lead directly or indirectly to persons becoming participants in a trading scheme by any means unless the advertisement:

- 2022 (1) states the name and address of the promoter or, in the case of a scheme promoted by more than one person, the names and addresses of all the promoters;
- 2023 (2) describes the goods or services acquired or supplied under the trading scheme; and
- 2024 (3) contains the prescribed words⁴ which must:
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284. (a) not appear at the beginning or end of the advertisement;
285. (b) in so far as the advertisement contains any information as to the sources of income for participants from participation in the trading scheme, appear together with such information and be given no less prominence than such information;
286. (c) be easily legible or audible; and
287. (d) be afforded no less prominence than that given to any other information in the advertisement apart from the heading of the advertisement⁵.
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1 For the meaning of 'participant' see PARA 853 note 3 ante; definition applied by the Trading Schemes Regulations 1997, SI 1997/30, reg 2.

2 For the meaning of 'trading scheme' for these purposes see PARA 853 note 1 ante; definition applied by ibid reg 2.

3 For these purposes, 'advertisement' means any advertisement, document, prospectus, circular or notice, whether transmitted in electronic or any other form, which promotes a trading scheme: ibid reg 2.

4 The prescribed words are set out in ibid reg 3(1)(c), Sch 1, and are as follows:

60 (1) It is illegal for a promoter or a participant in a trading scheme to persuade anyone to make a payment by promising benefits from getting others to join a scheme.

61 (2) Do not be misled by claims that high earnings are easily achieved.

5 Ibid reg 3(1), (2). As to offences and defences see PARA 864 post.

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856. Pre-performance requirements.

No promoter of, nor participant¹ in, a trading scheme² is:

- 2025 (1) to supply goods or services to a participant in the trading scheme;
- 2026 (2) to provide any goods or services under a transaction effected by such a participant;
- 2027 (3) to be a party to any arrangement under which goods or services are so supplied or provided; or
- 2028 (4) to accept from any such participant any payment or undertaking to make a payment in respect of any goods or services supplied or provided as mentioned any of heads (1) to (3) above or in respect of any goods or services to be so supplied or provided,

save where the following requirements are satisfied:

- 2029 (a) the arrangements with a participant do not include a statement or promise that the participant will receive a payment or benefit in respect of the continued participation of another person in the trading scheme to which such arrangements relate or in any other trading scheme;
- 2030 (b) the promoter or a participant and the participant joining the trading scheme have signed a written agreement which contains all the terms under which the participant joining the scheme is participating in the trading scheme and which complies with the prescribed requirements³;
- 2031 (c) a copy of that agreement has been furnished to the participant joining the trading scheme⁴.

No undertaking to make any payment given by a participant in a trading scheme involving a contravention of head (4) above is enforceable against him in any civil proceedings or recoverable in any other way⁵.

1 For the meaning of 'participant' see PARA 855 note 1 ante.

2 For the meaning of 'trading scheme' see PARA 855 note 2 ante.

3 Ie the requirements of the Trading Schemes Regulations 1997, SI 1997/30, reg 5: see PARA 857 post.

4 Ibid reg 4(1), (2).

5 Ibid reg 11(2).

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857. Contents of contracts.

The written agreement which is to contain all the terms of the trading scheme¹ must include:

- 2032 (1) the name and address of the promoter or, in the case of a scheme promoted by more than one person, the names and addresses of all the promoters;
- 2033 (2) a description of the goods or services to be acquired by or supplied to the participant² by the promoter or promoters, other participants or suppliers nominated by the promoter or promoters or any other person under the trading scheme;
- 2034 (3) a statement describing the capacity in which the participant is to act for the purposes of any transaction which he may effect under the trading scheme;
- 2035 (4) a statement describing the financial obligation of the participant during the period of 12 months from the commencement date of the agreement and the promoter must give to the participant at least 60 days' advance written notice of any subsequent changes in such financial obligation;
- 2036 (5) a statement describing the right of the participant:
- 191 288. (a) to cancel the agreement within 14 days of entering into the agreement without penalty and with the right to recover any moneys which he had paid to or for the benefit of the promoter or any of the promoters or any other participant in connection with his participation in the trading scheme or paid to any other

participant in accordance with the provisions of the trading scheme and the manner in which that cancellation and recovery are to be effected;

289. (b) within 14 days of entering into the agreement, to return to an address specified in the agreement, which must be an address in the United Kingdom, any goods the participant has purchased within that period under the trading scheme and which remain unsold, provided that such unsold goods remain in the condition in which they were in at the time of purchase, whether or not their external wrappings have been broken, and to recover any moneys paid in respect of such goods;
290. (c) within 14 days of entering into the agreement, to cancel any services ordered within that period under the trading scheme and to recover any moneys paid in respect of such services not yet supplied to the participant,

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- 2037 and that the promoter or any other person who has supplied goods to the participant under the trading scheme is not entitled to make a handling charge in respect of goods returned under head (5)(b) above or services cancelled under head (5)(c) above;
- 2038 (6) a statement describing the rights of the participant to terminate the agreement at any time without penalty by giving 14 days' written notice to the promoter or any of the promoters at an address which is specified in the agreement;
- 2039 (7) a statement describing the rights of the participant following termination of the agreement by the promoter or the participant³;
- 2040 (8) the prescribed written warnings⁴;
- 2041 (9) a statement setting out the conditions under which the participant is entitled to return goods to the promoter or any promoters or any other participant⁵;
- 2042 (10) a statement setting out the conditions when commission already paid by the promoter or another participant will be recoverable from the participant⁶;
- 2043 (11) where the agreement comprises more than one document, a statement setting out all documents which form part of the contract between the parties and that those documents form the entire agreement between the parties⁷.

1 le the agreement referred to in the Trading Schemes Regulations 1997, SI 1997/30, reg 4: see PARA 856 ante. For the meaning of 'trading scheme' see PARA 855 note 2 ante.

2 For the meaning of 'participant' see PARA 855 note 1 ante.

3 le as set out in the Trading Schemes Regulations 1997, SI 1997/30.

4 The prescribed written warnings are set out in *ibid* reg 5, Sch 2 Pts I, II, and are as follows:

62 (1) It is illegal for a promoter or a participant in a trading scheme to persuade anyone to make a payment by promising benefits from getting others to join a scheme.

63 (2) Do not be misled by claims that high earnings are easily achieved.

64 (3) If you sign this contract, you have 14 days in which to cancel and get your money back.

The words of the written warnings must be easily legible and the words in head (3) *supra* must be printed immediately above the space for the participant's signature: see reg 5(h).

5 The statement must include at least the rights conferred on the participant by *ibid* reg 6 (see PARA 858 post) and must include an address in the United Kingdom to which such goods can be returned: reg 5(i).

6 The statement must include at least the rights conferred on the participant by *ibid* reg 9 (see PARA 861 post): reg 5(j).

7 *Ibid* reg 5.

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858. Right to return goods to promoter on termination.

The rights of the participant¹ to return goods are that, if a participant or the promoter or any of the promoters terminates an agreement which contains all the terms of the trading scheme² or an agreement entered into in consequence of such an agreement with a participant, the participant has the right to be released from all future contractual obligations and to return to the promoter or any of the promoters or any other participant any goods the participant has purchased within a period of 90 days prior to such termination under the scheme and which remain unsold and to recover from the promoter or such other participant who supplied the goods:

- 2044 (1) where the participant has terminated the agreement, the price (inclusive of VAT) which the participant paid for them less, in the case of any goods the condition of which has deteriorated due to an act or default on the part of the participant, an amount equal to the diminution in their value resulting from such deterioration, and a reasonable charge;
- 2045 (2) where the promoter or any of the promoters or any other participant has terminated the agreement, the price (inclusive of VAT) which the participant paid for them together with any costs incurred by the participant for returning the goods to the promoter or any other participant;
- 2046 (3) on terms whereby the purchase price is payable on delivery of the goods or, if the goods are already held by the promoter or any of the promoters, forthwith; and
- 2047 (4) on terms whereby the goods not already held by the promoter or any of the promoters will be delivered within 21 days of such termination at the promoter's expense to the address stated in the agreement³.

Where, however, an agreement which contains all the terms of the trading scheme⁴ contains an obligation on the participant not to compete with the business of the promoter after termination of such agreement, that non-competition provision continues in force after the date of termination⁵.

¹ I.e. under the Trading Schemes Regulations 1997, SI 1997/30, reg 5(i): see PARA 857 head (9) ante. For the meaning of 'participant' see PARA 855 note 1 ante.

² I.e. an agreement referred to in *ibid* reg 4: see PARA 856 ante. For the meaning of 'trading scheme' see PARA 855 note 2 ante.

³ *Ibid* reg 6(1). As to VAT generally see VALUE ADDED TAX.

⁴ See note 2 *supra*.

⁵ Trading Schemes Regulations 1997, SI 1997/30, reg 6(2).

CIRCUMSTANCES/(xxvi) Pyramid Selling and similar Trading Schemes/859. Securities and guarantees.

859. Securities and guarantees.

A promoter of, or a participant¹ in, a trading scheme² must not accept from a participant any guarantee or security³ in whatever form in respect of goods or services supplied or to be supplied or in respect of the payment of the price for goods or services supplied or to be supplied or an undertaking to provide such a guarantee or such security unless the creditor or a promoter or other supplier who is not a creditor has agreed in writing to refund the amount of that payment to the debtor on his returning the relevant goods in an undamaged condition to the creditor or to any promoter or supplier⁴.

1 For the meaning of 'participant' see PARA 855 note 1 ante.

2 For the meaning of 'trading scheme' see PARA 855 note 2 ante.

3 For these purposes, 'security' means mortgage, charge, pledge, bond, debenture, indemnity, guarantee, bill, note or other right provided by the participant, or at his request, express or implied, to secure the carrying out of the obligations of the participant under an agreement referred to in the Trading Schemes Regulations 1997, SI 1997/30, reg 4 (see PARA 856 ante): reg 2.

4 Ibid reg 7.

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860. Supply of goods and services.

A promoter of, or a participant¹ in, a trading scheme² is not to make a supply of goods or services to the participant unless, in respect of every supply of goods or services under a trading scheme, the promoter or participant has provided the participant to whom the goods are supplied or to be supplied with an adequate record³ of the transaction in respect of which payment is due from that participant⁴.

1 For the meaning of 'participant' see PARA 855 note 1 ante.

2 For the meaning of 'trading scheme' see PARA 855 note 2 ante.

3 For these purposes, an itemised order form, invoice or receipt constitutes an adequate record: Trading Schemes Regulations 1997, SI 1997/30, reg 8.

4 Ibid reg 8.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxvi) Pyramid Selling and similar Trading Schemes/861. Recovery of commission.

861. Recovery of commission.

The right to recover commission¹ is the right to retain, after termination of an agreement which contains all the terms of the trading scheme² or any agreement made thereunder, any commission paid to the participant³ under a trading scheme unless:

- 2048 (1) the commission was paid in respect of goods returned to the promoter or another participant who paid the commission;
- 2049 (2) the promoter has refunded all moneys due to the participant under the agreement⁴ in respect of goods returned to him by the participant;
- 2050 (3) the commission payment is claimed with 120 days of the date of having been made;
- 2051 (4) the promoter has entered into an agreement with the participant which complies with the statutory requirements⁵ and that agreement, and any subsequent agreement, contains a statement describing when commission becomes repayable to the promoter and the terms on which recovery of that payment may be made; and
- 2052 (5) the promoter recovers the commission payment in accordance with the terms referred to in head (4) above⁶.

1 Ie the right referred to in the Trading Schemes Regulations 1997, SI 1997/30, reg 5(j): see PARA 857 head (10) ante.

2 Ie an agreement referred to in ibid reg 4: see PARA 856 ante. For the meaning of 'trading scheme' see PARA 855 note 2 ante.

3 For the meaning of 'participant' see PARA 855 note 1 ante.

4 Ie the agreement referred to in the Trading Schemes Regulations 1997, SI 1997/30, reg 4.

5 Ie ibid reg 5: see PARA 857 ante.

6 Ibid reg 9.

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862. Liability limit.

A promoter of, or a participant¹ in, a trading scheme² must not accept from a participant joining the scheme any payment or an undertaking to make a payment of any sum exceeding £200 unless seven days have expired from the making of the agreement relating to goods or services supplied or to be supplied under that agreement to the participant by the promoter or any other participant under the trading scheme³.

No undertaking to make any payment given by a participant in a trading scheme involving a contravention of these provisions is enforceable against him in any civil proceedings or recoverable in any other way⁴.

1 For the meaning of 'participant' see PARA 855 note 1 ante.

2 For the meaning of 'trading scheme' see PARA 855 note 2 ante.

3 Trading Schemes Regulations 1997, SI 1997/30, reg 10.

4 Ibid reg 11(2).

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863. Civil consequences of contraventions.

Where a participant¹ makes a payment to or for the benefit of a promoter of, or to a participant in, a trading scheme² and the acceptance of that payment involves a contravention of the provisions relating to trading schemes³, that contravention is actionable at the suit of the participant who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty⁴.

A participant in a trading scheme is under no liability to pay for any goods or services, as the case may be:

- 2053 (1) supplied to him in circumstances involving a contravention of the provisions relating to trading schemes⁵; or
- 2054 (2) unless it was clearly explained to him by a promoter or a participant supplying or seeking to supply goods or services under the trading scheme, before he purchased the goods or services, that he had a free choice whether or not to purchase those goods or services and the purchase price for those goods or services and his annual financial obligation under the agreement were clearly stated⁶.

1 For the meaning of 'participant' see PARA 855 note 1 ante.

2 For the meaning of 'trading scheme' see PARA 855 note 2 ante.

3 I.e. the Trading Schemes Regulations 1997, SI 1997/30: see PARA 855 et seq ante.

4 Ibid reg 11(1). As to the sanctions and remedies for breach of statutory duty see STATUTES vol 44(1) (Reissue) PARA 1353 et seq; and as to claims for damages for breach of statutory duty see TORT vol 45(2) (Reissue) PARA 395 et seq.

5 I.e. ibid regs 4-10: see PARA 856 et seq ante.

6 Ibid reg 11(3).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxvi) Pyramid Selling and similar Trading Schemes/864. Offences.

864. Offences.

Any person who issues, circulates or distributes, or causes another person to issue, circulate or distribute, an advertisement, prospectus, circular or notice in contravention of regulations relating to trading schemes¹ is guilty of an offence². Where a person is charged with such an offence in respect of an advertisement, it is a defence for him to prove that he is a person whose business it is to publish or arrange for the publication of advertisements, and that he

received the advertisement for publication in the ordinary course of business and did not know, and had no reason to suspect, that its publication would amount to such an offence³.

Any person who contravenes any other relevant regulations⁴ is also guilty of an offence⁵.

If any person who is a participant⁶ in a trading scheme or who has applied or been invited to become a participant in a trading scheme:

2055 (1) makes any payment to or for the benefit⁷ of the promoter⁸ or, if there is more than one, any of the promoters⁸, or to or for the benefit of a participant in the trading scheme; and

2056 (2) is induced⁹ to make that payment by reason that the prospect is held out to him of receiving payments or other benefits in respect of the introduction of other persons who become participants in the trading scheme,

any person to whom or for whose benefit the payment is made is guilty of an offence¹⁰.

If the promoter or any of the promoters of a trading scheme or any other person acting in accordance with a trading scheme, by holding out to any person such a prospect as is mentioned in head (2) above, attempts to induce¹¹ him:

2057 (a) if he is already a participant in the trading scheme, to make any payment to or for the benefit of the promoter or any of the promoters, or to or for the benefit of a participant in the trading scheme; or

2058 (b) if he is not already a participant in the trading scheme, to become such a participant and to make any such payment as is mentioned in head (a) above,

the person attempting to induce him to make that payment is guilty of an offence¹².

A person guilty of any of the above offences is liable to a penalty¹³.

Various provisions as to enforcement of orders made generally under the Fair Trading Act 1973 apply with modifications for the purposes of the provisions relating to pyramid selling and similar trading schemes¹⁴.

1 The regulations made under the Fair Trading Act 1973 s 119(1) (as amended): see PARA 853 note 11 ante. For the meaning of 'trading scheme' see PARA 853 note 1 ante.

2 Ibid s 120(1) (amended by the Trading Schemes Act 1996 s 2(2)). Nothing in the Fair Trading Act 1973 s 120(3)-(6) (see the text and notes 6-12 infra) is to be construed as limiting the circumstances in which the commission of any act may constitute an offence under s 120(1) (as amended) or s 120(2) (see the text and notes 4-5 infra): s 120(7).

3 Ibid s 121(1).

4 The regulations made under ibid s 119(2): see PARA 853 note 11 ante.

5 Ibid s 120(2). See also note 2 supra.

6 For the meaning of 'participant' see PARA 853 note 3 ante.

7 For these purposes, any reference to the making of a payment to or for the benefit of a person is to be construed as including the making of a payment partly to or for the benefit of that person and partly to or for the benefit of one or more other persons: Fair Trading Act 1973 s 120(8).

8 For the meanings of 'promoter' and 'promoters' see PARA 853 ante.

9 For these purposes, and for the purposes of the Fair Trading Act 1973 s 120(4) (see the text and notes 11-12 infra), in determining whether an inducement or attempt to induce is made by holding out such a prospect, it is sufficient if such a prospect constitutes or would constitute part of the inducement: s 120(5).

10 Ibid s 120(3). See also note 2 supra. Where the person by whom an offence is committed under s 120(3) or s 120(4) (see the text and notes 11-12 infra) is not the sole promoter of the trading scheme, any other person who is the promoter or one of the promoters is also guilty of the offence: s 120(6). Where a person is charged with an offence by virtue of s 120(6), it is a defence for him to prove that the trading scheme to which the charge relates was in operation before 14 September 1973 and that the act constituting the offence was committed without his consent or connivance: s 121(2).

11 See note 9 supra.

12 Fair Trading Act 1973 s 120(4). See also notes 2, 10 supra.

13 Ibid s 122. The penalty on conviction on indictment is imprisonment for a term not exceeding two years or a fine, or both, and on summary conviction is imprisonment for a term not exceeding three months or a fine not exceeding the prescribed sum, or both: see s 122. As to the prescribed sum see PARA 498 note 2 ante. No prosecution for an offence under the Fair Trading Act 1973 may be commenced after the expiration of three years from its commission or one year from its discovery by the prosecutor, whichever is the earlier (s 129(1)); and, notwithstanding anything in the Magistrates' Courts Act 1980 s 127(1) (general provisions as to limitation of time: see MAGISTRATES vol 29(2) (Reissue) PARA 589), a magistrates' court may try an information for an offence under the Fair Trading Act 1973 if the information was laid within 12 months from the commission of the offence (s 129(2) (amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 118)).

14 See the Fair Trading Act 1973 s 123. The provisions of ss 29-32 (as amended) have effect for the purposes of Pt XI (ss 118-123) (as amended) as if: (1) references to a weights and measures authority or a duly authorised officer of such an authority were omitted; and (2) any reference to an offence under s 23 (as amended) were a reference to an offence under Pt XI (as amended): s 123(1).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxvii) Recreational Craft/865. In general.

(xxvii) Recreational Craft

865. In general.

Specific provisions of the Recreational Craft Regulations 2004 apply to products¹ of the following descriptions².

Provisions with regard to design and construction apply to:

- 2059 (1) recreational craft (that is to say any boat of any type regardless of its means of propulsion³, whose hull, when measured in accordance with the appropriate harmonised standards⁴, is not less than 2.5 metres and not more than 24 metres in length and which is intended for sports or leisure purposes), and partly completed boats⁵;
- 2060 (2) personal watercraft⁶; and
- 2061 (3) components⁷.

Provisions with regard to exhaust emissions apply to:

- 2062 (a) propulsion engines⁸ which are installed or specifically intended for installation on or in recreational craft and personal watercraft; and
- 2063 (b) propulsion engines installed on or in such craft that are subject to a major engine modification⁹.

Provisions with regard to noise emissions apply to:

- 2064 (i) recreational craft with stern drive engines without integral exhausts or inboard propulsion engine installations;
- 2065 (ii) recreational craft with stern drive engines without integral exhausts or with inboard propulsion installations which are subject to a major craft conversion¹⁰ and subsequently placed on the Community¹¹ market within five years following conversion;
- 2066 (iii) personal watercraft; and
- 2067 (iv) outboard engines and stern drive engines with integral exhausts intended for installation on recreational craft¹².

No person is to place on the market any product unless the following requirements have been complied with in relation to it¹³:

- 2068 (A) it must satisfy the essential requirements¹⁴, that is to say the general requirements¹⁵, the integrity and structural requirements¹⁶, the handling characteristics¹⁷ and the installation requirements¹⁸, which are applicable to that product¹⁹;
 - 2069 (B) except in the case of any partly completed recreational craft:
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- 291. (aa) the appropriate conformity assessment procedure must have been carried out by the manufacturer²⁰ or by the manufacturer's authorised representative²¹ established in the Community; but, in the case of post-construction assessment for recreational craft, if neither the manufacturer nor his authorised representative established within the Community fulfils the responsibilities for the product's conformity, these responsibilities can be assumed by any person established within the Community who places the product on the market under his own responsibility; or
 - 292. (bb) where appropriate, the CE marking²² has been duly affixed to indicate conformity²³;
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- 2070 (c) in the case of any partly completed recreational craft, the manufacturer or his authorised representative established in the Community or the person responsible for the placing on the market must have declared that it is intended to be completed by others²⁴;
 - 2071 (d) when correctly constructed, maintained and used in accordance with its intended purpose, it must not endanger the safety and health of persons, property or the environment²⁵.

Recreational craft, personal watercraft, components and engines which are regarded as meeting the essential safety requirements or are presumed to do so²⁶ must bear the CE marking in a visible, legible and indelible form, affixed by either the manufacturer or his authorised representative in the Community²⁷. No person is to affix on any recreational craft or component any markings or inscriptions which are likely to mislead third parties with regard to the meaning or the form of the CE marking²⁸.

These provisions do not apply to the showing of any product at any trade fair, exhibition, demonstration or the like, provided that a visible sign clearly indicates that the product in question may not be placed on the market until it has been made to comply with them²⁹.

There are also provisions relating to: the appointment of bodies to carry out conformity assessment procedures and/or surveillance³⁰; the fees which notified bodies may charge in connection with carrying out their functions³¹; the procedure required where a notified body is minded to refuse an EC type-examination certificate³²; enforcement authorities³³ and their powers of enforcement³⁴; offences and penalties³⁵; and the requirement to give information

about a product which does not bear the CE marking or a product not required to bear the CE marking³⁶.

1 'Product' means any product described in the Recreational Craft Regulations 2004, SI 2004/1464, reg 3(1) (see the text and notes 3-12 *infra*): reg 2(1). For exclusions see PARA 866 *post*.

2 *Ibid* reg 3(1). The application of the Recreational Craft Regulations 2004, SI 2004/1464 (as amended) to any recreational craft or partly completed recreational craft is not prevented by the fact that the craft could be used for charter or for recreational boating training when it is placed on the market for recreational purposes: reg 3(2).

The Recreational Craft Regulations 2004, SI 2004/1464 (as amended) do not apply to: (1) any product which is placed on the market before 1 January 2005 (reg 5); or (2) any product referred to in reg 3(1)(a) (see heads (1)-(3) in the text) or any compression ignition or 4-stroke spark ignition engine which is placed on the market on or before 31 December 2005 or any 2-stroke spark ignition engine which is placed on the market on or before 31 December 2006, and which complies with any safety provisions with which it would have been required to comply for it to be placed on the market in the United Kingdom on 16 June 2003 (reg 6(1)). The exclusion provided by reg 6(1) does not apply in the case of any product which: (a) unless required to bear the CE marking pursuant to any other Community obligation, bears the CE marking or an inscription liable to be confused with it; or (b) bears or is accompanied by any other indication, howsoever expressed, that it complies with European Parliament and EC Council Directive 94/25 (OJ L164, 30.6.94, p 15) (as amended) (see PARA 393 *ante*): Recreational Craft Regulations 2004, SI 2004/1464, reg 6(2). As to the CE marking see note 22 *infra*. For the meaning of 'Community obligation' see PARA 483 note 1 *ante*. As to the Community see note 11 *infra*.

The Recreational Craft Regulations 2004, SI 2004/1464 (as amended) implement European Parliament and EC Council Directive 94/25 (OJ L164, 30.6.94, p 15) (as amended) (see PARA 393 *ante*). They revoke the Recreational Craft Regulations 1996, SI 1996/1353 (as amended), except as regards the application of those regulations to: (i) any product (as defined in those regulations) placed on the market (as so defined) prior to 1 January 2005; (ii) any such product to which the Recreational Craft Regulations 2004, SI 2004/1464 (as amended) do not apply by virtue of reg 6; (iii) any such product placed on the market in the European Economic Area (other than in the Community) until such time as reg 2(2)(a) has effect (see note 11 *infra*); and (iv) the appointment or termination of appointment of any notified body for the purposes of the Recreational Craft Regulations 1996, SI 1996/1353 (as amended): Recreational Craft Regulations 2004, SI 2004/1464, reg 1(4). As to the European Economic Area see PARA 368 note 1 *ante*.

3 'Means of propulsion' means the mechanical method by which the craft is driven, in particular marine propellers or waterjet mechanical drive systems: *ibid* reg 2(1).

4 'Harmonised standard' means a technical specification adopted by the European Committee for Standardisation or the European Committee for Electrotechnical Standardisation or both upon a remit from the Commission of the European Communities in accordance with European Parliament and EC Council Directive 98/34 (OJ L204, 21.07.1998, p 37) laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services: Recreational Craft Regulations 2004, SI 2004/1464, reg 2(1).

5 'Partly completed boat' is to be construed in accordance with the definition of 'recreational craft' (see head (1) in the text): *ibid* reg 2(1).

6 'Personal watercraft' means a vessel less than 4 metres in length which uses an internal combustion engine having a water jet pump as its primary source of propulsion and designed to be operated by a person or persons sitting, standing or kneeling on, rather than within the confines of, a hull: *ibid* reg 2(1).

7 *Ibid* reg 3(1)(a). For these purposes, 'component' means any one of the following components, when placed on the Community market and when intended for installation in recreational craft or personal watercraft: (1) ignition-protected equipment for inboard and stern drive engines; (2) start-in gear protection devices for outboard engines; (3) steering wheels, steering mechanisms and cable assemblies; (4) fuel tanks intended for fixed installations and fuel hoses; and (5) prefabricated hatches and portlights: reg 2(1), Sch 2 (reg 2(1) amended by SI 2004/3201).

8 'Propulsion engine' means any spark or compression ignition, internal combustion engine used for propulsion purposes, including 2-stroke and 4-stroke inboard, stern-drive with or without integral exhaust and outboard engines: Recreational Craft Regulations 2004, SI 2004/1464, reg 2(1).

9 *Ibid* reg 3(1)(b). 'Major engine modification' means the modification of an engine which: (1) could potentially cause the engine to exceed the emission limits set out in European Parliament and EC Council Directive 94/25 (OJ L164, 30.6.94, p 15) Annex IB, excluding routine replacement of engine components that do

not alter the emission characteristics; or (2) increases the rated power of the engine by more than 15%: Recreational Craft Regulations 2004, SI 2004/1464, reg 2(1), (2)(b), Sch 1.

10 'Major craft conversion' means a conversion of a craft which: (1) changes the means of propulsion of the craft; (2) involves a major engine modification; or (3) alters the craft to such an extent that it is considered a new craft: *ibid* reg 2(1).

11 Except for the references to the European Communities in the definition of 'the Commission' and in relation to the Official Journal, a reference to the Community includes a reference to the EEA, and a reference to a member state includes a reference to an EEA state: *ibid* reg 2(2)(a) (not yet in force). 'EEA state' means a state which is a contracting party to the EEA Agreement; and 'EEA Agreement' means the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)): Recreational Craft Regulations 2004, SI 2004/1464, reg 2(2)(a) (i)-(iii) (not yet in force). These provisions are to come into force on the date on which the Decision by the EEA Joint Committee by which the application of the amendment of the Directive is extended to the European Economic Area comes into force: see the Recreational Craft Regulations 2004, SI 2004/1464, reg 1(2). As to the EEA Agreement see PARA 386 note 1 ante.

12 Recreational Craft Regulations 2004, SI 2004/1464, reg 3(1)(c).

13 *Ibid* reg 7(1).

14 'Essential requirements' means the requirements in EC Council Directive 94/25 (OJ L164, 30.6.94, p 15) Annex I, which is set out in the Recreational Craft Regulations 2004, SI 2004/1464, Sch 1: reg 2(1).

15 See EC Council Directive 94/25 (OJ L164, 30.6.94, p 15) Annex I para 2.

16 See *ibid* Annex I para 3.

17 See *ibid* Annex I para 4.

18 See *ibid* Annex I para 5.

19 See the Recreational Craft Regulations 2004, SI 2004/1464, reg 7(1), (2)(a). For the purpose of satisfying those requirements: (1) where a transposed harmonised standard covers one or more of the essential requirements, a product which conforms with that standard is presumed to comply with that or, as the case may be, those essential requirements; and (2) in the case of a partly completed recreational craft, it complies with the requirements which apply at the relevant stage of construction: reg 7(1)(a)(i), (ii). 'Transposed harmonised standard' means a standard the reference number of which is published: (a) in the United Kingdom, by the Secretary of State in such manner as he considers appropriate; or (b) in another member state of the Community, and which corresponds to a harmonised standard the reference number of which is published in the Official Journal of the European Communities: reg 2(1). As to the Secretary of State see PARA 15 ante.

20 'Manufacturer' means any person who designs and manufactures a product or who has such a product designed and/or manufactured with a view to placing it on the market on his own behalf, and, in respect of a product which requires a declaration specified in European Parliament and EC Council Directive 94/25 (OJ L164, 30.6.94, p 15) Annex III (which is set out in the Recreational Craft Regulations 2004, SI 2004/1464, Sch 3), includes the builder of that product: reg 2(1), (2)(b).

21 'Authorised representative' means any person established in the Community who has received a written mandate from the manufacturer to act on his behalf with regard to the latter's obligation under European Parliament and EC Council Directive 94/25 (OJ L164, 30.6.94, p 15): Recreational Craft Regulations 2004, SI 2004/1464, reg 2(1).

22 This applies in the case of any of the products specified in *ibid* reg 8(1) (see the text to note 26 *infra*): reg 7(2)(b)(ii). 'CE marking' means the CE conformity marking referred to in reg 8 consisting of the initials 'CE' taking the form of the specimen given in Sch 4: reg 2(1).

23 See *ibid* reg 7(1), (2)(b). As to components intended to be incorporated into a recreational craft in respect of which compliance with the appropriate conformity assessment procedure is not required see reg 7(3); and as to conformity assessments see reg 10 (amended by SI 2004/3201).

24 See the Recreational Craft Regulations 2004, SI 2004/1464, reg 7(1), (2)(c).

25 See *ibid* reg 7(1), (2)(d).

26 *Ibid* reg 8(1).

27 Ibid reg 8(2). As to the affixing of the CE marking and the additional requirements relating to the CE marking see reg 8(3)-(9).

28 Ibid reg 9(1). Without prejudice to reg 9(1), nothing in the Recreational Craft Regulations 2004, SI 2004/1464 (as amended) prohibits the affixing on any product, or on its packaging, of any other markings, provided that the visibility and legibility of the CE marking are not thereby reduced: reg 9(2).

29 Ibid reg 3(3).

30 See ibid regs 11, 12.

31 See ibid reg 13.

32 See ibid reg 14.

33 See ibid reg 15.

34 See ibid reg 16, Sch 17 (Sch 17 amended by SI 2004/3201).

35 See the Recreational Craft Regulations 2004, SI 2004/1464, reg 17. As to commencement of proceedings see reg 21. As to the defence of due diligence see reg 18. As to the liability of persons other than the principal offender, and offences by bodies corporate, see reg 19.

36 See ibid reg 20.

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866. Excluded products.

For the purposes of the Recreational Craft Regulations 2004¹, the following are not products²:

2072 (1) for the purposes of the provisions as to design and construction³:

195

293. (a) craft intended solely for racing, including rowing racing boats and training rowing boats labelled as such by the manufacturer⁴;

294. (b) canoes, kayaks, gondolas and pedalos;

295. (c) sailing surfboards;

296. (d) surfboards, including powered surfboards;

297. (e) original, and individual replicas of, historical craft designed before 1950, built predominantly with the original materials and labelled as such by the manufacturer;

298. (f) experimental craft, provided that they are not subsequently placed on the Community market;

299. (g) craft built for own use, provided that they are not subsequently placed on the Community market during a period of five years;

300. (h) craft specifically intended to be crewed and to carry passengers for commercial purposes, in particular those defined in the Directive laying down technical requirements for inland waterway vessels⁵, regardless of the number of passengers;

301. (i) submersibles;

302. (j) air-cushion vehicles;

303. (k) hydrofoils; and

304. (l) external combustion steam powered craft, fuelled by coal, coke, wood, oil or gas⁶;

196

2073 (2) for the purposes of the provisions as to exhaust emissions⁷:
197

305. (a) propulsion engines installed or specifically intended for installation on the following: (i) craft intended solely for racing and labelled as such by the manufacturer; (ii) experimental craft, provided that they are not subsequently placed on the Community market; (iii) craft specifically intended to be crewed and to carry passengers for commercial purposes⁸, in particular those defined in the Directive laying down technical requirements for inland waterway vessels, regardless of the number of passengers; (iv) submersibles; (v) air cushion vehicles; or (vi) hydrofoils;

306. (b) original and individual replicas of historical propulsion engines, which are based on a pre-1950 design, not produced in series and fitted on craft referred to in heads (1)(e) and (1)(g) above; and

307. (c) propulsion engines built for own use provided that they are not subsequently placed on the Community market during a period of five years⁹;

198

2074 (3) for the purposes of the provisions as to noise emissions¹⁰:

199

308. (a) all craft referred to in head (2) above; and

309. (b) craft built for own use, provided that they are not subsequently placed on the Community market during a period of five years¹¹.

200

1 le the Recreational Craft Regulations 2004, SI 2004/1464 (as amended): see PARA 865 ante.

2 Ibid reg 4. For the meaning of 'product' see PARA 865 note 1 ante.

3 le the products referred to in ibid reg 3(1)(a): see PARA 865 heads (1)-(3) ante.

4 For the meaning of 'manufacturer' see PARA 865 note 20 ante.

5 le EC Council Directive 82/714 (OJ L301, 28.10.82, p 1).

6 Recreational Craft Regulations 2004, SI 2004/1464, reg 4(a).

7 le the products referred to in ibid reg 3(1)(b): see PARA 865 heads (a), (b) ante.

8 This is without prejudice to ibid reg 3(2) (see PARA 865 note 2 ante).

9 Ibid reg 4(b).

10 le the products referred to in ibid reg 3(1)(c): see PARA 865 heads (i)-(iv) ante.

11 Ibid reg 4(c).

UPDATE

866 Excluded products

NOTE 5--EC Council Directive 82/714: repealed (from 30 December 2008) and replaced (member state implementing measures to be in place by 30 December 2008) by European Parliament and EC Council Directive 2006/87 (OJ L389 30.12.2006 p 1) (as amended).

CIRCUMSTANCES/(xxviii) Timeshare Agreements/A. IN GENERAL/867. Application of provisions.

(xxviii) Timeshare Agreements

A. IN GENERAL

867. Application of provisions.

The Timeshare Act 1992 applies to:

- 2075 (1) any timeshare agreement¹ or timeshare credit agreement² if the agreement is to any extent governed by the law of the United Kingdom or of a part of the United Kingdom or, when the agreement is entered into, one or both of the parties are in the United Kingdom³; and
- 2076 (2) any timeshare agreement if the relevant accommodation⁴ is situated in the United Kingdom, the relevant accommodation is situated in another EEA state⁵ and the parties to the agreement are to any extent subject to the jurisdiction of any court in the United Kingdom in relation to the agreement, or, when the agreement is entered into, the offeree⁶ is ordinarily resident⁷ in the United Kingdom and the relevant accommodation is situated in another EEA state⁸.

The Timeshare Act 1992 came into force on 12 October 1992⁹ and has effect in relation to any timeshare agreement or timeshare credit agreement notwithstanding any agreement or notice¹⁰.

1 For the meaning of 'timeshare agreement' see PARA 868 post.

2 For the meaning of 'timeshare credit agreement' see PARA 869 post.

3 Timeshare Act 1992 s 1(7). As to the enforcement of the Timeshare Act 1992 see the Enterprise Act 2002 Pt 8 (ss 210-236) (as amended); and COMPETITION vol 18 (2009) PARAS 339-360. The subject matter of the Timeshare Act 1992 is a reserved matter for the purposes of the Scotland Act 1998 which, by virtue of s 29(2) (b), is outside the legislative competence of the Scottish Parliament: see s 30, Sch 5 Pt II head C para C7(f), Pt III para 5. As to the restrictions on the ability of the Scottish Parliament to modify the law on reserved matters see s 29, Sch 4 Pt I paras 2, 3.

4 For these purposes, 'the relevant accommodation' means: (1) the accommodation which is the subject of the agreement; or (2) some or all of the accommodation in the pool of accommodation which is the subject of the agreement, as the case may be: Timeshare Act 1992 s 1(7B) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 2(1), (8)).

5 For these purposes, 'EEA state' means a state which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)), adjusted by the Protocol (Brussels, 17 March 1993 (OJ L1, 3.1.94, p 572)) (the 'EEA Agreement'): Timeshare Act 1992 s 12(6) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 2(9)). As to the European Economic Area and the EEA Agreement see PARA 386 note 1 ante. The amendments made to the Timeshare Act 1992 by the Timeshare Regulations 1997, SI 1997/1081, implement European Parliament and Council Directive 94/47 (OJ L280, 29.10.94, p 83) (see PARA 393 ante). For a view that there is a lack of uniformity in the implementation of EC Council Directive 94/47 (OJ L280, 29.10.94, p 83) throughout the European Community see T Bourne 'Changing Times?' (1998) 148 NLJ 654. See also Case C-423/97 *Travel-Vac SL v Antelm Sanchis* [1999] All ER (EC) 656, [1999] ECR I-2195, ECJ (cited in PARA 393 notes 8, 27 ante).

6 For the meaning of references to the offeree see PARA 868 note 1 post.

7 For the meaning of 'ordinary residence' see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 58.

8 Timeshare Act 1992 s 1(7A) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 2(1), (8); and amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 1(1), (3)).

9 Timeshare Act 1992 s 13(2); Timeshare Act 1992 (Commencement) Order 1992, SI 1992/1941, art 2.

10 Timeshare Act 1992 s 12(4).

UPDATE

867 Application of provisions

NOTE 5--EC Council Directive 94/47 replaced (member state implementing measures to be in force by 23 February 2011): European Parliament and EC Council Regulation 2009/122 (OJ L33, 3.2.2009, p 10); references to the repealed directive should be construed as references to Directive 2009/122 and read in accordance with the correlation table in Annex VI: art 18.

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868. Meaning of 'timeshare agreement'.

'Timeshare agreement' means an agreement under which timeshare rights are conferred, or purport to be conferred, on any person¹. 'Timeshare rights' means rights by virtue of which a person becomes or will become² a timeshare user³, being rights exercisable during a period of not less than three years, other than rights under a contract of employment⁴ or a policy of insurance or such other rights as may be prescribed⁵.

No timeshare agreement may be cancelled⁶ under the Consumer Credit Act 1974⁷.

1 Timeshare Act 1992 s 1(4) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (3)). In relation to a timeshare agreement, references to the offeree are references to the person on whom timeshare rights are conferred, or purport to be conferred, and references to the offeror are references to the other party to the agreement; and, in relation to any time before the agreement is entered into, references in the Timeshare Act 1992 to the offeree or the offeror are references to the persons who become the offeree and offeror when it is entered into: Timeshare Act 1992 s 1(4).

2 For the purposes of *ibid* s 1A (as added) (see PARA 870 post), s 1B (as added) (see PARA 871 post), s 1C (as added) (see PARA 872 post), s 1D (as added) (see PARA 873 post), s 1E (as added) (see PARA 874 post), s 2(2B)-(2E) (as added) (see PARA 875 post), s 3(3) (see PARA 876 post), s 5A (as added and amended) (see PARA 878 post), s 5B (as added) (see PARA 879 post) and s 6A (as added) (see PARA 881 post), s 1(1) (as amended) is to be construed as if this referred to a person becoming a timeshare user on payment of a global price: see s 1(3A) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 2(1), (4); and amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 1(1), (2)).

3 For these purposes, 'timeshare users' means a class of persons all of whom have rights to use, or participate in arrangements under which they may use, timeshare accommodation, or accommodation within a pool of accommodation to which that accommodation belongs, for a specified or ascertainable period of the year: Timeshare Act 1992 s 1(1)(a) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 2(1), (2)). 'Timeshare accommodation' means any living accommodation, in the United Kingdom or elsewhere, used or intended to be used, wholly or partly, for leisure purposes by timeshare users: Timeshare Act 1992 s 1(1)(a) (as so amended). 'Accommodation' means accommodation in a building or in a caravan, as defined in the Caravan Sites and Control of Development Act 1960 s 29(1) (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1033): Timeshare Act 1992 s 1(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (2)).

4 For these purposes, 'contract of employment' has the same meaning as in the Employment Rights Act 1996 (see EMPLOYMENT vol 39 (2009) PARA 2): Timeshare Act 1992 s 1(3)(b) (amended by the Employment Rights Act 1996 s 240, Sch 1 para 53(a)).

5 Timeshare Act 1992 s 1(1)(b), (3) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 2(1), (3)). At the date at which this volume states the law no such other rights had been prescribed. For these purposes, 'prescribed' means prescribed by an order; and 'order' means an order made by the Secretary of State: Timeshare Act 1992 s 12(6). Any such order may make different provision for different cases or circumstances: s 12(7). Any power under the Timeshare Act 1992 to make an order is exercisable by statutory instrument; and a statutory instrument containing an order under the Act, other than an order made for the purpose of s 13(2) (ie an order bringing the Timeshare Act 1992 into force: see PARA 867 ante), is subject to annulment in pursuance of a resolution of either House of Parliament: s 12(8). As to the Secretary of State see PARA 15 ante.

6 Ie under the Consumer Credit Act 1974 s 67: see CONSUMER CREDIT vol 9(1) (Reissue) PARA 184.

7 Timeshare Act 1992 s 1(6A) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 2(1), (7)).

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869. Meaning of 'timeshare credit agreement'.

'Timeshare credit agreement' means an agreement, not being a timeshare agreement¹, under which credit² which fully or partly covers the price under a timeshare agreement is granted by the offeror³ or by another person, under an arrangement between that person and the offeror⁴.

No timeshare credit agreement may be cancelled⁵ under the Consumer Credit Act 1974⁶.

1 For the meaning of 'timeshare agreement' see PARA 868 ante.

2 For these purposes, 'credit' includes a cash loan and any other form of financial accommodation: Timeshare Act 1992 s 12(6). A person who grants credit under a timeshare credit agreement is referred to in the Timeshare Act 1992 as 'the creditor': see s 1(5) (substituted by the Timeshare Regulations 1997, SI 1997/1081, reg 2(1), (5)).

3 For the meaning of references to the offeror see PARA 868 note 1 ante.

4 Timeshare Act 1992 s 1(5) (as substituted: see note 2 supra).

5 Ie under the Consumer Credit Act 1974 s 67: see CONSUMER CREDIT vol 9(1) (Reissue) PARA 184.

6 Timeshare Act 1992 s 1(6A) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 2(1), (7)).

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B. MAKING OF TIMESHARE AGREEMENTS AND TIMESHARE CREDIT AGREEMENTS

870. Obligation to provide information.

A person who proposes in the course of a business to enter into a timeshare agreement¹ as offeror² (an 'operator') must provide any person who requests information on the proposed accommodation³ with a document which must provide:

- 2077 (1) a general description of the proposed accommodation;
- 2078 (2) certain of the information, which may be brief, which must be included in a timeshare agreement⁴;
- 2079 (3) information, which may be brief, on the statutory rights to cancel a timeshare agreement and the effect of cancellation on any related timeshare credit agreement⁵ to which the statutory provisions apply; and
- 2080 (4) information on how further information may be obtained⁶.

If a person contravenes these provisions, he is guilty of an offence⁷.

Where an operator:

- 2081 (a) provides a person with a document containing information on the proposed accommodation; and
- 2082 (b) subsequently enters as offeror into a timeshare agreement⁸ the subject of which is the proposed accommodation,

then, if the offeree⁹ under the agreement is an individual who is not acting in the course of a business and has received such a document, any information contained in that document which was, or would on request have been, required to be provided under head (2) above is deemed to be a term of the agreement¹⁰. If, in such a case, a change in the information contained in the document is communicated to the offeree in writing before the timeshare agreement is entered into, the change is deemed¹¹ always to have been incorporated in the information contained in the document if the change arises from circumstances beyond the offeror's control or the offeror and the offeree expressly agree to the change before entering into the timeshare agreement, and the change is expressly mentioned in the timeshare agreement¹².

These provisions only apply if:

- 2083 (i) the accommodation which is the subject of the proposed agreement or agreement is accommodation in a building; or
- 2084 (ii) some or all of the accommodation in the pool of accommodation which is the subject of the proposed agreement or agreement is accommodation in a building,

as the case may be¹³.

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act¹⁴.

1 I.e. a timeshare agreement to which the Timeshare Act 1992 applies: see PARA 867 ante. For the meaning of 'timeshare agreement' see PARA 868 ante.

2 For the meaning of references to the offeror see PARA 868 note 1 ante.

3 For these purposes, 'the proposed accommodation' means: (1) the accommodation which is the subject of the proposed agreement; or (2) the accommodation in the pool of accommodation which is the subject of the proposed agreement, as the case may be: Timeshare Act 1992 s 1A(7) (s 1A added by the Timeshare Regulations 1997, SI 1997/1081, reg 3(1)).

4 le the matters referred to in the Timeshare Act 1992 s 1C(1), Sch 1 paras (a)-(g), (i) (as added): see PARA 872 heads (1)-(7), (9) post.

5 For these purposes, 'related timeshare credit agreement' means a timeshare credit agreement under which credit which fully or partly covers the price under the timeshare agreement is granted: *ibid* s 1A(2A) (s 1A as added (see note 3 *supra*); and s 1A(2A) added by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 2(1), (4)).

6 Timeshare Act 1992 s 1A(1), (2) (as added (see note 3 *supra*); and amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 2(2)). The obligation to comply with the Timeshare Act 1992 s 1A(1) (as added and amended) is a duty owed by the person who proposes to enter into a timeshare agreement to any person whom he is required to provide with a document under s 1A(1) (as added and amended); and a contravention of the obligation is actionable accordingly: s 10A(1) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 12).

A person who is required to provide a document under the Timeshare Act 1992 s 1A(1) (as added and amended) contravenes s 1A(1) (as added and amended) if he does not provide a document which complies with s 1D(3), (4) (as added) (see the text and notes 8-10 *infra*), so far as applicable: see s 1D(2) (as added); and PARA 873 post.

7 *Ibid* s 1A(6) (as added: see note 3 *supra*). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 1A(6) (as so added). As to the statutory maximum see PARA 401 note 31 *ante*. As to the time limits for prosecutions see PARA 886 post. As to the defence of due diligence see PARA 884 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 885 post. As to the powers of officers of an enforcement authority see PARA 883 post.

8 See note 1 *supra*.

9 For the meaning of references to the offeree see PARA 868 note 1 *ante*.

10 Timeshare Act 1992 s 1A(3), (4) (as added: see note 3 *supra*).

11 le for the purposes of the Timeshare Act 1992.

12 *Ibid* s 1A(5) (as added: see note 3 *supra*).

13 *Ibid* s 1A(8) (as added: see note 3 *supra*).

14 *Ibid* s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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871. Advertising of timeshare rights.

No person is to advertise timeshare rights¹ in the course of a business unless the advertisement indicates the possibility of obtaining a document containing information about the timeshare rights² and where it may be obtained³.

If a person contravenes these provisions, he is guilty of an offence⁴. In proceedings against a person for such an offence it is a defence for that person to show that at the time when he advertised the timeshare rights he did not know, and had no reasonable cause to suspect, that he was advertising timeshare rights or he had reasonable cause to believe that the advertisement complied with the above requirements⁵.

These provisions apply only if:

2085 (1) the timeshare accommodation⁶ concerned is, or appears from the advertisement to be, accommodation in a building; or

2086 (2) some or all of the accommodation in the pool of accommodation concerned is, or appears from the advertisement to be, accommodation in a building,

as the case may be⁷.

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act⁸.

1 For the meaning of 'timeshare rights' see PARA 868 ante.

2 Ie the document referred to in the Timeshare Act 1992 s 1A(1) (as added): see PARA 870 ante.

3 Ibid s 1B(1) (s 1B added by the Timeshare Regulations 1997, SI 1997/1081, reg 4).

4 Timeshare Act 1992 s 1B(2) (as added: see note 3 supra). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 1B(2) (as so added). As to the statutory maximum see PARA 401 note 31 ante. As to the time limits for prosecutions see PARA 886 post. As to the defence of due diligence see PARA 884 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 885 post. As to the powers of officers of an enforcement authority see PARA 883 post.

5 Ibid s 1B(3) (as added: see note 3 supra).

6 For the meaning of 'timeshare accommodation' see PARA 868 note 3 ante.

7 Timeshare Act 1992 s 1B(4) (as added: see note 3 supra).

8 Ibid s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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872. Obligatory terms of timeshare agreements.

A person must not in the course of a business enter into a timeshare agreement¹ as offeror² unless the agreement includes, as terms set out in it, the following information:

2087 (1) the identities and domiciles³ of the parties, including specific information on the offeror's legal status at the time of the conclusion of the agreement and the identity and domicile of the owner;

2088 (2) the exact nature of the right which is the subject of the agreement and, if the accommodation concerned, or any of the accommodation in the pool of accommodation concerned, is situated in the territory of an EEA state⁴, a clause setting out the conditions governing the exercise of that right within the territory of that state and if those conditions have been fulfilled or, if they have not, what conditions remain to be fulfilled;

2089 (3) when the timeshare accommodation⁵ has been determined, an accurate description of that accommodation and its location;

2090 (4) where the timeshare accommodation is under construction:
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310. (a) the state of completion;

311. (b) a reasonable estimate of the deadline for completion of the timeshare accommodation;

- 312. (c) where it concerns specific timeshare accommodation, the number of the building permit and the name and full address of the competent authority or authorities;
 - 313. (d) the state of completion of the services rendering the timeshare accommodation fully operational (gas, electricity, water and telephone connections);
 - 314. (e) a guarantee regarding completion of the timeshare accommodation or a guarantee regarding reimbursement of any payment made if the accommodation is not completed and, where appropriate, the conditions governing the operation of those guarantees;
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- 2091 (5) the services (lighting, water, maintenance, refuse collection) to which the offeree⁶ has or will have access and on what conditions;
 - 2092 (6) the common facilities, such as swimming pool, sauna etc, to which the offeree has or may have access and, where appropriate, on what conditions;
 - 2093 (7) the principles on the basis of which the maintenance of and repairs to the timeshare accommodation and its administration will be arranged;
 - 2094 (8) the exact period within which the right which is the subject of the agreement may be exercised and, if necessary, its duration; and the date on which the offeree may start to exercise that right;
 - 2095 (9) the price to be paid by the offeree to exercise the right under the agreement; an estimate of the amount to be paid by the offeree for the use of common facilities and services; the basis for the calculation of the amount of charges relating to occupation of the timeshare accommodation, the mandatory statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs);
 - 2096 (10) a clause stating that acquisitions will not result in costs, charges or obligations other than those specified in the agreement;
 - 2097 (11) whether or not it is possible to join a scheme for the exchange or resale of the rights under the agreement; and any costs involved should an exchange or resale scheme be organised by the offeror or by a third party designated by him in the agreement;
 - 2098 (12) the date and place of each party's signing of the agreement⁷.

If, and to the extent that, any information so set out in an agreement is inconsistent with any term (the 'deemed term') which is deemed to be included in the agreement⁸, the agreement is to be treated for all purposes⁹ as if the deemed term, and not that information, were set out and included in the agreement¹⁰.

A person who contravenes these provisions is guilty of an offence¹¹.

These provisions apply only if:

- 2099 (i) the offeree is an individual and is not acting in the course of a business;
- 2100 (ii) the accommodation which is the subject of the agreement is accommodation in a building or some or all of the accommodation in the pool of accommodation which is the subject of the agreement is accommodation in a building, as the case may be¹².

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act¹³.

¹ I.e. a timeshare agreement to which the Timeshare Act 1992 relates: see PARA 867 ante. For the meaning of 'timeshare agreement' see PARA 868 ante.

- 2 For the meaning of references to the offeror see PARA 868 note 1 ante.
- 3 As to domicile see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.
- 4 For the meaning of 'EEA state' see PARA 867 note 5 ante.
- 5 For the meaning of 'timeshare accommodation' see PARA 868 note 3 ante.
- 6 For the meaning of references to the offeree see PARA 868 note 1 ante.
- 7 Timeshare Act 1992 s 1C(1), Sch 1 (s 1C, Sch 1 added by the Timeshare Regulations 1997, SI 1997/1081, regs 3(3), 5; and the Timeshare Act 1992 Sch 1 amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 10). The obligation to comply with the Timeshare Act 1992 s 1C(1) (as added) is a duty owed by the person who enters into a timeshare agreement as offeror to the offeree and a contravention of the obligation is actionable accordingly: s 10A(2) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 12; and amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 9).
- 8 le under the Timeshare Act 1992 s 1A(4) (as added): see PARA 870 ante.
- 9 le for all purposes of the Timeshare Act 1992.
- 10 Ibid s 1C(2) (as added: see note 7 supra).
- 11 Ibid s 1C(3) (as added: see note 7 supra). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 1C(3) (as so added). As to the statutory maximum see PARA 401 note 31 ante. As to the time limits for prosecutions see PARA 886 post. As to the defence of due diligence see PARA 884 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 885 post. As to the powers of officers of an enforcement authority see PARA 883 post.
- 12 Ibid s 1C(4) (as added: see note 7 supra).
- 13 Ibid s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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873. Form of agreement and language of brochure and agreement.

A person must not in the course of a business enter into a timeshare agreement¹ as offeror² unless the agreement is in writing and complies with certain requirements³, so far as applicable⁴.

If a person contravenes these provisions, he is guilty of an offence⁵.

These provisions only apply if:

- 2101 (1) the offeree is an individual and is not acting in the course of a business⁶;
- 2102 (2) the accommodation which is the subject of the agreement is accommodation in a building or some or all of the accommodation in the pool of accommodation which is the subject of the agreement is accommodation in a building, as the case may be⁷.

If the customer⁸ is resident in, or a national of, an EEA state⁹, the agreement or document, as the case may be, must be drawn up in a language which is:

- 2103 (a) the language, or one of the languages, of the EEA state in which he is resident; or
 2104 (b) the language, or one of the languages, of the EEA state of which he is a national,

and is an official language of an EEA state¹⁰. If, in such a case, there are two or more languages in which the agreement or document may be drawn up in compliance with these provisions and the customer nominates one of those languages, the agreement or document must be drawn up in the language he nominates¹¹. If the offeree is resident in the United Kingdom and the agreement would not otherwise be required to be drawn up in English, it must be drawn up in English, in addition to any other language in which it is drawn up¹².

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act¹³.

1 I.e. a timeshare agreement to which the Timeshare Act 1992 relates: see PARA 867 ante. For the meaning of 'timeshare agreement' see PARA 868 ante.

2 For the meaning of references to the offeror see PARA 868 note 1 ante.

3 I.e. the Timeshare Act 1992 s 1D(3)-(5) (as added): see the text and notes 8-12 infra.

4 Ibid s 1D(1) (s 1D added by the Timeshare Regulations 1997, SI 1997/1081, reg 6). A person who is required to provide a document under the Timeshare Act 1992 s 1A(1) (as added) (see PARA 870 ante) contravenes s 1A(1) (as added) if he does not provide a document which complies with s 1D(3), (4) (as added) (see the text and notes 8-11 infra), so far as applicable: s 1D(2) (as so added). The obligation to comply with s 1D(1) (as added) is a duty owed by the person who enters into a timeshare agreement as offeror to the offeree and a contravention of the obligation is actionable accordingly: s 10A(2) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 12; and amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 9). For the meaning of references to the offeree see PARA 868 note 1 ante.

5 Timeshare Act 1992 s 1D(6) (as added: see note 4 supra). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 1D(6) (as so added). As to the statutory maximum see PARA 401 note 31 ante. As to the time limits for prosecutions see PARA 886 post. As to the defence of due diligence see PARA 884 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 885 post. As to the powers of officers of an enforcement authority see PARA 883 post.

6 Ibid s 1D(8) (as added: see note 4 supra).

7 Ibid s 1D(9) (as added: see note 4 supra).

8 For these purposes, 'the customer' means: (1) for the purposes of ibid s 1D(1) (as added) (see the text and notes 1-4 supra), the offeree; and (2) for the purposes of s 1D(2) (as added) (see note 4 supra), the person to whom the document is required to be provided: s 1D(7) (as added: see note 4 supra).

9 For the meaning of 'EEA state' see PARA 867 note 5 ante.

10 Timeshare Act 1992 s 1D(3) (as added: see note 4 supra).

11 Ibid s 1D(4) (as added: see note 4 supra).

12 Ibid s 1D(5) (as added: see note 4 supra).

13 Ibid s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

874. Translation of agreement.

Save in a case where a timeshare agreement¹ is drawn up in a language in which the translation is required or permitted to be made, a person must not in the course of a business enter into a timeshare agreement² as offeror³ unless he complies with the following conditions, that is to say, if the timeshare accommodation⁴ which is the subject of the agreement, or any of the accommodation in the pool of accommodation which is the subject of the agreement, is situated in an EEA state⁵, the offeror must provide the offeree⁶ with a certified translation⁷ of the agreement in the language, or one of the languages, of that state⁸. The language of the translation must be an official language of an EEA state⁹.

If a person contravenes these provisions, he is guilty of an offence¹⁰.

These provisions only apply if:

- 2105 (1) the offeree is an individual and is not acting in the course of a business¹¹;
- 2106 (2) the accommodation which is the subject of the agreement is accommodation in a building or some or all of the accommodation in the pool of accommodation which is the subject of the agreement is accommodation in a building, as the case may be¹².

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act¹³.

1 For the meaning of 'timeshare agreement' see PARA 868 ante.

2 I.e. a timeshare agreement to which the Timeshare Act 1992 applies: see PARA 867 ante.

3 For the meaning of references to the offeror see PARA 868 note 1 ante.

4 For the meaning of 'timeshare accommodation' see PARA 868 note 3 ante.

5 For the meaning of 'EEA state' see PARA 867 note 5 ante.

6 For the meaning of references to the offeree see PARA 868 note 1 ante.

7 For these purposes, 'certified translation' means a translation which is certified to be accurate by a person authorised to make or verify translations for the purposes of court proceedings: Timeshare Act 1992 s 1E(6) (s 1E added by the Timeshare Regulations 1997, SI 1997/1081, reg 7).

8 Timeshare Act 1992 s 1E(1), (2), (4) (as added: see note 7 supra). The obligation to comply with s 1E(1) (as added) is a duty owed by the person who enters into a timeshare agreement as offeror to the offeree and a contravention of the obligation is actionable accordingly: s 10A(2) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 12; and amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 9).

9 Timeshare Act 1992 s 1E(3) (as added: see note 7 supra).

10 Ibid s 1E(5) (as added: see note 7 supra). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 1E(5) (as so added). As to the statutory maximum see PARA 401 note 31 ante. As to the time limits for prosecutions see PARA 886 post. As to the defence of due diligence see PARA 884 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 885 post. As to the powers of officers of an enforcement authority see PARA 883 post.

11 Ibid s 1E(7) (as added: see note 7 supra).

12 Ibid s 1E(8) (as added: see note 7 supra).

13 Ibid s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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C. CANCELLATION OF TIMESHARE AGREEMENTS AND TIMESHARE CREDIT AGREEMENTS

875. Obligation for timeshare agreement to contain information on cancellation rights.

A person must not in the course of a business enter into a timeshare agreement¹ as offeror² unless the offeree³ has received the agreement and it complies with the following requirements⁴.

The agreement must state:

- 2107 (1) that the offeree is entitled to give notice of cancellation of the agreement to the offeror at any time on or before the date specified in the agreement, being a day falling not less than 14 days after the day on which the agreement is entered into⁵;
- 2108 (2) that, if the offeree gives such a notice to the offeror on or before that date, he will⁶ have no further rights or obligations under the agreement, but will have the right to recover any sums paid under or in contemplation of the agreement⁷.

If the agreement includes provision for providing credit for or in respect of the offeree, it must state that, notwithstanding the giving of notice of cancellation⁸, so far as the agreement relates to repayment of the credit and payment of interest, it will continue⁹ to be enforceable¹⁰.

If (a) the price under the timeshare agreement is covered fully or partly by credit granted under a timeshare credit agreement¹¹; (b) the offeree is an individual; and (c) the accommodation which is the subject of the timeshare agreement is accommodation in a building, or some or all of the accommodation in the pool of accommodation which is the subject of the agreement is accommodation in a building, the timeshare agreement must state that, if the offeree gives to the offeror a notice as mentioned in head (2) above or a notice of cancellation of the agreement under the additional provisions¹² which has the effect of cancelling the agreement: (i) the notice will also have the effect of cancelling the timeshare credit agreement; (ii) so far as the timeshare credit agreement relates to repayment of credit and payment of interest, it will have effect subject to the provisions as to repayment of credit and interest¹³; and (iii) the offeree will have no further rights or obligations under the timeshare credit agreement¹⁴.

If the offeree is an individual, and the accommodation which is the subject of the timeshare agreement is accommodation in a building, or some or all of the accommodation in the pool of accommodation which is the subject of the agreement is accommodation in a building, the agreement must state that the offeree may have, in addition to the rights mentioned in heads (1) and (2) above, further rights¹⁵ to cancel the timeshare agreement¹⁶.

The agreement must contain a blank notice of cancellation¹⁷.

The timeshare agreement and the timeshare credit agreement must each be in such form as may be prescribed¹⁸, and comply with such requirements (whether as to type, size, colour or

disposition of lettering, quality or colour of paper, or otherwise) as may be prescribed for securing that the matters required to be stated or contained in the agreement¹⁹ are prominent and easily legible²⁰.

If a person contravenes these provisions, he is guilty of an offence²¹. An agreement is not, however, invalidated by reason of a contravention of these provisions²².

These provisions do not apply where, in entering into the agreement, the offeree is acting in the course of a business²³.

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act²⁴.

1 Ie a timeshare agreement to which the Timeshare Act 1992 applies: see PARA 867 ante. For the meaning of 'timeshare agreement' see PARA 868 ante.

2 For the meaning of references to the offeror see PARA 868 note 1 ante.

3 For the meaning of references to the offeree see PARA 868 note 1 ante.

4 Timeshare Act 1992 ss 2(1), 12(6) (s 2(1) amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 3(1), (2)). The obligation to comply with the Timeshare Act 1992 s 2(1) (as amended) is a duty owed by the person who enters into a timeshare agreement as offeror to the offeree and a contravention of the obligation is actionable accordingly: s 10A(2) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 12; and amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 9). As to the right to cancel a timeshare agreement see PARAS 877-878 post.

5 Timeshare Act 1992 s 2(2)(a) (amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 3(1), (3)).

6 Ie subject to the Timeshare Act 1992 s 5(9) (as amended): see PARA 877 post.

7 Ibid s 2(2)(b) (amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 3(3)).

8 Ie under the Timeshare Act 1992 s 5 (as amended) (see PARA 877 post) or s 5A (as added and amended) (see PARA 878 post).

9 Ie subject to ibid s 7 (as amended): see PARA 882 post.

10 Ibid s 2(2A) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 8(1), (2); and substituted by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 3(4)).

11 For the meaning of 'timeshare credit agreement' see PARA 869 ante.

12 Ie under the Timeshare Act 1992 s 5A (as added and amended): see PARA 878 post.

13 Ie ibid s 7 (as amended).

14 Ibid s 2(2B), (2C) (s 2(2B) added by the Timeshare Regulations 1997, SI 1997/1081, reg 8(2); and substituted by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 3(4); and the Timeshare Act 1992 s 2(2C) added by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 3(4)).

15 Ie under the Timeshare Act 1992 s 5A (as added and amended): see PARA 878 post.

16 Ibid s 2(2D), (2E) (added by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 3(4)).

17 Timeshare Act 1992 s 2(2F) (added by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 3(4)).

18 For the meaning of 'prescribed' see PARA 868 note 5 ante. For the prescribed form of notice of the right to cancel a timeshare agreement see the Timeshare (Cancellation Notices) Order 1992, SI 1992/1942, arts 2, 3(a), Sch 1. The notice must be printed on a single sheet of paper with the part which sets out the Timeshare Act 1992 s 7 (as amended) (repayment of credit and interest: see PARA 882 post) appearing on the back of the

sheet: Timeshare (Cancellation Notices) Order 1992, SI 1992/1942, arts 2, 4. The lettering of the words 'your right to cancel' and 'please read this carefully' in the notice must be larger than any other lettering on that notice: art 7. In the notice there must be inserted in the blank spaces beside the numbers shown in the form set out in Sch 1 the following wording or information and the numbers must not appear in the notice: (1) the offeror's reference number, code or other details to enable the contract or offer to be identified; (2) the name of the offeror; (3) the last date on which notice of cancellation may be given; (4) the name and address of a person to whom notice of cancellation may be given: art 8. The lettering of the notices referred to in art 3 must be easily legible and of a colour which is easily distinguishable from the colour of the paper; and capital letters must be used in all the places in which they are shown in each of the prescribed forms and phrases must be in bold lettering and underlined in accordance with each of the prescribed forms: art 5. No capital letter in the notice is to be less than two millimetres high with lower case letters in proportion: art 6. See also the Timeshare (Cancellation Information) Order 2003, SI 2003/2579.

19 le by virtue of the Timeshare Act 1992 s 2 or s 3 (as amended).

20 Ibid s 4(2) (amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 5(1), (2)). For the prescribed form of blank notice of cancellation see the Timeshare (Cancellation Notices) Order 1992, SI 1992/1942, arts 2, 3(b), Sch 2. The blank notice must be attached to the notice of the right to cancel a timeshare agreement: art 3(b). In the notice there must be inserted in the blank spaces beside the numbers shown in the form set out in Sch 2 the following wording or information and the numbers must not appear in the notice: (1) the name and address of a person to whom notice of cancellation may be given; (2) the offeror's reference number, code or other details to enable the contract or offer to be identified: art 8. As to the lettering of the notice see note 18 supra.

21 Timeshare Act 1992 s 2(3). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 2(3). As to the statutory maximum see PARA 401 note 31 ante. As to the time limits for prosecutions see PARA 886 post. As to the defence of due diligence see PARA 884 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 885 post. As to the powers of officers of an enforcement authority see PARA 883 post.

22 Ibid s 4(3).

23 Ibid s 4(1).

24 Ibid s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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876. Obligation for timeshare credit agreement to contain information on cancellation rights.

A person must not in the course of a business enter into a timeshare credit agreement¹ as creditor² unless the offeree³ has received the agreement and it complies with the following requirements⁴. The agreement must state:

- 2109 (1) that the offeree is entitled to give notice of cancellation of the agreement to the creditor at any time on or before the date specified in the agreement, being a day falling not less than 14 days after the day on which the agreement is entered into⁵;
- 2110 (2) that, if the offeree gives such a notice to the creditor on or before that date, then:

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315. (a) so far as the agreement relates to repayment of credit and payment of interest, it has effect subject to the provisions relating to repayment of credit and interest⁶; and
316. (b) subject to head (a) above, the offeree will have no further rights or obligations under the agreement⁷;
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- 2111 (3) that it is a timeshare credit agreement⁸.

If the offeree is an individual, and the accommodation which is the subject of the timeshare agreement to which the timeshare credit agreement relates is accommodation in a building, or some or all of the accommodation in the pool of accommodation which is the subject of that timeshare agreement is accommodation in a building, the timeshare credit agreement must state that, if the offeree gives a notice of cancellation⁹ of the timeshare agreement which has the effect of cancelling it, the notice will also have the effect of cancelling the timeshare credit agreement (with the same consequences as mentioned in head (2) above)¹⁰.

The agreement must contain a blank notice of cancellation¹¹. The timeshare agreement and the timeshare credit agreement must each be in such form as may be prescribed¹² and comply with such requirements, whether as to type, size, colour or disposition of lettering, quality or colour of paper or otherwise, as may be prescribed for securing that the notice is prominent and easily legible¹³.

An agreement is not invalidated by reason of a contravention of these provisions¹⁴.

These provisions do not apply where, in entering into the agreement, the offeree is acting in the course of a business¹⁵.

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act¹⁶.

1. Is a timeshare credit agreement to which the Timeshare Act 1992 applies: see PARA 867 ante. For the meaning of 'timeshare credit agreement' see PARA 869 ante.

2. For the meaning of 'creditor' see PARA 869 note 2 ante.

3. For the meaning of references to the offeree see PARA 868 note 1 ante.

4. Timeshare Act 1992 ss 3(1), 12(6) (s 3(1) amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 4(1), (2)). As to the right to cancel a timeshare credit agreement by giving notice see PARA 880 post; and as to automatic cancellation see PARA 881 post. For the prescribed form of notice of the right to cancel a timeshare credit agreement see the Timeshare (Cancellation Notices) Order 1992, SI 1992/1942, arts 2, 3(c), Sch 3. The notice must be printed on a single sheet of paper with the part which sets out the Timeshare Act 1992 s 7 (as amended) (repayment of credit and interest: see PARA 882 post) appearing on the back of the sheet: Timeshare (Cancellation Notices) Order 1992, SI 1992/1942, arts 2, 4. The lettering of the words 'your right to cancel' and 'please read this carefully' in the notice must be larger than any other lettering on that notice: art 7. In the notice there must be inserted in the blank spaces beside the numbers shown in the form set out in Sch 3 the following wording or information and the numbers must not appear in the notice: (1) the creditor's reference number, code or other details to enable the timeshare credit agreement to be identified; (2) the name of the creditor; (3) the last date on which notice of cancellation may be given; (4) the name and address of a person to whom notice of cancellation may be given: art 8. As to the lettering of the notice see PARA 875 ante.

Although the provisions of the Timeshare Act 1992 s 3 (as amended) correspond to the provisions of s 2 (as amended) (see PARA 875 ante), there is no provision in s 3 (as amended) for failure to provide a notice corresponding to the criminal offence created by s 2(3). It was argued that it would be inequitable to take a stricter approach with the timeshare industry than is taken in relation to consumer credit agreements generally: see 203 HC Official Report (6th series) col 577.

5. Timeshare Act 1992 s 3(2)(a) (amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 4(3)).

6 le the Timeshare Act 1992 s 7 (as amended): see PARA 882 post. For the meaning of 'credit' see PARA 869 note 2 ante.

7 Ibid s 3(2)(b).

8 Ibid s 3(3) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 8(3); and amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 4(4)).

9 le under the Timeshare Act 1992 s 5 (as amended) (see PARA 877 post) or s 5A (as added and amended) (see PARA 878 post).

10 Ibid s 3(4), (5) (added by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 4(5)).

11 Timeshare Act 1992 s 3(6) (added by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 4(5)).

12 For the meaning of 'prescribed' see PARA 868 note 5 ante.

13 Timeshare Act 1992 s 4(2) (amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 5(1), (2)). For the prescribed form of blank notice of cancellation see the Timeshare (Cancellation Notices) Order 1992, SI 1992/1942, arts 2, 3(d), Sch 4. The blank notice must be attached to the notice of the right to cancel a timeshare credit agreement: art 3(d). In the notice there must be inserted in the blank spaces beside the numbers shown in the form set out in Sch 4 the following wording or information and the numbers must not appear in the notice: (1) the name and address of a person to whom notice of cancellation may be given; (2) the creditor's reference number, code or other details to enable the timeshare credit agreement to be identified: art 8. As to the lettering of the notice see PARA 875 ante.

14 Timeshare Act 1992 s 4(3).

15 Ibid s 4(1).

16 Ibid s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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877. Right to cancel timeshare agreement.

Where a person has entered, or proposes to enter, into a timeshare agreement¹ as offeree² and the agreement complies with the statutory requirements³, the agreement may not be enforced against him on or before the date specified in the agreement⁴ and he may give notice of cancellation of the agreement⁵ to the offeror⁶ at any time on or before that date⁷.

Where a person enters into a timeshare agreement⁸ as offeree but the agreement does not comply with the statutory requirements⁹, the agreement may not be enforced against him and he may give notice of cancellation of the agreement to the offeror at any time¹⁰. If, however, in such a case, the offeree affirms the agreement at any time after the expiry of the period of 14 days beginning with the day on which the agreement is entered into, the agreement is not prevented from being enforced against him and he may not at any subsequent time give notice of cancellation of the agreement¹¹ to the offeror¹². Where the offeree is an individual, and the accommodation which is the subject of the agreement is accommodation in a building, or some or all of the accommodation in the pool of accommodation which is the subject of the agreement is accommodation in a building, the time allowed is three months and ten days¹³.

The offeree's giving, within the time allowed¹⁴, notice of cancellation of the agreement to the offeror at a time when the agreement has been entered into has the effect of cancelling the

agreement¹⁵; and the offeree's giving notice of cancellation of the agreement¹⁶ to the offeror before the agreement has been entered into has the effect of withdrawing any offer to enter into the agreement¹⁷.

Where a timeshare agreement is cancelled¹⁸, the agreement ceases to be enforceable and:

- 2112 (1) any sum which the offeree has paid under or in contemplation of the agreement to the offeror, or to any person who is the offeror's agent for the purpose of receiving that sum, is recoverable from the offeror by the offeree and is due and payable at the time the notice of cancellation is given; but
- 2113 (2) no sum may be recovered by or on behalf of the offeror from the offeree in respect of the agreement¹⁹.

The provisions of heads (1) and (2) above also apply where giving a notice of cancellation has the effect of withdrawing an offer to enter into a timeshare agreement²⁰.

Where a timeshare agreement includes provision for providing credit²¹ for or in respect of the offeree, then, notwithstanding the giving of notice of cancellation²², so far as the agreement relates to repayment of the credit and payment of interest, it continues to be enforceable²³.

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act²⁴.

1 Ie a timeshare agreement to which the Timeshare Act 1992 applies: see PARA 867 ante. For the meaning of 'timeshare agreement' see PARA 868 ante.

2 For the meaning of references to the offeree see PARA 868 note 1 ante.

3 Ie the requirements of the Timeshare Act 1992 ss 2, 4 (as amended): see PARA 875 ante.

4 Ie in pursuance of *ibid* s 2(2)(a) (as amended): see PARA 875 head (1) ante.

5 For these purposes, a notice of cancellation of an agreement is a notice, however expressed, showing that the offeree wishes unconditionally to cancel the agreement, whether or not it is in a prescribed form: *ibid* s 12(1). For the meaning of 'prescribed' see PARA 868 note 5 ante.

6 For the meaning of references to the offeror see PARA 868 note 1 ante.

7 Timeshare Act 1992 s 5(1) (amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 6(1), (2)). As to the additional right to cancel a timeshare agreement see PARA 878 post. For these purposes, if the offeree sends a notice by post in a properly addressed and prepaid letter, the notice is to be treated as given at the time of posting: Timeshare Act 1992 s 12(3).

8 See note 1 *supra*.

9 See note 3 *supra*.

10 Timeshare Act 1992 s 5(2) (amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 6(3)).

11 Ie under the Timeshare Act 1992 s 5(2) (as amended): see the text and notes 8-10 *supra*.

12 *Ibid* s 5(3) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 9(1)).

13 Timeshare Act 1992 s 5(3A) (added by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 6(4)). If, in a case falling within the Timeshare Act 1992 s 5(3A) (as added), the last day of the period of three months and ten days is a public holiday, the period will not end until the end of the first working day after the public holiday: s 5(3B) (added by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 6(4)).

14 Ie under the Timeshare Act 1992 s 5 (as amended) or s 5A (as added and amended) (see PARA 878 post).

15 *Ibid* s 5(4) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 9(2)).

- 16 le under the Timeshare Act 1992 s 5 (as amended).
- 17 Ibid s 5(5) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 9(3)).
- 18 See note 14 *supra*.
- 19 Timeshare Act 1992 s 5(6), (8) (s 5(6) amended by the Timeshare Regulations 1997, SI 1997/1081, reg 9(4)).
- 20 Timeshare Act 1992 s 5(7).
- 21 For the meaning of 'credit' see PARA 869 note 2 *ante*.
- 22 See note 14 *supra*.
- 23 Timeshare Act 1992 s 5(9) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 9(5); and by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 6(5)).
- 24 Timeshare Act 1992 s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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878. Additional right to cancel timeshare agreement.

If a timeshare agreement¹ does not include, as terms set out in it, the following information²:

- 2114 (1) the identities and domiciles³ of the parties, including specific information on the offeror's⁴ legal status at the time of the conclusion of the agreement and the identity and domicile of the owner;
- 2115 (2) the exact nature of the right which is the subject of the agreement and, if the accommodation concerned, or any of the accommodation in the pool of accommodation concerned, is situated in the territory of an EEA state⁵, a clause setting out the conditions governing the exercise of that right within the territory of that state and if those conditions have been fulfilled or, if they have not, what conditions remain to be fulfilled;
- 2116 (3) when the timeshare accommodation⁶ has been determined, an accurate description of that accommodation and its location;
- 2117 (4) where the timeshare accommodation is under construction:
- 205 317. (a) the state of completion;
318. (b) a reasonable estimate of the deadline for completion of the timeshare accommodation;
- 206 2118 (5) the exact period within which the right which is the subject of the agreement may be exercised and, if necessary, its duration; and the date on which the offeree⁷ may start to exercise that right;
- 2119 (6) the price to be paid by the offeree to exercise the right under the agreement; an estimate of the amount to be paid by the offeree for the use of common facilities and services; the basis for the calculation of the amount of charges relating to occupation of the timeshare accommodation, the mandatory

- statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs);
- 2120 (7) whether or not it is possible to join a scheme for the exchange or resale of the rights under the agreement; and any costs involved should an exchange or resale scheme be organised by the offeror or by a third party designated by him in the agreement;
- 2121 (8) information on the right to cancel or withdraw from the agreement and indication of the person to whom any letter of cancellation or withdrawal should be sent, specifying also the arrangements under which such letters may be sent; and, where appropriate, information on the arrangements for the cancellation of the credit agreement linked to the agreement in the event of cancellation of the agreement or withdrawal from it;
- 2122 (9) the date and place of each party's signing of the agreement,

the agreement may not be enforced against the offeree before the end of the period of three months and ten days⁸ beginning with the day on which the agreement was entered into, and the offeree may give notice of cancellation of the agreement⁹ to the offeror at any time during that period¹⁰. If such information is provided to the offeree before the end of the period of three months beginning with the day on which the agreement was entered into:

- 2123 (i) the offeree may give notice of cancellation of the agreement to the offeror at any time within the period of ten days¹¹ beginning with the day on which the information is received by the offeree; but
- 2124 (ii) the offeree may not at any subsequent time give notice of cancellation of the agreement¹² to the offeror¹³.

These provisions only apply if:

- 2125 (A) the offeree is an individual and is not acting in the course of a business¹⁴;
- 2126 (B) the accommodation which is the subject of the agreement is accommodation in a building or some or all of the accommodation in the pool of accommodation which is the subject of the agreement is accommodation in a building, as the case may be¹⁵.

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act¹⁶.

1 Ie a timeshare agreement to which the Timeshare Act 1992 applies: see PARA 867 ante. For the meaning of 'timeshare agreement' see PARA 868 ante. For these purposes, the reference to a timeshare agreement to which the Timeshare Act 1992 applies includes a reference to a binding preliminary agreement: s 5A(4) (s 5A added by the Timeshare Regulations 1997, SI 1997/1081, reg 9(6)).

2 Ie the information referred to in the Timeshare Act 1992 s 1C(1), Sch 1 paras (a)-(c), (d)(i), (ii), (h), (i), (k) and (m) (as added): see PARA 872 heads (1)-(3), (4)(a), (b), (8), (9), (11), (12) ante.

3 As to domicile see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

4 For the meaning of references to the offeror see PARA 868 note 1 ante.

5 For the meaning of 'EEA state' for these purposes see PARA 867 note 5 ante.

6 For the meaning of 'timeshare accommodation' see PARA 868 note 3 ante.

7 For the meaning of references to the offeree see PARA 868 note 1 ante.

8 If the last day of that period is a public holiday, the period concerned does not end until the end of the first working day after the public holiday: Timeshare Act 1992 s 5A(3) (as added: see note 1 supra).

9 For the meaning of 'notice of cancellation of an agreement' see PARA 877 note 5 ante.

10 Timeshare Act 1992 s 5A(1) (as added (see note 1 supra); and amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2 Schedule para 7). As to the giving of notice see PARA 877 note 7 ante.

11 If the last day of the period of ten days is a public holiday, the period concerned does not end until the end of the first working day after the public holiday: Timeshare Act 1992 s 5A(3) (as added: see note 1 supra).

12 *Ie* under *ibid* s 5A(1) (as added and amended): see the text and notes 1-10 supra.

13 *Ibid* s 5A(2) (as added: see note 1 supra).

14 *Ibid* s 5A(5) (as added: see note 1 supra).

15 *Ibid* s 5A(6) (as added: see note 1 supra).

16 *Ibid* s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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879. Advance payments.

A person who enters, or proposes to enter, in the course of a business into a timeshare agreement¹ as offeror² must not, either in person or through another person, request or accept from the offeree³ or proposed offeree any advance payment before the end of the period during which notice of cancellation of the agreement may⁴ be given⁵.

If a person contravenes these provisions, he is guilty of an offence⁶.

These provisions only apply if:

2127 (1) the offeree or proposed offeree is an individual and is not acting in the course of a business⁷;

2128 (2) the accommodation which is the subject of the agreement or proposed agreement is accommodation in a building or some or all of the accommodation in the pool of accommodation which is the subject of the agreement or proposed agreement is accommodation in a building, as the case may be⁸.

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act⁹.

1 *Ie* a timeshare agreement to which the Timeshare Act 1992 applies: see PARA 867 ante. For the meaning of 'timeshare agreement' see PARA 868 ante.

2 For the meaning of references to the offeror see PARA 868 note 1 ante.

3 For the meaning of references to the offeree see PARA 868 note 1 ante.

4 *Ie* under the Timeshare Act 1992 s 5 (as amended) (see PARA 877 ante) or s 5A (as added) (see PARA 878 ante).

5 Ibid s 5B(1) (reg 5B added by the Timeshare Regulations 1997, SI 1997/1081, reg 10).

6 Timeshare Act 1992 s 5B(2) (as added: see note 5 supra). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see s 5B(2) (as so added). As to the statutory maximum see PARA 401 note 31 ante. As to the time limits for prosecutions see PARA 886 post. As to the defence of due diligence see PARA 884 post. As to the liability of persons other than the principal offender, and as to offences by bodies corporate, see PARA 885 post. As to the powers of officers of an enforcement authority see PARA 883 post.

7 Ibid s 5B(3) (as added: see note 5 supra).

8 Ibid s 5B(4) (as added: see note 5 supra).

9 Ibid s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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880. Right to cancel timeshare credit agreement by giving notice.

Where a person has entered into a timeshare credit agreement¹ as offeree² and the agreement complies with the statutory requirements³, he may give notice of cancellation of the agreement⁴ to the creditor⁵ at any time on or before the date specified⁶ in the agreement⁷.

Where a person enters into a timeshare credit agreement⁸ as offeree but the agreement does not comply with the statutory requirements⁹, he may give notice of cancellation of the agreement to the creditor at any time¹⁰. If, however, in such a case the offeree affirms the agreement at any time after the expiry of the period of 14 days beginning with the day on which the agreement is entered into, he may not at any subsequent time give notice of cancellation of the agreement to the creditor¹¹.

The offeree's giving, within the time allowed under these provisions, notice of cancellation of the agreement to the creditor at a time when the agreement has been entered into has the effect of cancelling the agreement¹².

Where a timeshare credit agreement is cancelled¹³:

- 2129 (1) the agreement continues in force, subject to the provisions relating to credit and interest¹⁴, so far as the agreement relates to repayment of the credit and payment of interest; and
- 2130 (2) subject to head (1) above, the agreement ceases to be enforceable¹⁵.

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act¹⁶.

1 I.e a timeshare credit agreement to which the Timeshare Act 1992 applies: see PARA 867 ante. For the meaning of 'timeshare credit agreement' see PARA 869 ante.

2 For the meaning of references to the offeree see PARA 868 note 1 ante.

3 I.e the requirements of the Timeshare Act 1992 ss 3, 4 (as amended): see PARA 876 ante.

4 For the meaning of 'notice of cancellation of an agreement' see PARA 877 note 5 ante.

- 5 For the meaning of 'creditor' see PARA 869 note 2 ante.
- 6 Ie in pursuance of the Timeshare Act 1992 s 3(2)(a) (as amended): see PARA 876 head (1) ante.
- 7 Ibid s 6(1) (amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, reg 2, Schedule para 8(1), (2)). As to the giving of notice see PARA 877 note 7 ante.
- 8 See note 1 supra.
- 9 See note 3 supra.
- 10 Timeshare Act 1992 s 6(2) (amended by the Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922, Schedule para 8(3)).
- 11 Timeshare Act 1992 s 6(3).
- 12 Ibid s 6(4).
- 13 Ie under ibid s 6 (as amended) or s 6A (as added) (see PARA 881 post).
- 14 Ie ibid s 7 (as amended): see PARA 882 post. For the meaning of 'credit' see PARA 869 note 2 ante.
- 15 Ibid s 6(5) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 11(2)).
- 16 Timeshare Act 1992 s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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881. Automatic cancellation of timeshare agreement.

Where a notice of cancellation of a time share agreement is given¹ and the giving of the notice has the effect of cancelling the agreement, the notice also has the effect of cancelling any related timeshare credit agreement².

These provisions only apply if:

- 2131 (1) the offeree³ under the timeshare agreement concerned is an individual⁴;
- 2132 (2) the accommodation which is the subject of the agreement is accommodation in a building or some or all of the accommodation in the pool of accommodation which is the subject of the agreement is accommodation in a building, as the case may be⁵.

Where a timeshare agreement is so cancelled, the offeror⁶ must, if he is not the same person as the creditor⁷ under the related timeshare credit agreement, forthwith on receipt of the notice inform the creditor that the notice has been given⁸.

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act⁹.

1 Ie under the Timeshare Act 1992 s 5 (as amended) (see PARA 877 ante) or s 5A (as added) (see PARA 878 ante). For the meaning of 'timeshare agreement' see PARA 868 ante.

2 Ibid s 6A(1) (s 6A added by the Timeshare Regulations 1997, SI 1997/1081, reg 11(3)). For these purposes, 'related timeshare agreement' means any related timeshare agreement to which the Timeshare Act 1992

applies (see PARA 867 ante): s 6A(1) (as so added). A timeshare credit agreement is related to a timeshare agreement if credit under the timeshare credit agreement fully or partly covers the price under the timeshare agreement: s 6A(3) (as so added). For the meaning of 'credit' see PARA 869 note 2 ante.

3 For the meaning of references to the offeree see PARA 868 note 1 ante.

4 Timeshare Act 1992 s 6A(4) (as added: see note 2 supra).

5 Ibid s 6A(5) (as added: see note 2 supra).

6 For the meaning of references to the offeror see PARA 868 note 1 ante.

7 For the meaning of 'creditor' see PARA 869 note 2 ante.

8 Timeshare Act 1992 s 6A(2) (as added: see note 2 supra). The obligation to comply with s 6A(2) (as added) is a duty owed by the offeror under the timeshare agreement to the creditor under the related timeshare credit agreement, and a contravention of the obligation is actionable accordingly: see s 10A(3) (added by the Timeshare Regulations 1997, SI 1997/1081, reg 12).

9 Timeshare Act 1992 s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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882. Repayment of credit and interest.

Following:

- 2133 (1) the giving of notice of cancellation of a timeshare agreement¹;
- 2134 (2) the giving of notice of cancellation of a timeshare credit agreement²; or
- 2135 (3) the cancellation of a timeshare credit agreement³,

if the offeror⁴ repays the whole or a portion of the credit⁵:

- 2136 (a) before the expiry of one month following the giving of the notice or the cancellation of the timeshare credit agreement⁶, as the case may be; or
- 2137 (b) in the case of a credit repayable by instalments, before the date on which the first instalment is due,

no interest is payable on the amount repaid⁷.

If the whole of a credit repayable by instalments is not repaid on or before the date specified in head (b) above, the offeree is not liable to repay any of the credit except on receipt of a request in writing in such form as may be prescribed⁸, signed by or on behalf of the offeror or, as the case may be, creditor, stating the amounts of the remaining instalments, recalculated by the offeror or creditor as nearly as may be in accordance with the agreement and without extending the repayment period, but excluding any sum other than principal and interest⁹.

The rights conferred and the duties imposed by these provisions are in addition to any rights imposed by or under any other Act¹⁰.

1 In accordance with the Timeshare Act 1992 s 5 (as amended) in a case where s 5(9) (as amended) applies: see PARA 877 ante. For the meaning of 'timeshare agreement' see PARA 868 ante.

- 2 le in accordance with *ibid* s 6 (as amended): see PARA 880 ante. For the meaning of 'timeshare credit agreement' see PARA 869 ante.
- 3 le by virtue of *ibid* s 6A (as added): see PARA 881 ante.
- 4 For the meaning of references to the offeree see PARA 868 note 1 ante.
- 5 For the meaning of 'credit' see PARA 869 note 2 ante.
- 6 See note 3 *supra*.
- 7 Timeshare Act 1992 s 7(1), (2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (4)-(6)).
- 8 For the meaning of 'prescribed' see PARA 868 note 5 ante. Any request in writing, to be made under the Timeshare Act 1992 s 7(3), following the giving of notice of cancellation of a timeshare agreement in accordance with s 5 (as amended) (see PARA 877 ante) in a case where s 5(9) (as amended) applies must contain the following information: (1) a description of the cancelled agreement sufficient to identify it; (2) the name and a postal address of the offeror; (3) the name and a postal address of the offeree; (4) the amount of credit received by the offeree under the agreement; (5) the date when the first instalment was due under the agreement; (6) the amount of credit repaid by the offeree before that date or a statement that none of the credit was repaid before that date; (7) the amounts of the remaining instalments, recalculated in accordance with s 7(3) (see the text to note 9 *infra*), which the offeree is required to pay, ie excluding any sum other than principal and interest; (8) a precise indication of the dates on which the instalments are due or a statement indicating clearly the manner in which those dates will be determined; (9) a clear and unambiguous statement by the offeror that payment of the amounts of the remaining instalments is demanded on the dates indicated: Timeshare (Repayment of Credit on Cancellation) Order 1992, SI 1992/1943, art 3(1), Sch 1.
- Any request in writing, to be given to an offeree under the Timeshare Act 1992 s 7(3) (see the text to note 9 *infra*), following the giving of notice of cancellation of a timeshare credit agreement in accordance with s 6 (as amended) (see PARA 880 ante) must contain the following information: (a) a description of the cancelled agreement sufficient to identify it; (b) the name and a postal address of the creditor; (c) the name and a postal address of the offeree; (d) the amount of credit received by the offeree under the agreement; (e) the date when the first instalment was due under the agreement; (f) the amount of credit repaid by the offeree before that date or a statement that none of the credit was repaid before that date; (g) the amounts of the remaining instalments, recalculated in accordance with s 7(3), which the offeree is required to pay, ie excluding any sum other than principal and interest; (h) a precise indication of the dates on which the instalments are due or a statement indicating clearly the manner in which those dates will be determined; (i) a clear and unambiguous statement by the creditor that payment of the amounts of the remaining instalments is demanded on the dates indicated: Timeshare (Repayment of Credit on Cancellation) Order 1992, SI 1992/1943, art 3(2), Sch 2.
- 9 Timeshare Act 1992 s 7(3).
- 10 *Ibid* s 12(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 14(1), (9)).

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D. ENFORCEMENT

883. Enforcement.

Every local weights and measures authority¹ in Great Britain is an enforcement authority for the purposes of the Timeshare Act 1992; and it is the duty of each such authority to enforce the provisions of that Act within its area².

If a duly authorised officer of an enforcement authority has reasonable grounds for suspecting that an offence under the Timeshare Act 1992³ has been committed, he may:

- 2138 (1) require a person carrying on or employed in a business to produce any book or document relating to the business, and take copies of it or any entry in it; or
- 2139 (2) require such a person to produce in a visible and legible documentary form or in a form from which it can readily be produced in a visible and legible form any information so relating which is stored in any electronic form, and take copies of it,

for the purposes of ascertaining whether such an offence has been committed⁴.

If such an officer has reasonable grounds for believing that any documents may be required as evidence in proceedings for such an offence, he may seize and detain them and must, if he does so, inform the person from whom they are seized⁵.

The above powers of an officer may be exercised by him only at a reasonable hour and on production, if required, of his credentials⁶.

Nothing in these provisions requires a person to produce, or authorises the taking from a person of, a document which he could not be compelled to produce in civil proceedings before the High Court⁷.

A person who:

- 2140 (a) intentionally obstructs an officer of an enforcement authority acting in pursuance of these provisions;
- 2141 (b) without reasonable excuse fails to comply with a requirement made of him⁸ by such an officer; or
- 2142 (c) without reasonable excuse fails to give an officer of an enforcement authority acting in pursuance of his powers under these provisions any other assistance or information which the officer has reasonably required of him for the purpose of the performance of the officer's functions under these provisions,

is guilty of an offence⁹.

If a person, in giving information to an officer of an enforcement authority who is acting in pursuance of his powers under these provisions, makes a statement which he knows is false in a material particular or recklessly makes a statement which is false in a material particular, he is guilty of an offence¹⁰.

Nothing in these provisions requires a person to answer any question or give any information if to do so might incriminate him¹¹.

1 As to local weights and measures authorities see PARA 398 ante.

2 Timeshare Act 1992 s 10, Sch 2 para 1(1) (s 10 amended, and Sch 2 renumbered, by the Timeshare Regulations 1997, SI 1997/1081, regs 3(2), 14(1), (7)). Nothing in the Timeshare Act 1992 Sch 2 para 1(1) (as renumbered) authorises a local weights and measures authority to bring proceedings in Scotland for an offence: Sch 2 para 2(2) (as so renumbered).

As to enforcement of the Timeshare Act 1992 see also the Enterprise Act 2002 Pt 8 (ss 210-236) (as amended); and COMPETITION vol 18 (2009) PARAS 339-360.

3 I.e. an offence under any of the Timeshare Act 1992 s 1A (as added) (see PARA 870 ante), s 1B (as added) (see PARA 871 ante), s 1C (as added) (see PARA 872 ante), s 1D (as added) (see PARA 873 ante), s 1E (as added) (see PARA 874 ante), s 2 (as amended) (see PARA 875 ante) or s 5B (as added) (see PARA 879 ante).

4 Ibid Sch 2 para 3(1) (as renumbered (see note 2 supra); and amended by the Timeshare Regulations 1997, SI 1997/1081, regs 3(2), 13(4); and the Criminal Justice and Police Act 2001 s 70, Sch 2 para 20(b)). As to restrictions on the disclosure of information obtained by an authorised officer in the exercise of his functions under the Timeshare Act 1992 see PARA 401 ante.

- 5 Ibid Sch 2 para 3(2) (as renumbered: see note 2 supra).
- 6 Ibid Sch 2 para 3(3) (as renumbered: see note 2 supra).
- 7 Ibid Sch 2 para 3(4) (as renumbered: see note 2 supra).
- 8 Ie under ibid Sch 2 para 3(1) (as renumbered and amended): see the text and notes 3-4 supra.
- 9 Ibid Sch 2 para 4(1), (2) (as renumbered: see note 2 supra). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see Sch 2 para 4(1), (2) (as so renumbered). As to the standard scale see PARA 498 note 3 ante.
- 10 Ibid Sch 2 para 4(3), (4) (as renumbered: see note 2 supra). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: see Sch 2 para 4(3), (4) (as so renumbered). As to the statutory maximum see PARA 401 note 31 ante. As to the time limit for prosecutions see PARA 886 ante.
- 11 Ibid Sch 2 para 6 (as renumbered: see note 2 supra).

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E. LEGAL PROCEEDINGS

884. Defence of due diligence.

In proceedings against a person for an offence under the Timeshare Act 1992¹ it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence².

Where, in proceedings against a person for such an offence, the defence of due diligence³ involves an allegation that the commission of the offence was due to the act or default of another or to reliance on information given by another, that person is not, without the leave of the court, entitled to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served on the person bringing the proceedings a notice in writing giving such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time when he serves it⁴.

- 1 Ie an offence under the Timeshare Act 1992 s 1A(6) (as added) (see PARA 870 ante), s 1B(2) (as added) (see PARA 871 ante), s 1C(3) (as added) (see PARA 872 ante), s 1D(6) (as added) (see PARA 873 ante), s 1E(5) (as added) (see PARA 874 ante), s 2(3) (see PARA 875 ante) or s 5B(2) (as added) (see PARA 879 ante).
- 2 Ibid s 8(1) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 13(1)).
- 3 Ie the defence provided by the Timeshare Act 1992 s 8(1) (as amended): see the text and notes 1-2 supra.
- 4 Ibid ss 8(2), (3), 16(6).

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885. Liability of persons other than principal offender.

Where the commission by a person of an offence under the Timeshare Act 1992¹ is due to the act or default of some other person, that other person is guilty of the offence and may be proceeded against and punished by virtue of these provisions, whether or not proceedings are taken against the first-mentioned person².

Where a body corporate is guilty of an offence under the Timeshare Act 1992³ in respect of any act or default which is shown to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager⁴, secretary or other similar officer of the body corporate, or a person who was purporting to act in such a capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly⁵.

1 Ie an offence under the Timeshare Act 1992 s 1A(6) (as added) (see PARA 870 ante), s 1B(2) (as added) (see PARA 871 ante), s 1C(3) (as added) (see PARA 872 ante), s 1D(6) (as added) (see PARA 873 ante), s 1E(5) (as added) (see PARA 874 ante), s 2(3) (see PARA 874 ante) and s 5B(2) (as added) (see PARA 879 ante).

2 Ibid s 9(1) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 13(2)).

3 Ie where it is guilty of an offence under the Timeshare Act 1992 s 1A(6) (as added) (see PARA 870 ante), s 1B(2) (as added) (see PARA 871 ante), s 1C(3) (as added) (see PARA 872 ante), s 1D(6) (as added) (see PARA 873 ante), s 1E(5) (as added) (see PARA 874 ante), s 2(3) (see PARA 875 ante) or s 5B(2) (as added) (see PARA 879 ante), including where it is so guilty by virtue of s 9(1) (as amended) (see the text and notes 1-2 supra).

4 As to the meaning of 'manager' see PARA 500 note 3 ante.

5 Timeshare Act 1992 s 9(2) (amended by the Timeshare Regulations 1997, SI 1997/1081, reg 13(2)). Where the affairs of a body corporate are managed by its members, the Timeshare Act 1992 s 9(2) (as amended) applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 9(3).

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886. Time limit for prosecutions.

No proceedings for an offence under the Timeshare Act 1992¹ may be commenced after the end of the period of three years beginning with the date of the commission of the offence or the end of the period of one year beginning with the date of the discovery of the offence by the prosecutor, whichever is the earlier².

A certificate signed by or on behalf of the prosecutor and stating the date on which the offence was discovered by him is conclusive evidence of that fact; and a certificate stating that matter and purporting to be so signed is to be treated as so signed unless the contrary is proved³.

1 Ie an offence under the Timeshare Act 1992 s 1A(6) (as added) (see PARA 870 ante), s 1B(2) (as added) (see PARA 871 ante), s 1C(3) (as added) (see PARA 872 ante), s 1D(6) (as added) (see PARA 873 ante), s 1E(5) (as added) (see PARA 874 ante), s 2(3) (see PARA 875 ante), s 5B(2) (as added) (see PARA 879 ante) or s 10, Sch 2 para 4(3) (as renumbered) (see PARA 883 ante).

2 Ibid s 11(1) (amended by the Timeshare Regulations 1997, SI 1997/1081, regs 13(3), 14(1), (8); and the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) Order 2003, SI 2003/1400, art 7, Sch 5).

3 Timeshare Act 1992 s 11(2).

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(xxix) Touting

887. Ticket touts.

If an unauthorised person¹ sells, or offers or exposes for sale, a ticket² for a designated football match³ in any public place or place to which the public has access or, in the course of a trade or business, in any other place, he is guilty of an offence⁴.

1 For these purposes, a person is 'unauthorised' unless he is authorised in writing to sell tickets for the match by the home club or by the organisers of the match: Criminal Justice and Public Order Act 1994 s 166(2)(a).

2 For these purposes, 'ticket' means anything which purports to be a ticket: *ibid* s 166(2)(b).

3 For these purposes, 'designated football match' means a football match of a description, or a particular football match, for the time being designated under the Football Spectators Act 1989 Pt I (ss 1-13) (as amended) (see THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARAS 114-119) or Pt III (ss 14-22) (as amended) (see THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARA 122-125; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 530): Criminal Justice and Public Order Act 1994 s 166(2)(c) (amended by the Football (Offences and Disorder) Act 1999 s 10).

4 Criminal Justice and Public Order Act 1994 s 166(1), (3). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see s 166(1), (3). As to the standard scale see PARA 498 note 3 ante. The Police and Criminal Evidence Act 1984 s 32 (as amended) (search of persons and premises, including vehicles, on arrest: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 936) has effect, in its application in relation to an offence under the Criminal Justice and Public Order Act 1994 s 166 (as amended), as if the power conferred on a constable to enter and search any vehicle extended to any vehicle which the constable has reasonable grounds for believing was being used for any purpose connected with the offence: s 166(5). The powers of summary arrest conferred by the Police and Criminal Evidence Act 1984 s 24 (as amended) apply to an offence under the Criminal Justice and Public Order Act 1994 s 166 (as amended): see the Police and Criminal Evidence Act 1984 s 24(1)(c), (2)(h) (as added); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 924.

An order made by statutory instrument may apply the Criminal Justice and Public Order Act 1994 s 166 (as amended), with modifications if thought fit, to such sporting event or category of sporting event for which 6,000 or more tickets are issued for sale as is thought fit: s 166(6). No order may be so made unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament: s 172(5). Such an order may provide that: (1) a certificate (a 'ticket sale certificate') signed by a duly authorised officer certifying that 6,000 or more tickets were issued for sale for a sporting event is conclusive evidence of that fact; (2) an officer is duly authorised if he is authorised in writing to sign a ticket sale certificate by the home club or the organisers of the sporting event; and (3) a document purporting to be a ticket sale certificate is to be received in evidence and is deemed to be such a certificate unless the contrary is proved: s 166(7). Where an order has been made under s 166(6), s 166 (as amended) also applies, with any modifications made by the order, to any part of the sporting event specified or described in the order, provided that 6,000 or more tickets are issued for sale for the day on which that part of the event takes place: s 166(8). At the date at which this volume states the law no such order had been made.

UPDATE

887 Ticket touts

TEXT AND NOTES--For supplementary provision relating to the sale and disposal of tickets on the internet see THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARA 120A.

NOTE 1--In 1994 Act s 166(2)(a) after 'sell' add 'or otherwise dispose of' and omit the words 'by the home club or': Violent Crime Reduction Act 2006 s 53(3)(a), Sch 5. A reference to selling a ticket includes a reference to (1) offering to sell a ticket; (2) exposing a ticket for sale; (3) making a ticket available for sale by another; (4) advertising that a ticket is available for purchase; and (5) giving a ticket to a person who pays or agrees to pay for some other goods or services or offering to do so: 1994 Act s 166(2)(aa) (added by 2006 Act s 53(3)(b)).

NOTE 3--1994 Act s 166(2)(c) further amended: 2006 Act s 53(3)(c). An order under the 1994 Act s 166(2)(c) may designate descriptions of football matches wherever played or when played at descriptions of ground or in any area specified in the order: s 166(2A) (added by 2006 Act s 53(4)). The power of the Secretary of State to make an order under the 1994 Act s 166(2)(c) will be exercisable by statutory instrument which will be subject to annulment in pursuance of a resolution of either House of Parliament: s 166(2B) (as so added). For an order made under s 166(2)(c) see the Ticket Touting (Designation of Football Matches) Order 2007, SI 2007/790.

TEXT AND NOTE 4--It is an offence for an unauthorised person to (1) sell a ticket for a designated football match, or (2) otherwise to dispose of such a ticket to another person: 1994 Act s 166(1) (substituted by 2006 Act s 53(2)).

NOTE 4--Police and Criminal Evidence Act 1984 s 24 substituted: Serious Organised Crime and Police Act 2005 s 110(1). The 1984 Act s 24 (as substituted) now contains a general power of arrest without warrant, based on a test of necessity, in relation to any offence.

In 1994 Act s 166(7) omit 'the home club or': 2006 Act s 53(5), Sch 5.

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888. Taxi touts.

If a person, in a public place¹, solicits persons to hire vehicles to carry them as passengers, he is guilty of an offence².

It is a defence for the accused to show that he was soliciting for passengers to be carried at separate fares by public service vehicles³ on behalf of the holder of a PSV operator's licence⁴ for those vehicles whose authority he had at the time of the alleged offence⁵.

No offence is committed under these provisions where soliciting persons to hire licensed taxis is permitted by a scheme⁶ for shared taxis⁷.

1 For these purposes, 'public place' includes any highway and any other premises or place to which at the material time the public has or is permitted to have access, whether on payment or otherwise: Criminal Justice and Public Order Act 1994 s 167(6).

2 Ibid s 167(1), (4). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: see s 167(1), (4). As to the standard scale see PARA 498 note 3 ante.

Section 167(1) does not imply that the soliciting must refer to any particular vehicle nor is the mere display of a sign on a vehicle that the vehicle is for hire soliciting within s 167(1): s 167(2). The purpose of s 167 is to enable the police to take effective action against persons who tout for passengers for vehicles acting as unlicensed taxis: see 556 HL Official Report (5th series) col 153. The powers of summary arrest conferred by the Police and Criminal Evidence Act 1984 s 24 (as amended) apply to an offence under the Criminal Justice and Public Order Act 1994 s 167: see the Police and Criminal Evidence Act 1984 s 24(1)(c) (as amended), s 24(2) (as substituted), Sch 1A para 21(c) (as added).

3 For these purposes, 'public service vehicle' has the same meaning as in the Public Passenger Vehicles Act 1981 Pt II (ss 6-29) (as amended) (see ROAD TRAFFIC vol 40(3) (2007 Reissue) PARA 1136): Criminal Justice and Public Order Act 1994 s 167(6).

4 For these purposes, 'PSV operator's licence' has the same meaning as in the Public Passenger Vehicles Act 1981 Pt II (as amended) (see ROAD TRAFFIC vol 40(3) (2007 Reissue) PARA 1136): Criminal Justice and Public Order Act 1994 s 167(6).

5 Ibid s 167(4) (amended by the Transport Act 2000 s 265(3)).

6 Is a scheme under the Transport Act 1985 s 10 (as amended) (see ROAD TRAFFIC vol 40(3) (2007 Reissue) PARA 1495), whether or not supplemented by provision made under s 13 (as amended) (modifications of the taxi code: see ROAD TRAFFIC vol 40(3) (2007 Reissue) PARA 1498).

7 Criminal Justice and Public Order Act 1994 s 167(3).

UPDATE

888 Taxi touts

NOTE 2--Police and Criminal Evidence Act 1984 s 24 substituted, Sch 1A repealed: Serious Organised Crime and Police Act 2005 s 110(1), Sch 7 para 24(3), Sch 17 Pt 2. The 1984 Act s 24 (as substituted) now contains a general power of arrest without warrant, based on a test of necessity, in relation to any offence.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/ (xxx) Unauthorised Grant of Academic Degrees/889. In general.

(xxx) Unauthorised Grant of Academic Degrees

889. In general.

Any person who, in the course of business, grants, offers to grant or issues any invitation relating to any award¹:

2143 (1) which may reasonably be taken to be an award granted or to be granted by a United Kingdom institution²; and

2144 (2) which either is described as a degree or purports to confer on its holder the right to the title of bachelor, master or doctor and may reasonably be taken to be a degree,

is guilty of an offence³.

These provisions do not apply as respects anything done in relation to any recognised award⁴.

Where in any proceedings for such an offence it is shown:

2145 (a) that the accused granted, offered to grant or issued an invitation relating to an award; and

2146 (b) that an address in the United Kingdom was given in any document issued by the accused certifying the granting of the award or containing the offer or invitation in question,

the reward is presumed to fall within head (1) above unless it is shown that the accused took reasonable steps to inform the person to whom the award was granted or any member of the public or particular individual to whom the offer or invitation was addressed that the award was not granted or to be granted by a United Kingdom institution⁵.

In any proceedings for such an offence it is a defence for the accused to show:

2147 (i) that the award in question was granted or to be granted by virtue of authority conferred on or before 5 July 1988 by a foreign institution⁶ on the body granting the award; and

2148 (ii) that the accused took reasonable steps to inform the person to whom the award was granted or any member of the public or particular individual to whom the offer was addressed that the award was granted or was to be granted by virtue of authority conferred by a foreign institution⁷.

1 For these purposes, the reference to issuing an invitation relating to any award includes, in particular, the issuing of any circular, prospectus or advertisement relating to an award, whether addressed to the public generally, to any section of the public, or to any particular individual or individuals: Education Reform Act 1988 s 214(10)(c).

2 For these purposes, 'United Kingdom institution' means any institution established in the United Kingdom, other than one which is, or is affiliated to or forms part of, an institution whose principal establishment is situated outside the United Kingdom: *ibid* s 214(10)(a).

3 *Ibid* s 214(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: see s 214(1). As to the standard scale see PARA 498 note 3 ante. Nothing in s 214 (as amended) applies in relation to the granting of an award to a candidate who:

65 (1) before 12 May 1988 began to undertake a course of education approved by the person granting the award in preparation for an examination to qualify for the award; and

66 (2) whether before or after that date, passes the examination,

and, for these purposes, 'examination' includes any form of assessment and the reference to passing an examination is to be construed accordingly: s 214(9). As to the institution of proceedings and enforcement see PARA 890 post.

Where an offence under s 214 (as amended) which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly: s 214(7). As to the meaning of 'manager' see PARA 500 note 3 ante.

4 *Ibid* s 214(2). For these purposes, 'recognised award' means: (1) any award granted or to be granted by a university, college or other body which is authorised by royal charter or by or under Act of Parliament to grant degrees; (2) any award granted or to be granted by any body for the time being permitted by any body falling within head (1) *supra* to act on its behalf in the granting of degrees; or (3) such other award as may by order be designated as a recognised award for these purposes: s 214(2) (amended by the Further and Higher Education Act 1992 s 93(1), Sch 8 paras 27, 48). An order under the Education Reform Act 1988 s 214(2)(c) (see head (3) *supra*) may designate as a recognised award either a specified award granted or to be granted by a person named in the order or any award granted or to be granted by such a person: s 214(3). The power to make such an order is exercisable by statutory instrument (s 232(1)); and such an order may make different provision for different cases or circumstances and may contain incidental, supplemental or transitional provisions (see s 232(5)). As to orders that have been made see the Education (Recognised Awards) Order 1988, SI 1988/2035 (amended by SI 1989/598; SI 1990/1085; SI 1993/2828); and the Education (Recognised Awards) (Richmond College) (No 2) Order 1996, SI 1996/2564.

For the purposes of the Education Reform Act 1988 s 214 (as amended) and s 215 (see PARA 890 post), any body for the time being designated by order as appearing to be a recognised body is conclusively presumed to be such a body: s 216(1). As to the order that has been made see the Education (Recognised Bodies) Order 1997, SI 1997/1. A list must be compiled, maintained and published by order, including the name of every body appearing to fall for the time being within the Education Reform Act 1988 s 216(3): s 216(2). A body falls within this provision if it is not a recognised body and either: (a) provides any course which is in preparation for a degree to be granted by a recognised body and is approved by or on behalf of the recognised body; or (b) is a constituent college, school or other institution of a university which is a recognised body: s 216(3). As to the order that has been made see the Education (Listed Bodies) Order 1997, SI 1997/54 (amended by SI 1998/876). For these purposes, 'recognised body' means a body falling within the Education Reform Act 1988 s 214(2)(a) or (b) (as amended) (see heads (1), (2) supra): s 216(4).

5 Ibid s 214(4).

6 For these purposes, 'foreign institution' means any institution other than a United Kingdom institution: ibid s 214(10)(b).

7 Ibid s 214(5). For these purposes, where: (1) on or before 5 July 1988 authority was conferred by a foreign institution on a body to grant awards of any description for a period expiring after that date; and (2) new authority is conferred by the institution, whether before or after the expiry of that period, on the body to grant awards of that description, the new authority is to be taken to have been granted on or before that date: s 214(6).

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890. Enforcement provisions.

Proceedings for an offence relating to the unauthorised award of degrees¹ may not be instituted except by or on behalf of a local weights and measures authority² or the chief officer of police for a police area³.

It is the duty of every local weights and measures authority to enforce the provisions relating to the unauthorised award of degrees⁴ within its area; and such an authority must make reports on the exercise of its statutory functions⁵ as directed⁶.

A duly authorised officer of a local weights and measures authority may, at all reasonable hours and on production, if required, of his credentials, exercise the following powers:

- 2149 (1) he may for the purpose of ascertaining whether any offence⁷ has been committed, enter and search any premises which he reasonably believes may be used for or in connection with the carrying on of a business which is concerned with the granting of awards which are not recognised awards⁸;
- 2150 (2) he may, for that purpose, require any person carrying on or employed in connection with any such business to produce any documents or other items relating to the business and may take copies of any such documents;
- 2151 (3) he may require any information which is contained in a computer and is accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible if he has reason to believe that it may be evidence of the commission of such an offence; and
- 2152 (4) he may seize and detain anything which he has reason to believe may be evidence of the commission of such an offence⁹.

If a justice of the peace, on sworn information in writing:

- 2153 (a) is satisfied that there is reasonable ground to believe that any documents or other items which a duly authorised officer has power under these provisions to inspect are on any premises and that their inspection is likely to disclose evidence of the commission of an offence¹⁰; and
- 2154 (b) is also satisfied:
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319. (i) that admission to the premises has been or is likely to be refused and that notice of intention to apply for such a warrant has been given to the occupier; or
320. (ii) that an application for admission, or the giving of such a notice, would defeat the object of the entry or that the premises are unoccupied or that the occupier is temporarily absent and it might defeat the object of the entry to await his return,
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the justice may by warrant under his hand, which continues in force for a period of one month, authorise an officer of a local weights and measures authority to enter premises, if need be by force¹¹.

An officer entering any premises by virtue of these provisions may take with him such other persons and such equipment as may appear to him necessary; and, on leaving any premises which he has entered by virtue of a warrant so issued, he must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured against trespassers as he found them¹².

An officer seizing any documents or other items in the exercise of his powers under these provisions must inform the person from whom they are seized¹³.

Nothing in these provisions is to be taken to compel the production by a solicitor of a document or other item containing a privileged communication made by or to him in that capacity or to authorise the taking of possession of any such item which is in his possession¹⁴.

1 Ie an offence under the Education Reform Act 1988 s 214 (as amended): see PARA 889 ante.

2 As to local weights and measures authorities see PARA 398 ante.

3 Education Reform Act 1988 s 214(8). For the meaning of 'chief officer of police' see POLICE vol 36(1) (2007 Reissue) PARA 105. As to police areas see POLICE vol 36(1) (2007 Reissue) PARAS 136-138.

4 Ie *ibid* s 214 (as amended).

5 Ie its functions under *ibid* s 214 (as amended) and s 215.

6 See *ibid* s 215(1). Nothing in s 215 is to be taken as authorising a local weights and measures authority in Scotland to institute proceedings for an offence: s 215(9).

7 See note 1 *supra*.

8 For these purposes, 'recognised award' has the same meaning as in the Education Reform Act 1988 s 214 (as amended) (see PARA 889 note 4 ante): s 215(3).

9 *Ibid* s 215(2). The Trade Descriptions Act 1968 s 29 (as amended) (penalty for obstruction of authorised officers: see PARA 511 ante) applies as respects the obstruction of an officer acting in pursuance of the Education Reform Act 1988 s 215 as it applies as respects the obstruction of an officer acting in pursuance of the Trade Descriptions Act 1968 but with the substitution in s 29(1) (as amended) of a reference to the Education Reform Act 1988 s 215 for the reference to the Trade Descriptions Act 1968 s 28 (as amended) (see PARA 509 ante) and of a reference to his functions under the Education Reform Act 1988 s 215 for the reference to his functions under the Trade Descriptions Act 1968: Education Reform Act 1988 s 215(7).

10 See note 1 *supra*.

11 Education Reform Act 1988 s 215(4).

- 12 Ibid s 215(6).
- 13 Ibid s 215(5).
- 14 Ibid s 215(8).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxxi) Video Recordings/891. Classification certificates.

(xxxi) Video Recordings

891. Classification certificates.

A classification certificate issued in respect of a video work in pursuance of arrangements made by the designated authority¹ must contain the title assigned to the video work and:

- 2155 (1) a statement that the video work concerned is suitable for general viewing and unrestricted supply, with or without any advice as to the desirability of parental guidance with regard to the viewing of the work by young children or as to the particular suitability of the work for viewing by children; or
- 2156 (2) a statement that the video work concerned is suitable for viewing only by persons who have attained the age, not being more than 18 years, specified in the certificate and that no video recording containing that work is to be supplied to any person who has not attained the age so specified; or
- 2157 (3) the statement mentioned in head (2) above together with a statement that no video recording containing that work is to be supplied other than in a licensed sex shop².

¹ As to the authority to determine the suitability of video works for classification see the Video Recordings Act 1984 ss 4, 5; and LICENSING AND GAMBLING vol 67 (2008) PARA 279.

² See ibid s 7(1), (2) (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARAS 279-280.

As to the criteria for suitability to which special regard is to be had, and as to the review of a determination as to suitability, see ss 4A, 4B (as added); and LICENSING AND GAMBLING vol 67 (2008) PARA 280.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxxi) Video Recordings/892. Labelling requirements.

892. Labelling requirements.

In relation to video works in respect of which classification certificates¹ have been issued, regulations may require such indication as may be specified by the regulations of any of the contents of any classification certificate to be shown in such a manner as may be so specified on any video recording containing the video work in respect of which the certificate was issued or any spool, case or other thing on or in which such a video recording is kept².

¹ As to classification certificates see PARA 891 ante.

2 See the Video Recordings Act 1984 s 8(1); the Video Recordings (Labelling) Regulations 1985, SI 1985/911 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 283.

The regulations may make different provision for different video works and for different circumstances: Video Recordings Act 1984 s 8(1).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxxi) Video Recordings/893. Offences.

893. Offences.

The following constitute an offence¹ under the Video Recordings Act 1984:

- 2158 (1) supplying a video recording of an unclassified work²;
- 2159 (2) possessing a video recording of an unclassified work for the purposes of supply³;
- 2160 (3) supplying a video recording of a classified work in breach of its classification⁴;
- 2161 (4) supplying or offering to supply a video recording to be supplied only in a licensed sex shop elsewhere than in a licensed sex shop⁵;
- 2162 (5) supplying a video recording not complying with the labelling requirements⁶;
- 2163 (6) supplying a video recording containing a false indication as to its classification⁷.

1 As to offences by bodies corporate see the Video Recordings Act 1984 s 16; and LICENSING AND GAMBLING vol 67 (2008) PARA 290. As to penalties see s 15 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 284 et seq.

As to the general defence see s 14A (as added); and LICENSING AND GAMBLING vol 67 (2008) PARA 284.

As to enforcement see ss 16A, 16B (as added); and LICENSING AND GAMBLING vol 67 (2008) PARA 290. As to entry, search and seizure see s 17; and LICENSING AND GAMBLING vol 67 (2008) PARA 291. As to forfeiture see s 21; and LICENSING AND GAMBLING vol 67 (2008) PARA 284.

- 2 See *ibid* s 9 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 284.
- 3 See *ibid* s 10 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 285.
- 4 See *ibid* s 11 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 286.
- 5 See *ibid* s 12 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 287.
- 6 See *ibid* s 13 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 288.
- 7 See *ibid* s 14 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 289.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(6) STATUTORY PROTECTION IN PARTICULAR CIRCUMSTANCES/(xxxii) Weights and Measures/894. In general.

(xxxii) Weights and Measures

894. In general.

Consumers are afforded protection by the prohibition of the sale of certain goods otherwise than by reference to weight, length, or measure of capacity or volume, as the case may be¹. Provision may be made by order for ensuring that goods are sold only in quantities made known to the buyer at or before the time of sale². There are also restrictions on the seller of goods by a vending machine or any person causing goods to be so offered or exposed for sale³.

Where any goods are required by or under the Weights and Measures Act 1985 to be sold only by quantity expressed in a particular manner, it is sufficient compliance with that requirement in the case of any sale of, or an agreement to sell, any such goods if the quantity of the goods expressed in the manner in question is made known to the buyer before the purchase price is agreed⁴. Any person who, in selling or purporting to sell any goods by weight or other measurement or by number, delivers or causes to be delivered to the buyer a lesser quantity than that purported to be sold or a lesser quantity than corresponds with the price charged is guilty of an offence⁵. It is also an offence to make any misrepresentation, whether oral or otherwise, or to do any other act calculated to mislead a person buying or selling goods as to the quantity of goods⁶. No contract for the sale of goods is, however, void by reason only of a contravention of any provision contained in or made under the Weights and Measures Act 1985 with respect to any document which is, or is required to be, associated with the goods⁷.

1 See the Weights and Measures Act 1985 Pt IV (ss 21-46), Schs 4-7 (as amended); and WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 54 et seq.

2 See *ibid* s 22(1)(a); and WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 105.

3 See *ibid* s 25(5); and WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 85. An offence under the Weights and Measures Act 1985 s 25, s 28 or s 29 is specified for the purposes of the Enterprise Act 2002 s 230 (notice to Office of Fair Trading of intended prosecution): Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, art 2, Schedule. See PARA 400 ante.

4 See the Weights and Measures Act 1985 s 44(a); and WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 88.

5 See *ibid* s 28(1); note 3 supra; and WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 110.

6 See *ibid* s 29(1); note 3 supra; and WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 60.

7 See *ibid* s 91; and WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 33.

UPDATE

894 In general

TEXT AND NOTES 3, 6--Weights and Measures Act 1985 s 29 repealed: SI 2008/1277. SI 2003/1376 Schedule amended: see SI 2008/1277 Sch 2 para 101, Sch 3 para 9.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(i) Consumer Advice/895. Citizens' advice bureaux.

(7) CONSUMER REDRESS

(i) Consumer Advice

895. Citizens' advice bureaux.

Since their creation in 1939 citizens' advice bureaux have developed from an emergency war service into a professional, independent network; and they protect the rights of the individual by offering their expertise and practical support over a wide range of problems, including consumer issues. There are now 700 citizens' advice bureaux, each of which is a registered charity, receives funding from its local authority, business, charitable trusts and individual donations, belongs to the National Association of Citizens' Advice Bureaux¹, and is staffed mostly by volunteers.

The aims and principles of the citizens' advice bureaux service are to ensure that individuals do not suffer through lack of knowledge available to them, or through the inability to express their needs effectively, and equally to exercise a responsible influence on the development of social policies and services, both locally and nationally. Advice is given free of charge, in confidence, and impartially, to everybody regardless of race, sex, disability or sexuality.

¹ The National Association of Citizens' Advice Bureaux researches, writes and updates the comprehensive information system used by all citizens' advice bureaux, gives training and support, and co-ordinates social policy work. It may be contacted at Myddelton House, 115-123 Pentonville Road, London N1 9LZ.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(i) Consumer Advice/896. Neighbourhood law centres.

896. Neighbourhood law centres.

The Law Centres Federation¹, which was created in 1978, represents all law centres in the United Kingdom, its main aims being:

- 2164 (1) to provide support and development services to law centres;
- 2165 (2) to contribute to the development of new law centres;
- 2166 (3) to contribute to the development of publicly funded legal services nationally and internationally;
- 2167 (4) to undertake social policy work in conjunction with law centres.

Its work is funded by grants from government and charities and by membership subscriptions.

Law centres, by providing free legal advice and representation to individuals and community organisations, play an important part in developing the rights of communities and effecting changes in government policy and legislation. They target their work so that their resources are made available to those sections of the community which have the greatest need and, through their community and education work, they seek to increase people's awareness of their legal rights and options.

¹ The Law Centres Federation may be contacted at 18/19 Warren Street, London W1P 5DB.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(ii) Consumer Arbitration/897. In general.

(ii) Consumer Arbitration

897. In general.

Some consumer codes contain provision for arbitration¹ in the event of a dispute between the trade and the consumer. Whilst some such schemes offered consumers definite advantages, some were found to bind consumers to high-cost arbitration and hence to deter them from litigating. Accordingly, it is now provided by statute that a term which constitutes an arbitration agreement, that is to say an agreement to submit to arbitration present or future disputes or differences, whether or not contractual, is unfair² so far as it relates to a claim for a pecuniary remedy which does not exceed £5,000, whatever the law applicable to the arbitration agreement³.

1 As to arbitration see ARBITRATION vol 2 (2008) PARA 1201 et seq.

2 See for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see PARA 452 et seq ante.

3 Arbitration Act 1996 ss 89(1)-(3), 91(1); Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999/2167, art 3. The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended) apply where the consumer is a legal person as they apply where the consumer is a natural person: Arbitration Act 1996 ss 89(2), 90.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(ii) Consumer Arbitration/898. Small claims arbitration.

898. Small claims arbitration.

Rules of court:

- 2168 (1) may prescribe cases in which proceedings are, without any order of the court, to be referred to arbitration; and
- 2169 (2) may prescribe the manner in which and the terms on which cases are to be so referred; and
- 2170 (3) may, where cases are so referred, require other matters within the jurisdiction of the court in dispute between the parties also to be referred to arbitration¹.

Rules of court may also:

- 2171 (a) prescribe cases in which proceedings may be referred to arbitration by order of the court; and
- 2172 (b) authorise the court also to order other matters in dispute between the parties and within the jurisdiction of the court to be so referred².

Rules of court may prescribe the procedures and rules of evidence to be followed on any such reference³; and rules so made may, in particular, make provision with respect to the manner of taking and questioning evidence⁴.

On such a reference, the award⁵ of the arbitrator, arbitrators or umpire is to be entered as the judgment in the proceedings and is as binding and effectual to all intents as if it had been given by the judge⁶; but the judge may, if he thinks fit, on application made to him within such time

as may be prescribed, set aside the award, or may, with the consent of the parties, revoke the reference or order another reference to be made⁷.

Disputed claims involving an amount of £5,000 or less (or, in the case of housing repairs or personal injury, £1,000 or less) are allocated to the small claims track⁸.

1 County Courts Act 1984 s 64(1) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2)). Nothing in the Arbitration Act 1996 Pt I (ss 1-84) (as amended) (see ARBITRATION vol 2 (2008) PARA 1201 et seq) applies to arbitration under the County Courts Act 1984 s 64 (as amended): Arbitration Act 1996 s 92.

2 County Courts Act 1984 s 64(2) (amended by the Civil Procedure Act 1997 Sch 2 para 2(1), (2)).

3 County Courts Act 1984 s 64(2A) (added by the Courts and Legal Services Act 1990 s 6; and amended by the Civil Procedure Act 1997 Sch 2 para 2(1), (2)).

4 County Courts Act 1984 s 64(2B) (added by the Courts and Legal Services Act 1990 s 6).

5 For these purposes, 'award' includes an interim award: County Courts Act 1984 s 64(5).

6 Ibid s 64(3).

7 Ibid s 64(4).

8 See CPR 26.6; and PARA 905 post.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iii) Court Proceedings/A. LITIGANTS IN PERSON/899. Right to sue in person or bring private prosecutions.

(iii) Court Proceedings

A. LITIGANTS IN PERSON

899. Right to sue in person or bring private prosecutions.

In general any person who is not under a disability has a constitutional right of access to the Queen's courts and may begin and carry on proceedings in a county court or in the High Court in person¹.

Save where the right to prosecute is specifically restricted², any person may institute any criminal proceedings or conduct any criminal proceedings to which the Director of Public Prosecutions' duty to take over proceedings³ does not apply⁴. Where criminal proceedings are so instituted, the Director is not under a duty to take over their conduct, but may nevertheless do so at any stage⁵.

A litigant in person is, however, inevitably at a distinct disadvantage in coping with the technical rules of practice and procedure and, if he repeatedly institutes vexatious proceedings or makes applications, then, however much he may feel a victim of grievance or injustice, he runs the risk of being declared a vexatious litigant⁶ who will be unable to institute or continue to make any application in any legal proceedings without the leave of the court.

In relation to public proceedings and non-private chambers proceedings, a litigant in person should be allowed to have the assistance of another person (a 'McKenzie friend'), whether he is a professional person or not, to take notes and quietly to make suggestions and give advice to that party, so long as he does not take part in the proceedings as an advocate⁷, unless the judge is satisfied that fairness and the interests of justice do not require a litigant in person to have the assistance of a McKenzie friend⁸. Where, however, the proceedings are in private, the

nature of the proceedings which make it appropriate for a litigant in person to be heard in private makes it undesirable in the interest of justice for a McKenzie friend to assist⁹.

1 It is specifically provided that a party may present his own case at a hearing on the small claims track: see *Practice Direction--Small Claims Track* (1999) PD27 para 3.2(1); and CIVIL PROCEDURE.

2 See eg the Weights and Measures Act 1985 s 83(1) (proceedings for an offence under the Weights and Measures Act 1985 not to be instituted except by or on behalf of a local weights and measures authority or the chief officer of police for a police area); and WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 226.

3 As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq. As to the duty of the Director of Public Prosecutions to take over the conduct of proceedings see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1071. A person is precluded from bringing a private prosecution by the Prosecution of Offences Act 1985 s 6(1) in respect of those proceedings set out in s 3(2)(a), (c), (d) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1080 heads (1), (5), (6)) which the Director is under a duty to take over; however, where the Director could have instituted proceedings under s 3(2)(b) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1080 head (3)) but has decided not to do so, any other person may institute a private prosecution: *R v Bow Street Stipendiary Magistrate, ex p South Coast Shipping Co Ltd* [1993] QB 645, [1993] 1 All ER 219. In appropriate cases, the Director may take over proceedings in order to abort them by offering no evidence: see *Turner v DPP* (1978) 68 Cr App Rep 70; *Raymond v A-G* [1982] QB 839, [1982] 2 All ER 487, CA (both decided under the Prosecution of Offences Act 1979 s 4 (repealed)).

4 Prosecution of Offences Act 1985 s 6(1). Such a person does not have a right of access to police statements, reports and photographs held by the Crown Prosecution Service: *R v DPP, ex p Hallas* (1987) 87 Cr App Rep 340, DC.

5 Prosecution of Offences Act 1985 s 6(2).

6 See PARA 900 post.

7 A person who chooses regularly to appear as a McKenzie friend because he earns his living that way, especially one who is also a clerk to a practising solicitor, must exercise considerable restraint. If he fails to do so, he will cease to conduct himself as an assistant and will indirectly run the case, using the litigant in person in the same manner as a puppet master uses a puppet. Such behaviour can provide a firm foundation for a judge not wishing him to be present as a McKenzie friend: *R v Bow County Court, ex p Pelling* [1999] 4 All ER 751, [1999] 1 WLR 1807, CA, per curiam.

8 *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034, CA; *R v Bow County Court, ex p Pelling* [1999] 4 All ER 751, [1999] 1 WLR 1807, CA. Where in such circumstances a person is wrongly excluded from the proceedings, the proceedings are not a nullity, but the onus is on the opposite party to show that the error did not cause prejudice: *McKenzie v McKenzie* supra at 41 and 1039 per Sachs LJ.

9 *R v Bow County Court, ex p Pelling* [1999] 4 All ER 751, [1999] 1 WLR 1807, CA. A judge should give reasons for refusing to allow a litigant in person the assistance of a McKenzie friend, that obligation being owed to the litigant in person, not to the McKenzie friend: *R v Bow County Court, ex p Pelling* supra.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iii) Court Proceedings/A. LITIGANTS IN PERSON/900. Vexatious litigants.

900. Vexatious litigants.

If, on an application made by the Attorney General, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground¹:

- 2173 (1) instituted vexatious² civil proceedings, whether in the High Court or any inferior court, and whether against the same person or against different persons; or
- 2174 (2) made vexatious applications in any civil proceedings, whether in the High Court or any inferior court, and whether instituted by him or another; or

2175 (3) instituted vexatious prosecutions, whether against the same person or different persons,

the court may, after hearing that person or giving him an opportunity of being heard, make a civil proceedings order³, a criminal proceedings order⁴ or an all proceedings order⁵. An order so made may provide that it is to cease to have effect at the end of a specified period, but otherwise remains in force indefinitely⁶.

Leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of an order for the time being in force is not to be given unless the High Court is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application⁷.

1 Before the court can make a vexatious litigant order, it must be satisfied that the statutory precondition is fulfilled, ie that the person against whom the order is sought has habitually and persistently and without any reasonable ground instituted vexatious civil proceedings or made such applications, whether in the High Court or any inferior court, and whether against the same or different persons. Where that precondition is not satisfied, the court has no discretion to make an order; but, where the court is satisfied that the precondition is satisfied, it has a discretion, but is not obliged, to make an order: *A-G v Barker* [2000] 2 FCR 1, [2000] 1 FLR 759, CA.

2 In considering whether any proceedings are vexatious, the court must look at the whole history of the matter; and proceedings may be held to be vexatious, notwithstanding that in each individual case taken singly the pleading discloses a cause of action: *Re Vernazza* [1959] 2 All ER 200, [1959] 1 WLR 622; affd [1960] 1 QB 197, [1960] 1 All ER 183, CA; revsd in part on other grounds sub nom *A-G v Vernazza* [1960] AC 965, [1960] 3 All ER 97, HL.

The court considers the number, general character and result of the proceedings alleged to be vexatious, and may make an order even though there may have been reasonable grounds for the proceedings in each case considered by itself: *Re Chaffers, ex p A-G* (1897) 76 LT 351. See also *Re Jones, Re Vexatious Actions Act* (1902) 18 TLR 476.

3 For these purposes, 'civil proceedings order' means an order that: (1) no civil proceedings are, without the leave of the High Court, to be instituted in any court by the person against whom the order is made; (2) any civil proceedings instituted by him in any court before the making of the order are not to be continued by him without the leave of the High Court; and (3) no application, other than one for leave under the Supreme Court Act 1981 s 42 (as amended), is to be made by him in any civil proceedings instituted in any court by any person, without the leave of the court: s 42(1A) (added by the Prosecution of Offences Act 1985 s 24(1), (3)).

4 For these purposes, 'criminal proceedings order' means an order that: (1) no information is to be laid before a justice of the peace by the person against whom the order is made without the leave of the court; and (2) no application for leave to prefer a bill of indictment is to be made by him without the leave of the High Court: Supreme Court Act 1981 s 42(1A) (as added: see note 3 supra).

5 Ibid s 42(1) (amended by the Prosecution of Offences Act 1985 s 24(1), (2)). See also *Johnson v Valks* [2000] 1 All ER 450, [2000] 1 WLR 1502, CA, applying *Henry J Garratt & Co v Ewing* [1991] 4 All ER 891, [1991] 1 WLR 1356, CA; *A-G v Foley* [2000] 2 All ER 609, CA.

6 Supreme Court Act 1981 s 42(2).

7 Ibid s 42(3) (amended by the Prosecution of Offences Act 1985 s 24(1), (4)).

UPDATE

900 Vexatious litigants

NOTES 3, 4, 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iii) Court Proceedings/B. ACCESS TO JUSTICE/901. The Legal Services Commission.

B. ACCESS TO JUSTICE

901. The Legal Services Commission.

There is a body known as the Legal Services Commission¹ ('the Commission') which has the functions relating to the Community Legal Service² and the Criminal Defence Service³ conferred on it by the provisions of the Access to Justice Act 1999 or any other enactment⁴. An order may be made establishing two bodies in place of the Commission, one to have functions relating to the Community Legal Service and the other to have functions relating to the Criminal Defence Service⁵.

The Commission may do anything which it considers is necessary or appropriate for, or for facilitating, the discharge of its functions or is incidental or conducive to the discharge of its functions⁶.

Guidance may be given to the Commission as to the manner in which it should discharge its functions⁷; and the Commission must take into account any such guidance when considering the manner in which it is to discharge its functions⁸.

1 As to the Legal Services Commission see LEGAL AID vol 65 (2008) PARA 17 et seq.

2 As to the Community Legal Service see PARA 902 post.

3 As to the Criminal Defence Service see PARA 903 post.

4 See the Access to Justice Act 1999 s 1 (as amended); and LEGAL AID vol 65 (2008) PARA 17 et seq.

5 See *ibid* s 2 (as amended); and LEGAL AID vol 65 (2008) PARA 28.

6 See *ibid* s 3 (as amended); and LEGAL AID vol 65 (2008) PARA 26.

7 See *ibid* s 23(1) (as amended); and LEGAL AID vol 65 (2008) PARA 29. Guidance may not be so given in relation to individual cases (see s 23(3); and LEGAL AID vol 65 (2008) PARA 29); and the guidance so given must be published (see s 23(4) (as amended); and LEGAL AID vol 65 (2008) PARA 29).

8 See *ibid* s 23(2); and LEGAL AID vol 65 (2008) PARA 29.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iii) Court Proceedings/B. ACCESS TO JUSTICE/902. The Community Legal Service.

902. The Community Legal Service.

The Legal Services Commission¹ ('the Commission') must establish, maintain and develop a service known as the Community Legal Service for the purpose of promoting the availability to individuals of services of the following descriptions:

- 2176 (1) the provision of general information about the law and legal system and the availability of legal services;

- 2177 (2) the provision of help by the giving of advice as to how the law applies in particular circumstances;
- 2178 (3) the provision of help in preventing, or settling or otherwise resolving, disputes about legal rights and duties;
- 2179 (4) the provision of help in enforcing decisions by which such disputes are resolved; and
- 2180 (5) the provision of help in relation to legal proceedings not relating to disputes,

and, in particular, for securing, within the resources made available, and priorities set, that individuals have access to services that effectively meet their needs².

Every person who exercises any function relating to the Community Legal Service must have regard to the desirability of exercising it, so far as is reasonably practicable, so as:

- 2181 (a) to promote improvements in the range and quality of services provided as part of the Community Legal Service and in the ways in which they are made accessible to those who need them;
- 2182 (b) to secure that the services provided in relation to any matter are appropriate, having regard to its nature and importance; and
- 2183 (c) to achieve the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court³.

The Commission must also inform itself about the need for, and the provision of, services of the descriptions specified in heads (1) to (5) above and about the quality of the services provided and, in co-operation with such authorities and other bodies as it considers appropriate:

- 2184 (i) plan what can be done towards meeting that need by the performance by the Commission of its functions; and
- 2185 (ii) facilitate the planning by other authorities, bodies and persons of what can be done by them to meet that need by the use of any resources available to them⁴.

The Commission may set and monitor standards in relation to services of the descriptions specified in heads (1) to (5) above⁵. In particular, the Commission may accredit, or authorise others to accredit, persons or bodies providing services of the descriptions specified in heads (1) to (5) above; and any system of accreditation must include provision for the monitoring of the services provided by accredited persons and bodies and for the withdrawal of accreditation from any providing services of unsatisfactory quality⁶.

The Commission must establish and maintain a fund known as the Community Legal Service Fund from which it is to fund services as part of the Community Legal Service⁷; but the Commission may only fund services for an individual as part of the Community Legal Service if his financial resources are such that, under regulations, he is an individual for whom they may be so funded⁸.

The Commission must prepare a code setting out the criteria according to which it is to decide whether to fund, or continue to fund, services as part of the Community Legal Service for an individual for whom they may be so funded and, if so, what services are to be funded for him⁹. In settling the criteria to be set out in the code, the Commission must consider the extent to which they ought to reflect the following factors:

- 2186 (A) the likely cost of funding the services and the benefit which may be obtained by their being provided;

- 2187 (B) the availability of sums in the Community Legal Services Fund for funding the services and, having regard to present and likely future demands on the Community Legal Services Fund, the appropriateness of applying them to the services;
- 2188 (C) the importance of the matters in relation to which the services would be provided for the individual;
- 2189 (D) the availability to the individual of services not funded by the Commission and the likelihood of his being able to avail himself of them;
- 2190 (E) if the services are sought by the individual in relation to a dispute, the prospects of his success in the dispute;
- 2191 (F) the conduct of the individual in connection with services funded as part of the Community Legal Service, or an application for funding, or in, or in connection with, any proceedings;
- 2192 (G) the public interest; and
- 2193 (H) such other factors as it may by order be required to consider¹⁰.

An individual for whom services are funded by the Commission as part of the Community Legal Service is not to be required to make any payment in respect of the services except where regulations otherwise provide¹¹.

1 As to the Legal Services Commission see PARA 901 ante.

2 See the Access to Justice Act 1999 s 4(1), (2); and LEGAL AID vol 65 (2008) PARA 31.

3 See *ibid* s 4(4); and LEGAL AID vol 65 (2008) PARA 31.

4 See *ibid* s 4(6) (as amended); and LEGAL AID vol 65 (2008) PARA 31.

5 See *ibid* s 4(7); and LEGAL AID vol 65 (2008) PARA 32.

6 See *ibid* s 4(8); and LEGAL AID vol 65 (2008) PARA 32. The Commission may charge for accreditation, for monitoring the services provided by accredited persons and bodies and for authorising accreditation by others; and persons or bodies authorised to accredit may charge for accreditation, and for such monitoring, in accordance with the terms of their authorisation: see s 4(9); and LEGAL AID vol 65 (2008) PARA 34.

7 See *ibid* s 5(1); and LEGAL AID vol 65 (2008) PARA 38. As to the funding of the service see s 5(2)-(7) (as amended); and LEGAL AID vol 65 (2008) PARA 38. As to the services which may be funded see s 6 (as amended); and LEGAL AID vol 65 (2008) PARA 41. As to the services which may not be funded see s 6(6), Sch 2 (as amended); and LEGAL AID vol 65 (2008) PARA 42.

8 See *ibid* s 7(1); and LEGAL AID vol 65 (2008) PARA 54. Regulations may provide that, in prescribed circumstances and subject to any prescribed conditions, services of a prescribed description may be funded for individuals without reference to their financial resources: see s 7(2); and LEGAL AID vol 65 (2008) PARA 54.

9 See *ibid* s 8(1); and LEGAL AID vol 65 (2008) PARA 39.

10 See *ibid* s 8(2) (as amended); and LEGAL AID vol 65 (2008) PARA 39. The criteria set out in the code must reflect the principle that in many family disputes mediation will be more appropriate than court proceedings: see s 8(3); and LEGAL AID vol 65 (2008) PARA 39.

11 See *ibid* s 10(1); and LEGAL AID vol 65 (2008) PARA 97. As to the making of regulations see s 10(2)-(8); and LEGAL AID vol 65 (2008) PARA 97.

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903. The Criminal Defence Service.

The Legal Services Commission¹ ('the Commission') must establish, maintain and develop a service known as the Criminal Defence Service for the purpose of securing that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interests of justice require².

¹ As to the Legal Services Commission see PARA 901 ante.

² See the Access to Justice Act 1999 s 12(1); and LEGAL AID vol 65 (2008) PARA 120. As to the criminal proceedings covered see s 12(2) (as amended); and LEGAL AID vol 65 (2008) PARA 121. As to the funding of advice and assistance see s 13 (as amended); and LEGAL AID vol 65 (2008) PARAS 131-132. As to the funding of representation see s 14 (as amended); and LEGAL AID vol 65 (2008) PARAS 159-160. As to the selection of representatives see s 15; and LEGAL AID vol 65 (2008) PARA 162. As to the preparation of a code of conduct see s 16 (as amended); and LEGAL AID vol 65 (2008) PARA 125. As to the terms of the provision of funded services see s 17; and LEGAL AID vol 65 (2008) PARA 174. As to funding see s 18 (as amended); and LEGAL AID vol 65 (2008) PARA 128.

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C. CRIMINAL PROCEEDINGS

904. In general.

Most statutory provisions imposing criminal penalties for offences relating to consumer protection require a local weights and measures authority to enforce those provisions¹. Nevertheless, save where the right to prosecute is specifically restricted, any person may institute any criminal proceedings or conduct any criminal proceedings to which the Director of Public Prosecutions' duty to take over proceedings does not apply².

¹ See eg the Trade Descriptions Act 1968 s 26 (as amended) (see PARA 507 ante); the Prices Act 1974 s 7 (as amended), Schedule para 6 (see PARA 699 ante); the Hallmarking Act 1973 s 9 (see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 485); the Fair Trading Act 1973 s 27 (as amended); and the Consumer Credit Act 1974 s 161 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 305). As to local weights and measures authorities see PARA 398 ante; and as to the power of local authorities to prosecute legal proceedings see PARA 397 ante.

² See PARA 899 ante. As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq.

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D. CIVIL PROCEEDINGS

(A) ALLOCATION OF PROCEEDINGS TO A TRACK

905. The small claims track.

The small claims track is the normal track for:

- 2194 (1) any claim for personal injuries¹ where:
 209
 321. (a) the financial value of the claim is not more than £5,000; and
 322. (b) the financial value of any claim for damages for personal injuries² is not more than £1,000;
 210
 2195 (2) any claim which includes a claim by a tenant of residential premises against his landlord where:
 211
 323. (a) the tenant is seeking an order requiring the landlord to carry out repairs or other work to the premises, whether or not the tenant is also seeking some other remedy;
 324. (b) the cost of the repairs or other work to the premises is estimated to be not more than £1,000; and
 325. (c) the financial value of any other claim for damages is not more than £1,000³.
 212

Subject to the provisions described above, the small claims track is the normal track for any claim which has a financial value of not more than £5,000⁴.

1 For these purposes, 'claim for personal injuries' means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death: CPR 2.3.

2 For these purposes, 'damages for personal injuries' means damages claimed as compensation for pain, suffering and loss of amenity and does not include any other damages which are claimed: CPR 26.6(2).

3 See CPR 26.6(1); and CIVIL PROCEDURE. As to the allocation of a claim to a track see PARA 908 post.

4 See CPR 26.6(3); and CIVIL PROCEDURE.

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906. The fast track.

The fast track is the normal track for any claim for which the small claims track¹ is not the normal track and which has a financial value of not more than £15,000²; but the fast track is the normal track for such claims only if the court considers that:

- 2196 (1) the trial is likely to last for no longer than one day; and
 2197 (2) oral expert evidence at trial will be limited to: (a) one expert per party in relation to any expert field; and (b) expert evidence in two expert fields³.

1 As to the small claims track see PARA 905 ante.

2 See CPR 26.6(4); and CIVIL PROCEDURE. As to the allocation of a claim to a track see PARA 908 post.

3 See CPR 26.6(5); and CIVIL PROCEDURE.

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907. The multi-track.

The multi-track is the normal track for any claim for which the small claims track¹ or the fast track² is not the normal track³.

- 1 As to the small claims track see PARA 905 ante.
- 2 As to the fast track see PARA 906 ante.
- 3 See CPR 26.6(6); and CIVIL PROCEDURE. As to the allocation of a claim to a track see PARA 908 post.

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908. Allocation of claim to a track.

In considering whether to allocate a claim to the normal track for that claim, the court will have regard to the following matters:

- 2198 (1) the financial value¹, if any, of the claim;
- 2199 (2) the nature of the remedy sought;
- 2200 (3) the likely complexity of the facts, law or evidence;
- 2201 (4) the number of parties or likely parties;
- 2202 (5) the value of any counterclaim or other Part 20 claim and the complexity of any matters relating to it;
- 2203 (6) the amount of oral evidence which may be required;
- 2204 (7) the importance of the claim to persons who are not parties to the proceedings;
- 2205 (8) the views expressed by the parties; and
- 2206 (9) the circumstances of the parties².

The court will allocate a claim which has no financial value to the track which it considers most suitable, having regard to the matters mentioned in heads (1) to (9) above³; but the court will not allocate proceedings to a track if the financial value of any claim in those proceedings, assessed by the court⁴, exceeds the limit for that track unless all the parties consent to the allocation of the claim to that track⁵.

The court will not allocate a claim to the small claims track⁶ if it includes a claim by a tenant of residential premises against his landlord for a remedy in respect of harassment or unlawful eviction⁷.

When it has allocated a claim to a track, the court will serve notice of allocation on every party⁸; and, when doing so, the court will also serve a copy of the allocation questionnaire filed by the other parties and a copy of any further information provided by another party about his case, whether by order or not⁹.

The court may subsequently re-allocate a claim to a different track¹⁰.

1 It is for the court to assess the financial value of a claim and, in doing so, it will disregard any amount not in dispute, any claim for interest, costs and any contributory negligence: CPR 26.8(2). Where two or more claimants have started a claim against the same defendant using the same claim form and each claimant has a claim against the defendant separate from the other claimants, the court will consider the claim of each claimant when it assesses financial value under CPR 26.8(1): CPR 26.8(3).

2 See CPR 26.7(1), 28.8(1); and CIVIL PROCEDURE. As to Part 20 claims see CIVIL PROCEDURE vol 11 (2009) PARA 618 et seq.

3 See CPR 26.7(2); and CIVIL PROCEDURE.

4 ie under CPR 26.8.

5 See CPR 26.7(3); and CIVIL PROCEDURE.

6 As to the small claims track see PARA 905 ante.

7 See CPR 26.7(4); and CIVIL PROCEDURE.

8 See CPR 26.9(1); and CIVIL PROCEDURE.

9 See CPR 26.9(2); and CIVIL PROCEDURE.

10 See CPR 26.10; and CIVIL PROCEDURE.

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(B) MULTI-PARTY ACTIONS

909. In general.

A special procedure now exists for the conduct of group litigation¹. Representative proceedings are sometimes called 'class actions' or 'group actions' in the popular sense that the representative parties stand as champions or guardians of the numerous persons they represent in the proceedings². The procedure, which is derived from the former practice in the Court of Chancery³, is designed to cater for two strictly different kinds of situation:

2207 (1) in ordinary proceedings where representative parties, as claimants or defendants, represent numerous persons having the same interest in the proceedings⁴; and

2208 (2) in minority shareholders' claims brought by one or more shareholders on behalf of the company alleging something illegal, oppressive, fraudulent or ultra vires on the part of the company, qua company, against its directors or controlling officers⁵.

As part of its general power of management the court has power to consolidate proceedings or to try two or more claims on the same occasion⁶.

1 See PARA 910 post.

2 As to representative actions see PARA 912 post.

3 See *London Sewers Comrs v Gellatly* (1876) 3 ChD 610 at 615, CA, per Jessel MR ('where one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right - and it was utterly impossible to try the question of that right between the two multitudes on account of their number - some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might finally be decided as between all parties in a suit so constituted').

4 See PARA 912 post.

5 See COMPANIES vol 14 (2009) PARA 455 et seq.

6 See CPR 3.1(2)(g), (h); and CIVIL PROCEDURE.

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910. Group litigation.

The court may make a group litigation order ('GLO') to provide for the case management of claims which give rise to common or related issues of fact or law (the 'GLO issues') where there are or are likely to be a number of claims giving rise to the GLO issues¹.

A GLO must:

- 2209 (1) contain directions about the establishment of a register (the 'group register') on which the claims managed under the GLO will be entered;
- 2210 (2) specify the GLO issues which will identify the claims to be managed as a group under the GLO; and
- 2211 (3) specify the court (the 'management court') which will manage the claims on the group register².

A GLO may:

- 2212 (a) in relation to claims which raise one or more of the GLO issues, direct their transfer to the management court, order their stay until further order and direct their entry on the group register;
- 2213 (b) direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court and entered on the group register; and
- 2214 (c) give directions for publicising the GLO³.

Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues, that judgment or order is binding on the parties to all the other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise; and the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register⁴. Any party who is adversely affected by a judgment or order which is binding on him may seek permission to appeal against the order⁵; save that a party to a claim which was entered on the group register after a judgment or order which is binding on him was given or made may not apply for the judgment or order to be set aside, varied or stayed, or appeal against the judgment or order, but may apply to the court for an order that the judgment or order is not binding on him⁶. Unless the court orders otherwise, disclosure of any document relating to the GLO issues by a party to a claim on the group register is disclosure of that

document to all parties to claims on the group register and claims which are subsequently entered on that register⁷.

A party to a claim entered on the group register may apply to the management court for the claim to be removed from the register⁸. If the management court orders the claim to be removed from the register, it may give directions about the future management of the claim⁹.

Where a direction has been given for a claim on the group register to proceed as a test claim and that claim is settled, the management court may order that another claim on the group register be substituted as the test claim¹⁰; and, where an order is so made, any order made in the test claim before the date of substitution is binding on the substituted claim unless the court orders otherwise¹¹.

1 CPR 19.10, 19.11(1). As to group litigation generally see CIVIL PROCEDURE. So-called 'class actions' have existed for some time in the United States of America where groups of litigants may bring or defend a single action which might not otherwise be pursued because eg the value of each individual claim is small.

2 CPR 19.11(2). Directions given by the management court may include directions: (1) varying the GLO issues; (2) providing for one or more claims on the group register to proceed as test claims; (3) appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants; (4) specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met; (5) specifying a date after which no claim may be added to the group register unless the court gives permission; and (6) for the entry of any particular claim which meets one or more of the GLO issues on the group register: CPR 19.13.

3 CPR 19.11(3).

4 CPR 19.12(1).

5 CPR 19.12(2).

6 CPR 19.12(3).

7 CPR 19.12(4).

8 CPR 19.14(1).

9 CPR 19.14(2).

10 CPR 19.15(1).

11 CPR 19.15(2).

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911. Joinder of parties.

The court may in general order a person to be added as a new party if it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings or if there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve the issue¹.

1 See CPR 19.2(2); and CIVIL PROCEDURE.

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912. Representative actions.

Where more than one person has the same interest in a claim, the claim may be begun, or the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest¹. The court may direct that a person may not act as a representative²; and any party may apply to the court for such an order³. Unless the court otherwise directs, any judgment or order given in a claim in which a party is so acting as a representative is binding on all persons represented in the claim but may only be enforced by or against a person who is not a party to the claim with the permission of the court⁴.

Where a company, other incorporated body or trade union is alleged to be entitled to claim a remedy and a claim is made by one or more members of the company, body or trade union for it to be given that remedy (a 'derivative claim'), the company, body or trade union for whose benefit a remedy is sought must be a defendant to the claim⁵.

1 CPR 19.6(1). As to representation of interested persons who cannot be ascertained etc see CPR 19.7; as to the effect of death on a claim see CPR 19.8; and as to representative actions generally see CIVIL PROCEDURE.

2 CPR 19.6(2).

3 CPR 19.6(3).

4 CPR 19.6(4).

5 See CPR 19.9; and CIVIL PROCEDURE.

UPDATE

912 Representative actions

NOTE 5--As to new procedures for derivative claims under the Companies Act 2006 see CIVIL PROCEDURE vol 11 (2009) PARA 232.

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913. Relator actions.

A relator action may be brought to restrain interference with a public right, whether committed or threatened, or to compel the performance of a public duty or to abate a public nuisance; and in such an action the Attorney General is a necessary party. The action is brought in the name of the Attorney General at the relation of the person or body seeking to prevent the commission or continuation of the public wrong¹.

1 As to relator actions generally see CIVIL PROCEDURE vol 11 (2009) PARAS 236-237.

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(C) CONDITIONAL FEE AND LITIGATION FUNDING AGREEMENTS

914. Conditional fee agreements.

A conditional fee agreement¹ which satisfies all the conditions applicable to it is not unenforceable by reason only of its being a conditional fee agreement; but any other conditional fee agreement is unenforceable².

The following conditions are applicable to every conditional fee agreement:

- 2215 (1) it must be in writing;
- 2216 (2) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and
- 2217 (3) it must comply with such requirements, if any, as may be prescribed³.

The following further conditions are applicable to a conditional fee agreement which provides for a success fee⁴:

- 2218 (a) it must relate to proceedings of a specified description;
- 2219 (b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and
- 2220 (c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates⁵.

1 For these purposes, 'conditional fee agreement' means an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances: Courts and Legal Services Act 1990 s 58(2)(a) (substituted by the Access to Justice Act 1999 s 27(1)). As to the proceedings which cannot be the subject of an enforceable conditional fee agreement see the Courts and Legal Services Act 1990 s 58A(1), (2) (s 58A added by the Access to Justice Act 1999 s 27(1); and the Courts and Legal Services Act 1990 s 58A(2) prospectively amended by the Adoption and Children Act 2002 s 139(1), Sch 3 para 80; and the Civil Partnership Act 2004 s 261(1), (4), Sch 27 para 138, Sch 30).

2 See the Courts and Legal Services Act 1990 s 58(1) (substituted by the Access to Justice Act 1999 s 27(1)); and LEGAL PROFESSIONS vol 66 (2009) PARA 953. If a conditional fee agreement is an agreement to which the Solicitors Act 1974 s 57 (as amended) (non-contentious business agreements between a solicitor and his client: see LEGAL PROFESSIONS vol 66 (2009) PARAS 942-943) applies, the Courts and Legal Services Act 1990 s 58(1) (as substituted) does not make it unenforceable: s 58(5) (substituted by the Access to Justice Act 1999 s 27(1)).

3 See the Courts and Legal Services Act 1990 s 58(3) (substituted by the Access to Justice Act 1999 s 27(1); and amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, art 9, Sch 2 para 8(1)(c)); the Conditional Fee Agreements Regulations 2000, SI 2000/692 (amended by SI 2000/2988; SI 2003/1240; SI 2003/3344); and LEGAL PROFESSIONS vol 66 (2009) PARA 953.

4 For these purposes, a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances: Courts and Legal Services Act 1990 s 58(2)(b) (substituted by the Access to Justice Act 1999 s 27(1)).

5 See the Courts and Legal Services Act 1990 s 58(4) (substituted by the Access to Justice Act 1999 s 27(1); and amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, Sch 2 para 8(1)(c)); and LEGAL PROFESSIONS vol 66 (2009) PARA 953.

UPDATE**914 Conditional fee agreements**

TEXT AND NOTES--See also Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) which provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

NOTE 1--Amendments made by Civil Partnership Act 2004 Sch 27 para 138, Sch 30 now in force: SI 2005/3175.

NOTE 3--SI 2000/692 revoked: SI 2005/2305.

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915. Litigation funding agreements.

A litigation funding agreement¹ which satisfies all the conditions applicable to it is not unenforceable by reason only of its being a litigation funding agreement².

The following conditions are applicable to a litigation funding agreement:

- 2221 (1) the funder must be a prescribed person, or person of a prescribed description;
- 2222 (2) the agreement must be in writing;
- 2223 (3) the agreement must not relate to proceedings which cannot be³ the subject of an enforceable conditional fee agreement⁴ or to proceedings of any such description as may be prescribed;
- 2224 (4) the agreement must comply with such requirements, if any, as may be prescribed;
- 2225 (5) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services; and
- 2226 (6) that amount must not exceed such percentage of that anticipated expenditure as may be prescribed in relation to proceedings of the description to which the agreement relates⁵.

1 For these purposes, 'litigation funding agreement' means an agreement under which a person ('the funder') agrees to fund, in whole or in part, the provision of advocacy or litigation services, by someone other than the funder, to another person ('the litigant') and the litigant agrees to pay a sum to the funder in specified circumstances: Courts and Legal Services Act 1990 s 58B(2) (s 58B prospectively added by the Access to Justice Act 1999 s 28); and LEGAL PROFESSIONS vol 66 (2009) para 954. The Access to Justice Act 1999 s 28 is to come into force on such day as may be appointed; and different days may be appointed for different purposes: see s 108(1). At the date at which this volume states the law no such day or days had been appointed.

2 See the Courts and Legal Services Act 1990 s 58B(1) (prospectively added: see note 1 supra); and LEGAL PROFESSIONS vol 66 (2009) para 954.

3 Ie by virtue of *ibid* s 58A(1), (2) (as added and amended): see LEGAL PROFESSIONS vol 66 (2009) para 954.

4 For the meaning of 'conditional fee agreement' see PARA 914 ante.

5 See the Courts and Legal Services Act 1990 s 58B(3) (prospectively added (see note 1 supra); substituted by the Access to Justice Act 1999 s 28; and amended by the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, art 9, Sch 2 para 11(1)(b)); and LEGAL PROFESSIONS vol 66 (2009) PARA 954.

UPDATE

915 Litigation funding agreements

TEXT AND NOTES--See also Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) which provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iii) Court Proceedings/E. COSTS/(A) Criminal Proceedings/916. Costs in criminal cases.

E. COSTS

(A) CRIMINAL PROCEEDINGS

916. Costs in criminal cases.

A court may, in any proceedings in respect of an indictable offence and in any proceedings before a Divisional Court of the Queen's Bench Division or the House of Lords in respect of a summary offence, order the payment out of central funds¹ of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings². Where a court makes such an order but is of the opinion that there are circumstances which make it inappropriate that the prosecution should recover the full amount of its costs, the court must assess what amount would, in its opinion, be just and reasonable and specify that amount in the order³.

Where a court orders that the costs of a private prosecutor should be paid from central funds, the order will include the costs incurred in the proceedings in the lower courts unless for good reason the court directs that such costs are not included in the order⁴.

Conversely, the court may in certain circumstances make an order in favour of the accused for a payment to be made out of central funds in respect of his costs (a 'defendant's costs order')⁵.

1 For these purposes, 'central funds' in an enactment providing in relation to England and Wales for the payment of costs out of central funds means money properly provided by Parliament: Interpretation Act 1978 s 5, Sch 1, Sch 2 para 4(1)(b).

2 See the Prosecution of Offences Act 1985 s 17(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 2062.

3 See *ibid* s 17(3); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 2062.

4 *Practice Note* [1989] 2 All ER 604, sub nom *Practice Direction* [1989] 1 WLR 625, CA.

5 See the Prosecution of Offences Act 1985 s 16(1)-(5) (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 2059. As to the award of costs against the accused see s 18 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 2063.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iii) Court Proceedings/E. COSTS/(B) Civil Proceedings/917. Costs generally.

(B) CIVIL PROCEEDINGS

917. Costs generally.

Subject to the provisions of the Supreme Court Act 1981 or any other enactment and to rules of court, the costs of and incidental to all proceedings in the civil division of the Court of Appeal, the High Court and any county court are in the discretion of the court¹. The court has full power to determine by whom and to what extent the costs are to be paid².

¹ See the Supreme Court Act 1981 s 51(1) (as substituted); and CIVIL PROCEDURE. Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs: see s 51(2) (as substituted and amended); and CIVIL PROCEDURE.

² See *ibid* s 51(3) (as substituted); and CIVIL PROCEDURE. As to the general rules about costs see CPR Pt 44; as to fixed costs see CPR Pt 45; as to fast track trial costs see CPR Pt 46; as to the procedure for detailed assessment of costs and default provisions see CPR Pt 47; and as to costs in special cases see CPR Pt 48. See further CIVIL PROCEDURE.

UPDATE

917 Costs generally

TEXT AND NOTES--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iii) Court Proceedings/E. COSTS/(B) Civil Proceedings/918. Costs of litigants in person.

918. Costs of litigants in person.

Where any costs of a litigant in person¹ are ordered to be paid by any other party to the proceedings² or in any other way, there may, subject to rules of court, be allowed on the taxation or other determination of those costs sums in respect of any work done, and any expenses and losses incurred, by the litigant in or in connection with the proceedings to which the order relates³.

Where the court orders, whether by summary assessment or detailed assessment, that the costs of a litigant in person⁴ are to be paid by any other person, the costs allowed must not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative⁵. Costs allowed to the litigant in person are:

- 2227 (1) costs for the same categories of work and of disbursements which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf;
- 2228 (2) the payments reasonably made by him for legal services relating to the conduct of the proceedings; and
- 2229 (3) the costs of obtaining expert assistance in assessing the costs claim⁶.

The amount of costs to be allowed to the litigant in person for any item of work to which the costs relate are, if he fails to prove financial loss, to be⁷ an amount in respect of the time spent reasonably doing the work at the rate specified in the costs practice direction⁸.

A litigant who is allowed costs for attending court to conduct his case is not entitled to a witness allowance in respect of such attendance in addition to those costs⁹.

Where the party to whom fast track trial costs are to be awarded is a litigant in person, the court will award:

- 2230 (a) if the litigant in person can prove financial loss, two-thirds of the amount that would otherwise be awarded; or
- 2231 (b) if the litigant in person fails to prove financial loss, an amount in respect of the time spent reasonably doing the work at the rate specified in the costs practice direction¹⁰.

The right to costs on the small claims track is restricted¹¹.

1 As to litigants in person see PARAS 899-900 ante.

2 In civil proceedings: (1) in a county court, in the Supreme Court or in the House of Lords on appeal from the High Court or the Court of Appeal; (2) before the Lands Tribunal; or (3) in or before any other court or tribunal specified in an order made by the Lord Chancellor: see the Litigants in Person (Costs and Expenses) Act 1975 s 1(1). As from a day to be appointed this provision is amended by the Constitutional Reform Act 2005 ss 40(4), 59(5), Sch 9 Pt 1 para 26, Sch 11 Pt 4 para 22(a). At the date at which this volume states the law, no such day had been appointed.

3 Litigants in Person (Costs and Expenses) Act 1975 s 1(1). As to the assessment of costs see CIVIL PROCEDURE.

4 For these purposes, 'litigant in person' includes: (1) a company or other corporation which is acting without a legal representative; and (2) a barrister, solicitor, solicitor's employee or other authorised litigator, as defined in the Courts and Legal Services Act 1990 (see LEGAL PROFESSIONS vol 65 (2008) PARA 498), who is acting for himself: CPR 48.6(6). A Crown servant is a litigant in person when acting as such: *Re Minotaur Data Systems Ltd, Official Receiver v Brunt* [1999] 3 All ER 122, [1999] 1 WLR 1129, CA (the office of Official Receiver is not a prerogative office under the Crown, but is rather a statutory office; as the holder of such an office the Official Receiver is empowered to bring proceedings in his own name and is accorded by law a right of audience before the court to which he is attached; it follows, therefore, that the Official Receiver is a litigant in person when he acts personally in proceedings which he is empowered to bring without representation).

5 See CPR 48.6(1), (2); and CIVIL PROCEDURE.

6 See CPR 48.6(3); and CIVIL PROCEDURE. The costs practice direction deals with who may be an expert for the purposes of CPR 48.6(3)(c) (see head (3) in the text): see CPR 48.6; and CIVIL PROCEDURE.

7 In subject to CPR 48.6(2): see the text and notes 4-5 supra.

8 See CPR 48.6(4); and CIVIL PROCEDURE.

9 See CPR 48.6(5); and CIVIL PROCEDURE.

10 See CPR 46.3(5); and CIVIL PROCEDURE.

11 See CPR 27.14; and CIVIL PROCEDURE.

UPDATE**918 Costs of litigants in person**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 3--As to Litigants in Person (Costs and Expenses) Act 1975 s 1 see CIVIL PROCEDURE vol 12 (2009) PARA 1809.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iii) Court Proceedings/E. COSTS/(B) Civil Proceedings/919. Costs in funded cases.

919. Costs in funded cases.

Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him are not to exceed the amount, if any, which is a reasonable one for him to pay having regard to all the circumstances including the financial resources of all the parties to the proceedings and their conduct in connection with the dispute to which the proceedings relate¹.

In so assessing the financial resources of an individual for whom services are funded by the Legal Services Commission² ('the Commission') as part of the Community Legal Service³, his clothes and household furniture and the tools and equipment of his trade are not to be taken into account, except so far as may be prescribed⁴.

Regulations may⁵ make provision about costs in relation to proceedings in which services are funded by the Commission for any of the parties as part of the Community Legal Service⁶. The regulations may, in particular, make provision:

- 2232 (1) specifying the principles to be applied in determining the amount of any costs which may be awarded against a party for whom services are funded by the Commission as part of the Community Legal Service;
- 2233 (2) limiting the circumstances in which, or the extent to which, an order for costs may be enforced against such a party;
- 2234 (3) as to the cases in which, and extent to which, such a party may be required to give security for costs and the manner in which it is to be given;
- 2235 (4) requiring the payment by the Commission of the whole or part of any costs incurred by a party for whom services are not funded by the Commission as part of the Community Legal Service;
- 2236 (5) specifying the principles to be applied in determining the amount of any costs which may be awarded to a party for whom services are so funded;
- 2237 (6) requiring the payment to the Commission, or the person or body by which the services were provided, of the whole or part of any sum awarded by way of costs to such a party; and
- 2238 (7) as to the court, tribunal or other person or body by whom the amount of any costs is to be determined and the extent to which any determination of that amount is to be final⁷.

1 See the Access to Justice Act 1999 s 11(1); and LEGAL AID vol 65 (2008) PARA 109.

2 As to the Legal Services Commission see PARA 901 ante.

- 3 As to the Community Legal Service see PARA 902 ante.
- 4 See the Access to Justice Act 1999 s 11(2); and LEGAL AID vol 65 (2008) PARA 109.
- 5 le subject to ibid s 11(1), (2): see the text and notes 1-4 supra.
- 6 See ibid s 11(3); and LEGAL AID vol 65 (2008) PARA 109.
- 7 See ibid s 11(4); and LEGAL AID vol 65 (2008) PARA 109.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iii) Court Proceedings/E. COSTS/(B) Civil Proceedings/920. Recovery of insurance premiums by way of costs.

920. Recovery of insurance premiums by way of costs.

Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy¹.

- 1 See the Access to Justice Act 1999 s 29; and CIVIL PROCEDURE.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iii) Court Proceedings/E. COSTS/(B) Civil Proceedings/921. Recovery where body undertakes to meet liability for costs.

921. Recovery where body undertakes to meet liability for costs.

Where a body of a prescribed description undertakes to meet, in accordance with arrangements satisfying prescribed conditions, liabilities which members of the body or other persons who are parties to proceedings may incur to pay the costs of other parties to proceedings, then, if in any of the proceedings a costs order is made in favour of any of the members or other persons, the costs payable to him may¹ include an additional amount in respect of any provision made by or on behalf of the body in connection with the proceedings against the risk of having to meet such liabilities². The additional amount must not, however, exceed a sum determined in a prescribed manner; and there may, in particular, be prescribed as a manner of determination one which takes into account the likely cost to the member or other person of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings³.

- 1 le subject to the Access to Justice Act 1999 s 30(3) (see the text and note 3 infra) and, in the case of court proceedings, to rules of court.
- 2 See ibid s 30(1), (2); and CIVIL PROCEDURE.
- 3 See ibid s 30(3); and CIVIL PROCEDURE.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iv) Compensation/A.

COMPENSATION ORDERS AGAINST CONVICTED PERSONS/922. Compensation orders against convicted persons.

(iv) Compensation

A. COMPENSATION ORDERS AGAINST CONVICTED PERSONS

922. Compensation orders against convicted persons.

A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order (a 'compensation order') requiring him to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence or to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road; and a court must give reasons, on passing sentence, if it does not make such an order in a case where the court is empowered to do so¹. Such compensation is to be of such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor².

In determining whether to make a compensation order against any person, and in determining the amount to be paid by any person under such an order, the court must have regard to his means, so far as they appear or are known to the court³.

Where the court considers that it would be appropriate both to impose a fine and to make a compensation order but that the offender has insufficient means to pay both an appropriate fine and appropriate compensation, the court must give preference to compensation, though it may impose a fine as well⁴.

1 See the Powers of Criminal Courts (Sentencing) Act 2000 s 130(1), (3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375.

2 See *ibid* s 130(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375.

3 See *ibid* s 130(11); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375.

4 See *ibid* s 130(12); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iv) Compensation/A. COMPENSATION ORDERS AGAINST CONVICTED PERSONS/923. Compensation orders against young persons.

923. Compensation orders against young persons.

Where:

- 2239 (1) a child or young person (that is, any person aged under 18) is convicted of any offence for the commission of which a compensation order may be made¹; and
- 2240 (2) the court is of opinion that the case would best be met by the making of such an order, whether with or without any other punishment,

the court must order that the compensation awarded be paid by the parent or guardian of the child or young person instead of by the child or young person himself, unless the court is satisfied that the parent or guardian cannot be found or that it would be unreasonable to make an order for payment, having regard to the circumstances of the case².

1 le under the Powers of Criminal Courts (Sentencing) Act 2000 s 130: see PARA 922 ante.

2 See the Powers of Criminal Courts (Sentencing) Act 2000 s 137(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 383. In the case of a young person who has attained the age of 16 years, s 137(1) has effect as if, instead of imposing a duty, it conferred a power to make such an order as is mentioned in s 137(1): see s 137(3) (prospectively amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 383.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iv) Compensation/A. COMPENSATION ORDERS AGAINST CONVICTED PERSONS/924. Review of compensation orders.

924. Review of compensation orders.

The magistrates' court for the time being having functions in relation to the enforcement¹ of a compensation order² ('the appropriate court') may, on the application of the person against whom the compensation order was made, discharge the order or reduce the amount which remains to be paid, but it may do so only at a time when (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an appeal³ on which the compensation order could be varied or set aside, and at a time before the person against whom the compensation order was made has paid into court the whole of the compensation which the order requires him to pay⁴.

The appropriate court may exercise such a power only if it appears to the court:

- 2241 (1) that the injury, loss or damage in respect of which the compensation order was made has been held in civil proceedings to be less than it was taken to be for the purposes of the order;
- 2242 (2) in the case of a compensation order in respect of the loss of any property, that the property has been recovered by the person in whose favour the order was made;
- 2243 (3) that the means of the person against whom the compensation order was made are insufficient to satisfy in full both the order and a confiscation order⁵ made against him in the same proceedings; or
- 2244 (4) that the person against whom the compensation order was made has suffered a substantial reduction in his means which was unexpected at the time when the order was made, and that his means seem unlikely to increase for a considerable period⁶.

Where the compensation order was made by the Crown Court, the appropriate court may not exercise any of the above powers in a case where it is satisfied as mentioned in head (3) or head (4) above unless it has first obtained the consent of the Crown Court⁷.

1 As to enforcement see PARA 925 post.

2 As to compensation orders see PARA 922 ante.

3 As to appeals see PARA 928 post.

4 See the Powers of Criminal Courts (Sentencing) Act 2000 s 133(1), (2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 379.

5 See an order under the Criminal Justice Act 1988 Pt VI (ss 71-102) (as amended) or the Proceeds of Crime Act 2002 Pt 2 (ss 6-91): see SENTENCING AND DISPOSITION OF OFFENDERS.

6 See the Powers of Criminal Courts (Sentencing) Act 2000 s 133(3) (amended by the Proceeds of Crime Act 2002 s 456, Sch 11 paras 1, 37(1), (3)); and CRIMINAL LAW, EVIDENCE AND PROCEDURE.

7 See the Powers of Criminal Courts (Sentencing) Act 2000 s 133(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 379. Where a compensation order has been made on appeal, for the purposes of s 133(4) it is deemed, if it was made on an appeal brought from a magistrates' court, to have been made by that magistrates' court and, if it was made on an appeal brought from the Crown Court or from the criminal division of the Court of Appeal, to have been made by the Crown Court: s 133(5).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iv) Compensation/A. COMPENSATION ORDERS AGAINST CONVICTED PERSONS/925. Enforcement.

925. Enforcement.

A person in whose favour a compensation order¹ is made is not entitled to receive the amount due to him until, disregarding any power of a court to grant leave to appeal out of time, there is no further possibility of an appeal² on which the order could be varied or set aside³.

1 As to compensation orders see PARA 922 ante.

2 As to appeals see PARA 928 post.

3 See the Powers of Criminal Courts (Sentencing) Act 2000 s 132(1); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 380. Criminal Procedure Rules may make provision regarding the way in which the magistrates' court for the time being having functions, by virtue of the Administration of Justice Act 1970 s 41(1) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 2100), in relation to the enforcement of a compensation order is to deal with money paid in satisfaction of the order where the entitlement of the person in whose favour it was made is suspended: see the Powers of Criminal Courts (Sentencing) Act 2000 s 132(1) (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035, art 3, Schedule paras 39, 42).

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iv) Compensation/A. COMPENSATION ORDERS AGAINST CONVICTED PERSONS/926. Effect of compensation order on subsequent award of damages in civil proceedings.

926. Effect of compensation order on subsequent award of damages in civil proceedings.

Where a compensation order¹ has been made in favour of any person in respect of any injury, loss or damage and a claim by him in civil proceedings for damages in respect of the injury, loss or damage subsequently falls to be determined, the damages in the civil proceedings must be assessed without regard to the order; but the claimant may only recover an amount equal to the aggregate of:

- 2245 (1) any amount by which the damages exceed the compensation; and
- 2246 (2) a sum equal to any portion of the compensation which he fails to recover,

and may not enforce the judgment, so far as it relates to a sum such as is mentioned in head (2) above, without the leave of the court².

1 As to compensation orders see PARA 922 ante.

2 See the Powers of Criminal Courts (Sentencing) Act 2000 s 134(1), (2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 381.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iv) Compensation/A. COMPENSATION ORDERS AGAINST CONVICTED PERSONS/927. Suspension of compensation orders.

927. Suspension of compensation orders.

The Court of Appeal may by order annul or vary any compensation order¹ made by the court of trial, although the conviction is not quashed; and the order, if annulled, does not take effect and, if varied, takes effect as varied². Where the House of Lords restores a conviction, it may make any compensation order which the court of trial could have made³.

1 As to compensation orders see PARA 922 ante.

2 See the Powers of Criminal Courts (Sentencing) Act 2000 s 132(3); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 382.

3 See *ibid* s 133(4); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 379.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iv) Compensation/A. COMPENSATION ORDERS AGAINST CONVICTED PERSONS/928. Appeals.

928. Appeals.

Where a compensation order¹ has been made against any person in respect of an offence taken into consideration in determining his sentence:

2247 (1) the order ceases to have effect if he successfully appeals against his conviction of the offence or, if more than one, all the offences, of which he was convicted in the proceedings in which the order was made;

2248 (2) he may appeal against the order as if it were part of the sentence imposed in respect of the offence or, if more than one, any of the offences, of which he was so convicted².

1 As to compensation orders see PARA 922 ante.

2 See the Powers of Criminal Courts (Sentencing) Act 2000 s 132(5); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iv) Compensation/B. COMPENSATION IN RESPECT OF OCCUPATIONAL PENSIONS SCHEMES/929. Right to claim compensation.

B. COMPENSATION IN RESPECT OF OCCUPATIONAL PENSIONS SCHEMES

929. Right to claim compensation.

An application for compensation in respect of an occupational pension scheme may be made to the Pensions Compensation Board¹ if all the following conditions are met:

- 2249 (1) the scheme is a trust scheme;
- 2250 (2) the employer is insolvent;
- 2251 (3) the value of the assets of the scheme has been reduced, and there are reasonable grounds for believing that the reduction was attributable to an act or omission constituting a prescribed offence;
- 2252 (4) in the case of a salary-related trust scheme, immediately before the date of the application the value of the assets of the scheme is less than 90 per cent of the amount of the liabilities of the scheme; and
- 2253 (5) it is reasonable in all the circumstances that the members of the scheme should be assisted by the Board paying to the trustees of the scheme, out of funds for the time being held by it, an amount determined in accordance with the compensation provisions².

These provisions do not apply in respect of a trust scheme falling within a prescribed class or description; and head (3) above applies only to reductions in value on or after 6 April 1997³.

Such compensation may be paid only on an application made in the manner, and giving the information, required by the Board within the qualifying period by a prescribed person⁴. The Board may extend, or further extend, the qualifying period⁵.

1 As to the Pensions Compensation Board see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARAS 637-642.

2 See the Pensions Act 1995 s 81(1); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 643.

3 See *ibid* s 81(2); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 643.

4 See *ibid* s 82(1)-(4); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 644. As to the procedure on the determination of an application for payment see the Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, Pt II (regs 2-9); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 645. As to the amount of compensation payments see the Pensions Act 1995 s 83; and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 644. As to payments made in anticipation see s 84; and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 646. As to review of decisions see s 80; the Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, Pt III (regs 10-24); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARAS 648-654.

5 See the Pensions Act 1995 s 82(5); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 644.

Halsbury's Laws of England/SALE OF GOODS AND SUPPLY OF SERVICES (VOLUME 41 (2005 REISSUE))/8. CONSUMER PROTECTION/(7) CONSUMER REDRESS/(iv) Compensation/C. COMPENSATION UNDER THE DATA PROTECTION ACT 1998/930. Right to compensation.

C. COMPENSATION UNDER THE DATA PROTECTION ACT 1998

930. Right to compensation.

An individual who suffers:

- 2254 (1) damage by reason of any contravention by a data controller of any of the requirements of the Data Protection Act 1998 is entitled to compensation from the data controller for that damage¹;
- 2255 (2) distress by reason of any contravention by a data controller of any of the requirements of the Data Protection Act 1998 is entitled to compensation from the data controller for that distress if the individual also suffers damage by reason of the contravention or the contravention relates to the processing of personal data for the special purposes².

In proceedings brought against any person by virtue of these provisions it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned³.

1 See the Data Protection Act 1998 s 13(1); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 530.

2 See *ibid* s 13(2); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 530. As to the special purposes see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 519.

3 See *ibid* s 13(3); and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 530.